

Questionnaire

When drafting the national report, please: quote to the most relevant literature; refer to court decisions, wherever they exist; add a list of the quoted literature and of the abbreviations used; use the consistent terminology within your report; explain a special terms that might not be known outside your jurisdiction when you first use them; add the text of the relevant statutory provisions (translated into English or French) in the footnotes.

1. General Overview of the Collective Management

1.1 *Can collective management organizations be described as monopolies (natural monopolies or monopolies set by the law) in your jurisdictions?*

1.1.1) "Natural monopoly" is defined in this way in the OECD Glossary:

"A natural monopoly exists in a particular market if a single [organization] can serve that market at lower cost than any combination of two or more firms

"Natural monopoly arises out of the properties of productive technology, often in association with market demand, and not from the activities of governments or rivals (see monopoly).

"Generally speaking, natural monopolies are characterized by steeply declining long-run average and marginal-cost curves such that there is room for only one [organization] to fully exploit available economies of scale and supply the market...

"In essence natural monopolies exist because of economies of scale and economies of scope which are significant relative to market demand... Because productive efficiency requires that only one [organization] exist, natural monopolies are typically subject to government regulation. Regulations may include price, quality, and/or entry conditions." (See at

<https://stats.oecd.org/glossary/detail.asp?ID=3227>; emphasis added.)

This seems to be the generally accepted concept in economics:

"In the case of natural monopolies, trying to increase competition by encouraging new entrants into the market creates a potential loss of efficiency. The efficiency loss to society would exist if the new entrant had to duplicate all the fixed factors - that is, the infrastructure.

It may be more efficient to allow only one [organization] to supply to the market because allowing competition would mean a wasteful duplication of resources."

(See economicsonline.co.uk/Business_economy/Natural_economics.html; emphasis added.)

"Natural monopoly: a situation in which one [organization] is able to supply the whole market for a product or service more cheaply than two or more [organizations] could."

(See dictionary.cambridge.org/dictionary/english/natural-monopoly)

In the definitions quoted above, where reference is made to "firm" it has been replaced by reference to "organization". It is submitted that in this way these definitions are fully applicable to the concept and definition of "natural monopolies" from the viewpoint of collective management.

1.1.2) As it can be seen, "natural monopoly" is not a legal category; it exists objectively in a given situation. Thus, the question of whether or not collective management organizations (hereinafter: CMOs) can be described as natural monopolies in a given jurisdiction should be understood to mean whether, in that jurisdiction, the objective existence of such monopolies is recognized along with appropriate legislative norms, or it is not recognized and there are legal provisions promoting (or even directly or indirectly artificially introducing) competition even where it would have to be recognized that natural monopolies are involved.

1.1.3) The question above is how CMOs can be characterized. Therefore, much depends on the concept and definition of CMOs. If a "collective management organization" is meant to be what is defined in Article 3(a) of the EU Collective Management Directive (Directive 2014/26/EC), obviously we cannot speak about natural monopolies and even the question may seem to be meaningless. Under that provision – "transposed" from the definition of "licensing bodies" in section 116(2)(a) of the Copyright, Designs and Patent Act 1988 of the United Kingdom (as previously also adopted in section 149(1) of Copyright and Related Rights Act, 2000 of Ireland) – a CMO is to manage the rights of *more than one* (that is, if the definition is taken seriously, already *not more than two*) authors or other rightsholders. Such a definition might be appropriate for something else, such as certain "licensing bodies" (for example *agencies* representing a small number – even two – firms which are owners of rights in a great number of works) but it does not correspond to the *raison d'être* and phenomenon of collective management where the issue of nature monopolies truly emerges (fortunately, in certain other language versions, the definition sounds somewhat more realistically; for example, in the French version, reference is made to "*plusieurs titulaires de droit*" and in the Spanish version to "*varios titulares de derechos*").

1.1.4) Historically, real CMOs (and not just two co-authors acting together or two big firms merging their repertoires) were established as communities – societies – of authors. The very first one – the *Société des auteurs et compositeurs dramatiques (SACD)* – at the time of its creation, did not have yet a full collective management system (but it was a kind of guild to negotiate a framework agreement with theaters) and was not in the position of a natural monopoly, neither the second one – the *Société des gens de lettres (SDGL)* – at that time, but they did function as *collectives* based on the principle of solidarity and representing the common interest of creators vis-à-vis both productive exploiters and consumptive users of their works. However, the third one – the *Société des auteurs, compositeurs et éditeurs de musique (SACEM)* – was already established in a situation dictating natural monopoly, because it was clear that the exercise of the newly recognized right of public performance in musical works was only reasonable and practicable through

such a society. The musical performing rights societies set up in other countries were established in the same way; otherwise also the Performing Rights Society (PRS) in the United Kingdom and the Irish Music Rights Organization (IMRO) in Ireland which did and do manage the rights of not only more than one but more than several thousands and, through the network of bilateral contracts, more than several hundred thousand authors; practically the active world musical repertoire in respect of performing rights.

1.1.5) The WIPO-UNESCO working group of governmental experts which discussed and adopted a study and guiding principles on collective management – made available in 1990 as a WIPO publication – took into account this sort of collective management; that is, management of copyright by a collective of authors and other rightsholders where this way of exercising rights is indispensable or, at least, only practicable; that is, where the recognition of natural monopoly is desirable. In the conclusions chapter of the study, the very first guiding principle read in this way: “Collective administration of copyright and neighboring rights is necessary *where the individual exercise of such rights* – because of the number of, and other circumstances relating to, uses – *is impracticable or economically disadvantageous*”¹ (emphasis added). This principle implied that, although some sorts of *joint* management of rights by different rightholders is *possible* in other cases too, in those situations which are described in the principle, *collective* management is the *necessary* way of exercising rights, and it also implied that the legal regulation of collective management should be adapted, first of all, to this basic form of collective management. The working group took into account these criteria of collective management when, in another guiding principle, it stated: “As a rule, there should be only one organization for the same category of rights in each country. *The existence of two or more organization in the same field may diminish or even eliminate the advantages of collective management*”².

1.1.6) In the second edition of the above-mentioned WIPO study, these guiding principles were confirmed³, and it was also pointed out that it would be a mistake to mix up real collective management with other forms of joint licensing and try to apply the same norms for fundamentally differing entities:

‘There are significant differences between collective management proper and other systems of joint exercise of rights. The term “collective management” refers to those forms of joint exercise of rights *where there are true “collective” elements in the system* (for example, in respect of tariffs, licensing conditions and distribution rules), *there is a real collective behind it*, the management is carried out on behalf of such a collective, *and the organization also serves certain collective objectives* beyond the tasks of mere rights management (this is mainly typical in the case of management of the rights of authors and performers). *The other system* of joint exercise of rights is *mere “rights clearance”* which, in its fully fledged form, is *without any collective elements* (this system is mainly typical in the case of rights owned by legal entities).’⁴ (Emphasis added.)

¹ “Collective Management Administration of Copyright and Related Rights”, WIPO publication No. 688 (E), 1990, page 87, point (a)).

² *Ibid.*, page 88, point (f).

³ See “Collective Management of Copyright and Related Rights”, WIPO publication No. 855 (E), 2002, point (1) and (11) of the Conclusions chapter corresponding to the above-quoted point (a) and (f) in the first edition; pages 157 and 160).

⁴ *Ibid.*, page 157, point (3).

1.1.7) The Court of Justice of the European Union (CJEU) has also recognized the existence of natural monopoly situations where the interests of the various stakeholders, and the public in general, justify that only one CMO be authorized to manage the given right. In the *OSA* judgment published on February 27, 2016, a day after the adoption of the Collective Management Directive (which took place on February 26, 2016) the Court stated as follows:

"Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, and Articles 56 TFEU and 102 TFEU must be interpreted as *not precluding national legislation*, such as that at issue in the main proceedings, *which reserves the exercise of collective management of copyright in respect of certain protected works in the territory of the Member State concerned to a single copyright collecting society...* (emphasis added)

"However, Article 102 TFEU must be interpreted as meaning that the imposition by that copyright collecting society of fees for its services which are appreciably higher than those charged in other Member States (a comparison of the fee levels having been made on a consistent basis) *or* the imposition of a price which is excessive in relation to the economic value of the service provided are indicative of an abuse of a dominant position."⁵

What was disputed in the case was Article 98(6)(c) of the Copyright Law (Law No. 121/2000) of the Czech Republic in force at the time of the dispute under which only one organization was to be authorized to manage the same right in the same category of works. Although the Court did not use the expression "natural monopoly", the reasons indicated by it for the acceptability of a *de iure* monopoly in the given case (public performance of musical works) corresponded to the criteria of such monopoly⁶. It is submitted that the findings of the Court have remained valid also after the entry in force of the Directive. Under Article 36(2) of the Berne Convention, any country bound by the Convention must guarantee that "it will be in a position under its domestic law to give effect to the provisions of this Convention". The Court has found that, for effective applicability of certain rights in certain situations – where natural monopoly exists – provisions on *de iure* monopoly are justified. It follows from this that it would not be in accordance with this obligation of the countries of the Berne Union if a national law not only did not recognize natural monopolies in that way but even, by constraining on the authors and other rightsholders that they compete with each other where such competition would endanger the effectivity of exercising their rights.

1.1.8) The European Commission launched an infringement proceeding against the Czech Republic and Hungary at the same time on November 27, 2008 by its decision No IP/08/1786. The press release about it summed up the position of the Commission in the following way:

"Monopoly of collecting societies' activities: infringement proceedings against the Czech Republic and Hungary

⁵ Case C-351/12, summary findings at the end of the judgment.

⁶ *Ibid.*, see paragraph 72 of the judgement where the Court points out that the recognition and statutory provision on monopoly position was justified as "suitable for protecting intellectual property rights, since it is liable to allow the effective management of those rights and an effective supervision of their respect in that territory".

“The European Commission has decided to send reasoned opinions to the Czech Republic and Hungary on the grounds of obstacles to the freedom of establishment and to the freedom to provide services as a result of the monopolies granted to national rights management companies.

“Czech and Hungarian laws provide that a single collecting society may be authorised to operate in their respective countries for each type of right and work. This monopoly granted to national companies bans collecting societies set up in other Member States from undertaking any form of activity and denies them the freedom of establishment and the freedom to provide services. The Commission has doubts as to the justification of those national measures in the light of their negative effects on two of the fundamental freedoms enshrined in the EC Treaty.

“By its very nature, cross-border management may prove to be beneficial for rights management on cross-border platforms, including internet, satellite and possibly cable. Moreover, cross-border management facilitates distribution to a wider public, which benefits distributors and consumers, as well as rights holders.”⁷

1.1.9) The Czech Republic and Hungary chose different solutions. The Czech Republic went to the CJEU to protect its national law in the above-mentioned *OSA* case, while Hungary in Act CLXXIII of 2011 modified Article 86(2) of the 1999 Copyright Law – which had similar provisions as Article 96(6)(c) of the Czech Copyright Law – allowing, in principle, the establishment of more than one CMO to manage the same right, but with a safeguard condition under Article 91(4) of the Hungarian Copyright Law that this still did not become possible in the case of mandatory and extended collective management where the authorization of more than one organization would endanger the operability and efficiency of the collective management system. That is, where there is a natural monopoly situation. As it can be seen below at answer to question 1.4, this safeguard provision has been maintained in the framework of the transposition of the Collective Management Directive.

1.1.10) The above-mentioned new Hungarian provisions entered into force on January 1, 2012, much before the CJEU found on February 27, 2016 in the *OSA* case that such a provision in a natural monopoly situation is in accordance with the EU law and still before the judgements of the General Court of the CJEU in the *CISAC* case⁸, and specifically in the *Artisjus* case⁹ initiated in parallel for the same reasons, adopted on April 12, 2013. In the latter judgments the Court found that “the Commission has not proved to a sufficient legal standard the existence of a concerted practice [of CISAC member societies, including Artisjus] relating to the national territorial limitations, since it has neither demonstrated that the collecting societies acted in concert in that respect, nor provided evidence rendering implausible one of the applicant’s explanations for the collecting societies’ parallel conduct”¹⁰. The decision annulled by the Court¹¹ stated the Commission’s objection to *de iure* monopoly of national collective management systems concerning the internet, satellite broadcasting and cable retransmission.

⁷ See at Europe.eu/rapid/press-release_IP_08_1786_eu.pdf.

⁸ Case T-442/08.

⁹ Case T-411/08.

¹⁰ Para. 182 in the *CISAC* judgment and para. 157 of the *Artisjus* judgement,

¹¹ *Ibid.*, para. 182.

1.1.11) The General Court's judgment of 2013 was relevant mainly for satellite broadcasting and cable retransmission. Internet uses – in particular trans-border online use of musical works – were a separate category because, on the basis of Commission Recommendation of 18 October 2005 (2005/737/EC) on collective cross-border management of copyright and related rights for legitimate online music services, the transformation of traditional collective management system into a small number of platforms competing with each other with their fragmented repertoires was already in advanced stage. Online trans-border use of musical works took place under conditions which did not correspond to a natural monopoly situation; therefore, from that viewpoint the elimination of *de iure* or *de facto* monopoly position in this concrete field seemed to be justifiable. However, only from that viewpoint because, as the 2007 Resolution of the European Parliament on the above-mentioned Commission Recommendation¹² pointed out, the new system introduced by the Commission – as a kind of "collateral damage" – seriously endangered cultural diversity in particular as regards the culture of smaller Member States:

“there is concern about the potentially negative effects of some provisions of the Recommendation on local repertoires and on cultural diversity given the potential risk of favouring a concentration of rights in the bigger CRMs, and whereas the impact of any initiative for the introduction of competition between rights managers in attracting the most profitable right-holders must be examined and weighed against the adverse effects of such an approach on smaller right-holders, small and medium-sized CRMs and cultural diversity”¹³

This danger was then somewhat mitigated by certain provisions – such as by the "tag-on" obligations of the big platforms to accept management of the repertoires of smaller societies – in Title III of the Collective Management Directive.

1.1.12) To some up, under Hungarian copyright law, it is recognized that there are situations where natural monopolies exist with the effect that the authorization of more than one organization would endanger the due operation and efficiency of the collective management system and, therefore, in those cases *de iure* monopoly is ensured in accordance with the obligations under Article 36(2) of the Berne Convention quoted above.

Does your system make difference between the voluntary, extended (if any) and mandatory collective management? Which rights are managed under which regime?

(a) Introduction

1.2.1) Before the transposition of the Collective Management Directive, all the substantive provisions on collective management were included in the Copyright Law; only certain procedural rules were left to a governmental decree. With the adoption of Act XCIII of 2016 on collective management of copyright and related rights, which replaced Chapter XII of the Copyright Law on collective management (hereinafter: the Collective Management Law), the regulation has become more complex. Although the majority of the provisions on collective management may be found in the Collective Management Act (and in certain procedural rules in Governmental Decree No. 216/2016 (VII.22)), some of the

¹² European Parliament Resolution No. P6-TA(2007)0064.

¹³ *Ibid.*, para. L

provisions have remained in the Copyright Law, mainly those which determine cases where mandatory and extended collective management may be applied.

1.2.2) The Collective Management Law is in accordance with the four Titles of the Collective Management Directive. At the same time, it contains specific provisions on those aspects which are not regulated in the Directive. These are, in particular, the issues of mandatory and extended collective management; the establishment and registration of CMOs; the establishment and approval of tariffs; management of rights in case of more than one CMO established for the management of the same category of rights of the same category of right-holders; and the supervision of CMO. Certain specific rules apply also to independent management entities and to CMOs established in other Member States of the E.U. or in other States which are parties to the E.E.A. Agreement.

(b) Mandatory collective management

1.2.3) Article 4, point 6 of the Collective Management Law determines "a case where mandatory collective management applies" as "that kind of use [of works or objects of related right] in connection with which, on the basis of the Copyright Law, the right of authorization or the right to remuneration without right of authorization may only be exercised by means of collective management." Mandatory collective management may only be performed by a representative CMO (see below)

1.2.4) Mandatory collective management applies in the following cases:

- right of reproduction concerning recording of musical works with or without words and excerpts from dramatico-musical works the recording of which has been already authorized once (Article 19(1) of the Copyright Law);
- right to remuneration for private copying (Article 20(7) of the Copyright Law);
- right to remuneration for reprographic reproduction for private purposes, including a right to remuneration on equipment to be used for such reproduction and remuneration to be paid by copy-shops (Article 21(1) of the Copyright Law);
- unwaivable right to remuneration of authors and performers in case of transfer of their rental right to producers of phonograms or audiovisual works (Articles 23(6) and 73(3) of the Copyright Law);
- public lending right in literary works, sheet music and phonograms, including the recorded performances and the works performed and recorded on phonograms (Articles 23/A(3) and 78(2) of the Copyright Law);
- right of broadcasting in musical works with or without words and excerpts from dramatico-musical works, as well as short non-fiction literary works (Article 27(1) of the Copyright Law);
- cable retransmission right (Article 28(3) of the Copyright Law);
- resale right (Article 70(9) of the Copyright Law);
- right of performers to supplementary remuneration from producers of phonograms following the 50th year after the phonogram was published or, failing such publication, the 50th year after it was communicated to the public (Article 74/A(1) of the Copyright Law);

- right to single equitable remuneration of performers and producers of phonograms for broadcasting and communication to the public of phonograms published for commercial purposes (Article 77(3) of the Copyright Law).

(c) Extended collective management

1.2.5) The expression "extended collective management" is not defined separately in Article 3 on definitions of the Collective Management Act. It is used in Articles 17 and 18 of the Act which determine its basic aspects. The regulation of this form of collective management is quite complex; the relevant norms may be found in various provisions of the Copyright Law and the Collective Management Law. In the relevant provisions, also the expressions "prescribed collective management" and "representative collective management organization" are used, which, in contrast, are defined in points in Article 3 of the Collective Management Law.

1.2.6) Under Article 3, point 3 of the Collective Management Law, "a case where prescribed collective management applies" is "that kind of use [of works or objects of related right] in connection with which, on the basis of the Copyright Law, the right-holders may only exercise their rights through a CMO as long as their notice opposing collective management made in accordance with Article 18(1) enters into force." The expression "prescribed [in Hungarian "előírt"] collective management" might be misunderstood as to suggest that what is prescribed is that right-holders can only exercise their rights through collective management (which would be just another name for mandatory collective management). However, this is not the case since right-holders may "opt out" from a prescribed collective management system in accordance with Article 18(1) of the Law (see below). In fact, "prescribed" collective management is extended collective management *provided in the statutory law itself* in those cases where collective management is a normal way of exercising rights, practically with a natural monopoly situation.

1.2.7) In addition to the possibility of "opting out" from the collective management system, it is also generally recognized that extended collective management may only be regarded to be in accordance with the provisions on exclusive rights of authorization if it is applied where collective management is *necessary* to exercise the rights concerned and where the CMO is *duly representative both domestically and internationally* (and, if more than one CMO, it is *the most representative*).¹⁴

1.2.8) These further conditions – in respect of "prescribed collective management" – are determined in the following way. Under Article 5(1) of the Collective Management Law, not only mandatory collective management but also prescribed collective management may only be performed by "representative collective management organizations" (and the detailed norms on such organizations (see below) make it clear that they are truly representative). Furthermore, Article 34(2) of the Act provides as follows: "In cases other than those where mandatory or extended collective management applies, authorization to perform collective management as a representative CMO may only be granted if the rightholders cannot exercise their rights efficiently on an individual basis." The latter provision in Article 34(2) of the Collective Management Act confirms that "prescribed

collective management" is a specific form of extended collective management for which fulfillment of two of the above-mentioned conditions (the possibility of "opting out" and broad representativeness) is required, while fulfillment of the third condition (that the rights must be of a nature that they could not be exercised effectively on an individual basis), in the cases listed in the Copyright Law, is implied.

1.2.9) The Copyright Law provides for "prescribed collective management" in the following cases:

- public performance of musical works (other than dramatico-musical works) and literary works (other than scientific, technical and medical works and longer non-fiction works) (Article 25(1) and (3) of the Copyright Law).
- satellite broadcasting of musical works (other than dramatico-musical works) and literary works (other than scientific, technical and medical works and longer non-fiction works) (Article 27(2) of the Copyright Law).
- communication to the public in a way other than broadcasting of musical works (other than dramatico-musical works) and literary works (other than scientific, technical and medical works and longer non-fiction works), including (interactive) making available to the public provided in Article 26(8) of the Copyright Law (Article 27(3) of the Copyright Law).
- making available performances (in an interactive manner) to the public, as provided in Article 73(1)(e) of the Copyright Act (Article 74(2) of the Copyright Law).

1.2.10) Under Article 3, point 10 of the Collective Management Law, a "representative collective management organization" is "a collective management organization which, in regard to the right under copyright or related rights managed by it, corresponds to the requirements determined in Article 34 and which for the said right has received authorization to function as a representative collective management." As can be seen, this is not a substantive definition, since it only refers to Article 34 where the conditions to be fulfilled are truly determined (see below concerning authorization procedures).

1.2.11) Article 17 of the Collective Management Law includes provisions on the extension of the validity of licenses granted by representative CMOs to the rights of rightholders not covered by their repertoire and on the obligations of such CMOs in regard to the rights of such rightholders. Article 18 is on "opting out" notices; they are supposed to cover all works or objects of related rights of the rightholders concerned, and they enter into force on the first day after the end of the given financial year.

(d) Registration and authorization

1.2.12) Articles 32 and 33 of the Collective Management Law determine two general conditions to be fulfilled by any organization that intends to perform collective management. First, its staff must have appropriate qualifications and practical experience to manage rights collectively and to maintain international relations and, second, it should have databases of the right-holders represented by it and their works and objects of related rights, as well as of the uses thereof, which is necessary for distributing and transferring remuneration collected by it. If an organization fulfills these conditions, it does not need authorization to begin its collective management activities; it is sufficient that they register as CMOs at the National Intellectual Property Office by means of a simple notification. In contrast, authorization by the Office is needed for those organizations

which wish to be registered as representative CMOs (and, thus, may perform mandatory or extended collective management).

1.2.13) For authorization and registration of a CMO as a representative CMO, Article 34 of the Collective Management Law, in addition to the above-mentioned basic conditions, requires, first, that the CMO should represent a significant portion of the right-holders concerned and, second, that it should have representation agreements with foreign CMOs that are important from the viewpoint of the actual use of works or objects of related rights covered by the right to be managed. From the viewpoint of whether or not a CMO is significantly representative, not only the number of rightholders should be taken into account, but also the proportion of their works or objects of related rights within the actual use of such works or related rights and the proportion of their share of the remuneration collected and distributed by the CMO.

(e) Accordance with the provisions of Directive on Copyright in the Digital Single Market on extended collective management

1.2.14) The deadline for the transposition of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (hereinafter: DSM Directive) is still far away to expire (7 June 2022 under Article 17). Nevertheless, it is worthwhile mentioning that the Hungarian legislation is in accordance with the provisions of the Directive.

1.2.15) Paragraph 2 of the DSM Directive provides that extended collective management may only be applied within well-defined areas of use, where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely, due to the nature of the use or of the types of works or other subject matter concerned, and shall ensure that such licensing mechanism safeguards the legitimate interests of rightholders. For the requirements of well-defined areas mentioned in this paragraph where collective management is a necessary means of exercising rights, see the list in paragraph 1.2.9 above and the provisions mentioned in paragraph 1.2.8 above. The legitimate interests of rightholders – in addition to the the general provisions applicable for all forms of collective management and the possibility of "opting out" (see the following paragraph) – are also guaranteed by equal treatment as prescribed in Articles 17(2) and 18(2) of the Collective Management Law (see below).

1.2.16) The safeguards prescribed in Article 12(3) of the Directive are also duly provided in the Collective Management Law. Sufficient representativeness (subparagraph (a) of DSM Directive Article 12(3)) is a precisely determined condition (see paragraph 1.2.13 above). Articles 17(2) and 18(2) of the Collective Management Law guarantee equal treatment (as prescribed by subparagraph (b) of DSM Directive Article 12(3)) providing that those rightholders who have not authorized the organization to manage their rights must have the same rights as those who have authorized it and that the requirement of equal treatment also applies for rightholders who have opted out, in respect of the uses of their works and objects of related rights which took place before the validity of opting out. There are provisions on easy and effective opting out (in accordance with subparagraph (c) of DSM Directive Article 12(3)) as described in paragraphs 1.2.6 and 1.2.11 above. Appropriate publicity measures in accordance with subparagraph (d) of DSM Directive Article

12(3) are also prescribed in Article 18(3) of the Collective Management Law.

1.2 *Is the competition between collective management organizations permitted in your jurisdiction? If so, under which circumstances, how often and in which fields (e.g. tariffs, service for users, available repertoire, service for rightholders, amount of deductions) the competition may occur.*

1.3.1) The answer to this question depends on those aspects which are discussed above in connection with question 1.1 above; that is, whether real CMOs are involved or what are also called "collective management organization" but are in reality agency-type bodies fighting, or at least competing, with each other. As it is presented below in the response to question 1.4, in the case of mandatory and extended collective management, there are specific provisions aimed at preventing that the collective management system be undermined by the application of certain competition.

1.3.2) In question 1.3 above, three kinds of means of competing of CMOs against each other are mentioned: first, tariffs and services for users (that is, those aspects which concern the relationship with users); second, the available repertoire; and, third, services for rightholders and the amount of deductions on which certainly mainly the costs are meant. These methods of competition are analyzed below.

1.3.3) A CMO certainly may get more advantageous position in the "market" for its own repertoire to the detriment of the repertoires of other organizations if it decreases its tariffs proportionally (proportionally in the sense that the tariffs cover more or less the same size of repertoires). The other organizations may respond to decreasing their tariffs below the level of the tariffs of the first society to regain dominance in the "market". This way of competition through tariffs may work, but it is doubtful that it would be for the benefit of the creative community; as a result of a "race to the bottom" all rightholders may lose; the value of their creations may not be recognized anymore.

1.3.4) In the question above, service for users are mentioned as possible other means of competition. It is not clear what is exactly meant by this, but probably reference is made to less administrative burdens. This certainly may influence users to choose the repertoire of an organization rather than the repertoire of another. However, unless the users only use a given repertoire, with the increase of the number of competing organizations, the administrative burdens are proportionally increased. It is highly questionable that the replacement of one-stop-shops with competition between various organizations is beneficial to lawful users. Therefore, it may not have come as a surprise that EBU was on the side of authors' societies in the CISAC case and that the broadcasting organizations played a key role also in achieving the adoption of Article 32 on derogation from the provisions of Title III of the Collective Management Directive on the authorization of online trans-border use of musical works.

1.3.5) The second category of means of competition mentioned above – competing by the available repertoires – seems to be decisive to get better position at lawful users. Big repertoires also make it possible to decrease the level of costs/works because the administrative expenses of the organizations may be divided among a greater number of works. However, partly due to this sort of impact of the size of the repertoires on the level of costs, the organizations of smaller countries with smaller repertoires would get into a

disadvantageous position vis-à-vis the organizations of bigger countries with bigger repertoires if they were constrained to compete with them in the market of their own countries. This may endanger cultural diversity as the above-mentioned 2007 Resolution of the European Parliament on the Commission Recommendation has pointed out.

1.3.6) It is submitted that, if the government of a country can see that its culture might get into a disadvantageous position as a result of uncontrolled competition with certain economically more powerful cultures, it has got the sovereign right to protect its culture and that the provisions of the Treaty on the Functioning of the EU (TFEU) do confirm this right. It would be interesting to see the outcome of a dispute at the CJEU in which the rights of creators of cultural goods or services would not be addressed just from the viewpoint of market and competition aspects but where a Member State would claim (i) that culture is not an exclusive or even shared, but only supportive, competence of the European Union (see Article 6(c)); (ii) that as the UNESCO Convention on the protection and promotion of the protection of cultural expressions – binding the European Union and its Member States – states in the Preamble, “cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must... not be treated as solely having commercial value”; (iii) that, therefore, under Article 2.5 of the Convention “the cultural aspects of development are as important as its economic aspects”; (iv) that, the Parties to the Convention – including the EU and its Member States – in Article 5(1), have reaffirmed “their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions”; and (v) that, under Article 6 of the Convention, “[w]ithin the framework of its cultural policies and measures... taking into account its own particular circumstances and needs, each Party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory” which may include, *inter alia*, “regulatory measures aimed at protecting and promoting diversity of cultural expressions” and “measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services.” It would be interesting to see what happened if the CJEU were to deal with these aspects concerning the issues of collective management and not only with the competition and trade aspects – the Court which, as one of the key bodies of the Union, would be obligated to do so in accordance with Article 167(4) of the TFEU. It provides that “[t]he Union shall take cultural aspects into account in its action under other provisions of the Treaties [such also under the provisions concerning competition and trade], in particular in order to respect and to promote the diversity of its cultures”.

1.3.7) The third category of competition means relate to the way a CMO serves rightholders. From this viewpoint, the most important aspect is certainly the question of how efficiently and cost-effectively the organization manages the rights. Obviously the most effective and cost-effective organization is which is in the position of managing *de facto* the world repertoire. With the increase of the number of CMOs competing between each other efficiency and cost-effectiveness tends to decrease proportionally as the economic studies concerning national monopolies proves with the potential of undermining due operability and effectiveness of the collective management system. In

the answer to the following question – question 1.4 – it is presented through what provisions Hungarian legislation tries to prevent this.

1.3 How is extended (if any) and mandatory collective management regulated and applied where, for the management of a given right, there are more than one organization?

1.4.1) As mentioned above in point 1.2.12, under Articles 32 and 33 of the Collective Management Law, a CMO which fulfills the general conditions does not need authorization – beyond registering at the National Intellectual Property Office – if it does not wish to be recognized and registered as a representative CMO (which is necessary for mandatory and extended collective management). Thus, in principle, if there were such CMOs, they might manage the same category of rights of different groups of the same category of right-holders in parallel.

1.4.2) By virtue of Article 35 of the Collective Management Law, in the cases where mandatory or extended collective management applies, the functioning of more than one CMO, or a new CMO in addition to one already authorized, may only be authorized to manage the same right of the same category of right-holders *if such authorization does not endanger the operability and efficiency of collective management* (which obviously refers to a situation *where the recognition of natural monopoly is justified*). The fulfillment of this condition may be proved – *inter alia* – by the presentation of an agreement between the CMOs concerned about the management of the rights of those rightholders which are not covered by the repertoire of any of them (see Article 89 below) and on the establishment of joint tariffs as well as the collection of remuneration for the right-holders represented by all of them (see Article 90 below).

1.4.3) If these conditions are not met, that CMO must be authorized which better fulfills the conditions of authorization under Article 34, and a new CMO may be authorized – with simultaneous withdrawal of the registration of the already registered one – if it better satisfies those conditions.

1.4.4) Where two or more CMOs ask for authorization as representative CMOs to manage the same right of the same category of rightholders and they fulfill the conditions under Article 34, by virtue of Article 89, they must agree between themselves which of them grants licenses on the basis of extended collective management or collects remuneration in the framework of mandatory collective management on behalf of those rightholders who are not represented by any of them. Such CMOs, by virtue of Article 90, must also agree between themselves on the establishment of jointly applicable tariffs and on which of them collects remuneration on behalf of the other or the others. If they are unable to reach agreement on these issues, the National Intellectual Property Office appoints the CMO which better meets the conditions under Article 34.

1.4 *Is the collective licensing of rights conducted by non-profit CMOs or a different type of agency or entity (profitable entities such as business corporations), or by the state agency (such as the IP Office)?*

1.5.1) Article 3(8) of the Collective Management Law defines "collective management organization" in accordance with Article 2(a) of the Collective Management Directive; that is, a CMO may also be a business entity working for profit, because it is sufficient to fulfill only one of the two conditions: it must be owned or controlled by its members *or* it may work for profit.

1.5.2) Article 21 of the Collective Management Law provides that CMOs may only be established and function as private associations.

1.5 *Are the collective management organizations obliged to contribute to cultural development of the society? If so, in which areas and how is the cultural support implemented (e.g. management of social or cultural funds)? Is the creation of such funds and their allocation limited by law?*

1.6.1) There are two cases where it is obligatory for a CMO to contribute – from the remuneration collected by it – to cultural purposes: from the amount of non-distributable remuneration and from the remuneration collected for private copying and reprographic reproduction, respectively.

1.6.2) Under Article 8(5), of the Collective Management Directive, the general assembly of a CMO has competence, *inter alia*, to decide on "the general policy on the use of non-distributable amounts" (point (b)); and "the use of non-distributable amounts" (point and (e)). Nevertheless, Article 13(6) of the Directives provides that "Member States may limit or determine the permitted uses of non-distributable amounts, *inter alia*, by ensuring that such amounts are used in a separate and independent way in order to fund social, cultural and educational activities for the benefit of rightholders."

1.6.3) Article 26(1)(h) of the Collective Management Law in accordance with Article 8(5) of the Directive lists among the issues to be covered by the competence of the general assembly of a CMO to decide on the use non-distributable amounts as well as on deductions for cultural and social purposes. (The transposition of Article 15(1) of the Directive clarifying that deductions for such purposes may only be made from remuneration due to another CMO with the express consent of that CMO has also taken place, in Article 36(4) of the Law.)

1.6.4) Article 13(6) of the Directive has been interpreted and transposed in a special way in the Collective Management Law. Not only the use of non-distributable remuneration for cultural purposes is prescribed but, under Articles 42 and 45 of the Law, 90% of the amounts of such remuneration must be transferred to a government fund (National Cultural Fund) to be used by the Fund for cultural purposes. (10% of the non-distributable remuneration is left with the CMO mainly for the purpose to pay remuneration to those rightholders who happen to be identified and located within the prescription time; if in a given year the 10% withheld is not sufficient for such purpose, the CMO may deduct the surpass from the 90% of the non-distributable amount due to the National Cultural Fund).

1.6.5) The other case where it is obligated to use remuneration for cultural purposes concerns the remuneration to be collected for private copying and reprographic reproduction under Articles 20 and 21, respectively, of the Copyright law. Under Articles 44 and 45 of the Collective Management Law, 25% of such remuneration must be transferred to the National Cultural Fund which is supposed to use the sums for cultural purposes in the interests of those to whom the remuneration is due.

1.6.6) In other cases, deductions for cultural purposes is not obligatory. However, if the CMO applies such deductions, under Article 45(1) of the Collective Management Law, it must use it for such purposes by transferring the amounts to the National Cultural Fund.

2. Collective Management Organizations and Authors (Right-holders)

2.1 Do the authors/rightholders have a legal right to become represented? To become members? If they are rejected, what kind of remedy do they have at their disposal?

2.1.1) Rightholders do have a legal right to be *represented* by a CMO but this right does not include the right to become a *member* of the CMO.

The representation of rightholders by a CMO may take five formal standings¹⁵, each successive standing constituting stronger organisational ties with a CMO than the previous one. The following chart shows these five potential standings:

Basis of representation	Right to receive royalties; right to receive information on the activities of the	Right to control the scope of representation in terms of the rights	Right to influence all governance issues such as, e.g., distribution policies
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¹⁵ Relevant excerpts from the Collective Management Act:

"Section 6 (1) While performing its collective management activities, the CMO shall take into account the interests of all rightholders it represents without any unjustified discrimination between them.

Chapter III. The legal basis of collective management

7. The Rights Management Mandate

Section 13 (1) The rightholder may freely choose which collective management organization he entrusts with the management of his copyright or related rights under this Act, provided that the management of the given right is within the scope of that organization.

(2) The CMO shall accept the mandate if it is in accordance with paragraph (1).

Section 17(2) Where a CMO carries out collective management activities in accordance with paragraph (1) in respect of a rightholder who is represented by way of extended collective management but who have not given a specific rights management mandate, this rightholder, in respect of the activities pertaining to collective management, shall have the same rights than those having given such mandate. The provisions of the statutes and other regulations of the representative CMO, to the extent they are related to collective rights management activities, including those related to rightholders and non-commercial uses under Section 11, shall also apply to rightholders represented under paragraph (1).

Article 23 (1) The CMO shall accept as members all rightholders, including CMOs and other organisations representing rightholders, who are covered by its collective management activity and who fulfil the membership requirements.

(2) Membership requirements shall be defined in an objective, transparent manner and shall be based on non-discriminatory criteria. The CMO shall determine its membership requirements in its statutes or membership rules and make them available to the public.

	CMO	represented, the duration of the mandate, and the territories covered	and management costs
1. Representation based only on statutory law*	YES	NO	NO
2. Representation based on statutory law + a direct mandate	YES	YES	NO
3. Representation based on a voluntary direct mandate**	YES	YES	NO
4. Representation based on statutory law + a direct mandate + membership in the CMO	YES	YES	YES
5. Representation based on a voluntary direct mandate + membership in the CMO*	YES	YES	YES

*Representation based on statutory law may take the form of mandatory or extended collective management (see the answers in Chapter 1) **For the purposes of this chart, voluntary direct mandates are deemed to be stronger ties with a CMO than statutory representation, because the freedom of choice of the rightholder is greater in the former case and thus her deliberate decision to "opt in" to collective management expresses stronger ties to a CMO than either form of representation based on statutory law.

2.1.2) In case a claim for representation is rejected, the rightholder may lodge a complaint with the supervisory authority claiming that the CMO is in violation of the statutory regulations pertaining to collective management¹⁶. As almost always, litigation is also an option.

¹⁶ Relevant excerpts from the Collective Management Act:

"Complaints about the operation of a CMO or an independent rights management organization

Section 122 (1) Rightholders, users, organizations representing user interests, other CMOs or independent rights management organizations may lodge a complaint in writing with the HIPO concerning any activity, operation, or any relevant issue which, in their opinion, constitutes a violation of the law on collective management.

2.2 How does the CMO resolve a conflict between rightholders in case of a “double claim”? Are the rightholders referred to court or is there an ADR at hand?

There are no statutory rules regulating conflict resolution between rightholders in case of double claims. The rules of distribution of CMOs, however, usually include some sort of alternative dispute resolution procedure to which the rightholders may resort before going to court. These procedures usually aim to precipitate a peaceful settlement between rightholders by facilitating communication between them, and by suspending payments, so as to maintain status quo and not to favour either party until a settlement is reached. If all else fails, rightholders are ultimately referred to litigation¹⁷.

2.3 How can the authors (rightholders) participate in the activities of the collective management organization? Under which circumstances can they be elected into the management or controlling boards? Are there pre-conditions, such as a minimal amount of remuneration from CMO, to become elected?

There are so many possible ways to participate in the activities of a CMO that here, we focus only on those activities expressly guaranteed by statutory law as a personal right of the rightholder. For the purposes of this question, we assumed that here, the term "rightholders" refers to members of a CMO.

The fundamental rights of a CMO member are as follows¹⁸:

Section 123 (1) A complaint pursuant to Section 122 shall be immediately investigated by the HIPO upon receipt. If necessary, the HIPO may hold a hearing the complainant and the person against whom the complaint has been lodged and may request further information and information from them.

(2) Within 60 days of the receipt of the complaint, the HIPO shall decide, on the basis of the data at its disposal, whether it will initiate, based on the content of the complaint and pursuant to Section 112 (3), on its own initiative, a supervisory procedure against the relevant CMO or independent rights management organization.

¹⁷ Relevant excerpts from the Rules of Distribution of Artisjus:

"13.1 If for any reason a royalty claim is contested, the Society shall hold back such contested royalties until the dispute is settled by agreement (joint declaration) or judicial decision."

Relevant excerpts from the Rules of Distribution of EJI, the CMO of performing artists:

6. Dispute resolution in case of conflicting declarations of, or disputes between, performers

6.1. In the event of a conflict between performers (e.g. concerning the identity of the performers involved in the making of phonograms) or a controversy of other nature, in this conflict, EJI has no decision-making power, nor can it decide upon the accuracy of the statements of the parties, nor can it participate in the merits of the case in any other way. [...]

6.2. In the event of a dispute as referred to in Section 6.1. above, EJI may contribute to the settlement of the dispute by way of

a) facilitating contact between the performers concerned.

b) notifying the performer concerned that the content of her previously filed data has been challenged by another performer involved in the same recording and ask for confirmation or update of the previously filed data.

c) notifying the performer concerned, provided they would not be aware of this for whatever reason, that rightholders are liable for damages caused by filing inaccurate data.

d) requesting users to confirm or update their previously supplied playlist information.

In duly justified cases, EJI may decide to put the royalties contested on a separate account and disburse it only after either an agreement of all performers concerned or a final judicial decision in the merits of the matter has been filed with it."

¹⁸ Sections 24 to 27 of the Collective Management Act

- Right to participate personally or through an authorized representative in the General Assembly of the CMO, including the right to vote, to speak, to ask questions, and to make suggestions and comments. The following issues belong to the exclusive competence of the General Assembly:
 - (a) adoption of the statutes;
 - (b) adoption and amendment of the rules of distribution;
 - (c) adoption of the investment policy, and decision on the actual investment;
 - (d) adoption and amendment of the regulations of operation and, if the rules of membership are not included in the statutes, the rules of membership;
 - (e) adoption of the annual budget, annual accounts, and the annual transparency report;
 - (f) election and recall of the executive officer, supervision of the work of the executive officer, and exercise of the employer rights and responsibilities over the executive officer;
 - (g) election, dismissal, and remuneration of the auditor;
 - (h) decision on the use of royalties unpaid due to the fact that the rightholder or her place of residence is unknown, as well as the use of royalties for community, especially social or cultural purposes of rightholders;
 - (i) decision on the merger and division of the CMO;
 - (j) acquisition, transfer or encumbrance of any immovable property;
 - (k) adoption of the risk-management policy;
 - (l) decision on merging with another association, founding an association or another organization, and approving the acquisition of ownership or membership rights in another organization;
 - (m) decision on borrowing, lending or provision of credit.
- Eligibility to any post filled by way of election within the CMO.
- Right to communicate with the CMO by electronic means, including for the purposes of exercising membership rights.

2.4 How is the remuneration distributed amongst authors? How can the authors intervene in the process of the formulation of distribution schemes? In which phases of the collecting process are the fees taxed and by whom?

2.4.1) Rules of distribution may differ substantially according to the use in question, the usage information available concerning that particular use, and the specificities of the groups of rightholders concerned. To illustrate this with a practical example, let us compare the three rightholder groups typically involved in the making of sound recordings: authors, performers, and phonogram producers. If we rank these rightholder groups in the ascending order of the number of rightholders associated with a single recording, the result is as follows:

- *Phonogram producers*: in this category of rightholders sole ownership of rights is the most typical, so usually only one rightholder is associated with any one recording. As a principle, there is no need to compare and weigh against one another the contributions of several rightholders, all royalties go to a single rightholder.
- *Authors*: unless the musical work is purely instrumental, we have at least one composer and one lyricist associated with any one recording. The situation here is already somewhat more complex than in the case of phonogram producers, because the royalties collected for the

recording must be shared between the composer and the lyricist, and, as the case may be, also with the publisher of musical work. Thus, their respective contributions must be compared and weighed against one another and the outcome of this comparison must be adequately reflected in the rules of distribution. The various other forms of joint authorship, obviously, all require similar considerations and conforming distribution rules. Consequently, the rules of distribution for authors / publishers are likely to be more complex than for phonogram producers merely by virtue of the number of rightholders involved¹⁹.

- *Performers*: here, the number of rightholders associated with a single recording may well be over a hundred. Amongst them, some are soloists or "featured artists", others are collective contributors or "non-featured artists". Again, to fairly allocate between them the royalties collected, one must devise a set of rules that reflects at least the importance of their respective contributions.

Examples of this sort could be continued endlessly but suffice it to say that because of the multitude of factors taken into account in the various rightholders group, "distribution" is such a complex issue that even an overview of prevailing practices would go well beyond the scope and purpose of this questionnaire. Nonetheless, some general principles and recurring issues may be distilled from the practices of CMOs.

- *Actual use*: most rules of distribution aim to allocate royalties as close to the actual use of the protected subject matter as possible. As collective management is concerned with mass uses (recurring and parallel use of a multitude of works or other protected subject matter), the number of repetitions and the length of the work used are often the most decisive factors.
- *Weighing contributions*: as described above, if there is more than one contributor to a protected subject matter, the rules of distribution must devise a formula for the allocation of royalties between contributors²⁰.
- *Genres*: the various genres of works or other protected subject matter usually have some individual characteristics that sets them apart from other genres and that most rules of distribution deem fair to take into account²¹.
- *Bridging the information gap*: the usage information received from users is rarely complete and, in some cases, it is missing entirely. In case of musical works re-recorded several times over the years by different performers and producers, for example, the title of a phonogram may refer to entirely different sets of contributors and, unless the year of production is known, there is a risk to distribute the royalties erroneously. If, ultimately, such conclusive data proves to be unavailable, the rules of distribution often devise a default value that can be relied upon

¹⁹ For instance, according to the rules of distribution of Artisjus, the royalties collected for mechanical rights must be shared between the represented rightholders, depending on the number and form of contributions, in the following way: composer only 100%; composer and lyricist 50% - 50%; composer and publisher (if entitled to a share of rights revenues) 66,67% - 33,33%; composer, lyricist and publisher (if entitled to a share of rights revenues) 33,34% - 33,33% (Artisjus's Rules of Distribution II. 75.1.)

²⁰ For instance, according to the to the rules of distribution of Filmjus, the CMO of audio-visual authors and producers, uses the following formula to share the royalties collected between the main authors of an audio-visual production: scriptwriter / screenplay writer 44%, film director 44%, director of photography 12%. (Filmjus's Rules of Distribution Annex 2. 1.1).

²¹ For instance, Filmjus uses multipliers to express differences between the various audio-visual genres. When allocating the royalties collected to the productions used, dramatic genres (feature films, tv-series) typically receive a higher multiplier and, thus a higher share, than news programs or talk shows (Filmjus's Rules of Distribution Annex 1).

in such cases, e.g. it must be assumed that the earliest ("original") recording of the phonogram was used²².

- *Balancing factors*: while rightholders usually aim to use objective criteria to allocate royalties, solidarity amongst rightholders can be strong enough to occasionally allow for rules of distribution expressing shared cultural values or a willingness to help colleagues in need. For example, it is an established fact that in today's media, the use of popular music vastly exceeds the use of classical music. Solidarity amongst music authors however may allow for higher allocation of royalties to classical music than it would be justified merely by the proportion of its use and thus voluntarily tip the balance slightly in favour of a specific segment of their fellow rightholders. For the same reason, rightholders may voluntarily give up and set aside a small portion of their royalties, usually no more than 10%, to support the social, cultural, or vocational purposes of their professional community.

2.4.2) Rightholders may exert their influence on the rules of distribution through their adoption by the general assembly of CMOs. The adoption of the rules of distribution belongs to the exclusive competence of the general assembly of the CMO.

2.4.3) Royalties are taxed at two points: when the CMO collects them from the user and when the CMO pays them to the rightholder. As a thumb rule, turnover taxes such as the value added tax (VAT), are imposed on royalties upon collection from users, while income taxes, such as the personal income tax, are deducted from right revenues upon payment to rightholders.

2.5 *How does the law or legal practice reflect the will of the author ("autonomy of will") to grant licenses individually? Is it allowed for the user to obtain the license directly from the represented author? Are such direct licenses null and void or are they valid, while the user still pays remuneration to the CMO? Please elaborate for each regime of the collective management.*

The cases of individual and collective licensing are clearly delineated in statutory law and rightholders, as well as CMOs, must adhere to these rules.

This does not mean however that rightholders would be deprived from any choice when a given right is to be exercised by way of collective management.

Even in case of mandatory collective administration rightholders may choose the CMO to which they entrust their rights, as well as the duration of their mandate. The autonomy of the rightholder's will is even broader in case of extended collective management as she can opt out of this regime any time she wished (with a reasonable period of notice). Opting-out is currently permitted only with respect to the entire repertoire of the rightholder but soon, pursuant to the application of the DSM Directive, member states will have to ensure that rightholders may opt out from extended collective management not just for all of their works or other subject matter but also for specific works or other subject matter²³.

We are aware of only one established CMO practice when a licence is needed from both the author and the CMO but even in this case, what is happening should be described as "co-licensing"

²² For instance, according to the Rules of Distribution of EJI, if in the absence of relevant information, the version of the phonogram actually used cannot be identified, the royalty must be allocated to the performing artists appearing in the earliest ("original") version of the recording (EJI's Rules of Distribution 2.3.7.)

²³ Recital 48 and Article 13(2)(c) of the DSM Directive

rather than "parallel licensing". The case is as follows. Visual artists entrusted their CMO (Hungart) with the collective management of their reproduction right, covering mostly uses when the reproduction is made in an unaltered form. Nevertheless, the tariffs of the CMO stipulates that whenever a specific use may be susceptible to infringe the moral rights of the author (3D reproduction of a 2D work, ad-related and other explicitly commercial uses, political or religious uses, etc.), the CMO must first obtain the approval of the author concerned and may license the use of the work only afterward. Since the author and the CMO exercise different rights and they co-operate, rather than compete, in the granting of the license we would not say this practice amounts to parallel licensing.

We believe that individual and collective licensing, if clearly delineated, may complement one another efficiently. The opposite, i.e. allowing *unregulated* parallel licensing can hardly be considered an expression of respect for the will of the author, as this would only create legal uncertainty, chaos in collection and distribution and, ultimately, less revenues to rightholders.

2.6 Do CMOs allow the rightholders to grant a non-commercial license for their work? Are so called "public licences" used in this context? Are there any examples concerning the non-commercial distribution of the protectable subject matter by the CMOs in your country?

Pursuant to Article 5(3) of the Collective Management Directive CMOs operating in an EU member state must allow rightholders to grant licences for non-commercial uses of any rights, categories of rights or types of works and other subject-matter that they may choose.

Here are a few examples of how conditions of non-commercial uses are set out in the statutes of some Hungarian CMOs.

Artisjus²⁴ (literary and music authors)

- Literary authors, composers, lyricists and their heirs, subject to the conditions set out in the statutes, may authorize individually the non-commercial use of their works, even if the rights exercised belong to the scope of mandatory or extended collective management.
- The license so granted is subject to the prior approval of Artisjus.
- If more than one author is involved, Artisjus will grant its approval only if the use is authorized by all the authors of the work and all of them satisfy the terms and conditions set forth in the statutes.
- An individual license for non-commercial use can only be non-exclusive, user-specific and non-transferable.
- At least 30 days prior to the intended date of use, Artisjus must receive the agreement on the terms and conditions of the intended non-commercial use, which must contain at least the following
 - information identifying the rightholder and the user
 - description of the intended use;
 - indication of the work to be used;
 - the license and its duration and territorial scope;
 - an express waiver of the royalties by the rightholder granting the license;
 - a statement by the user that the intended use does not serve, directly or indirectly, the purpose of gaining or increasing income, and an unconditional commitment on the part of

²⁴ Statutes III.2.12.1 - III.2.12.6

- the user that, in case this statement proves to be untrue or loses its factual ground any time later, the user will pay the royalties due to Artisjus according to its relevant tariffs;
- a clause that beyond the scope of the license any agreement with any person or organisation to pay for the use of the work shall have no effect on Artisjus;
 - the condition that the agreement is conditional upon the approval of Artisjus and enters into force only after having been approved.

EJI²⁵ (performing artists)

- Only uses which are neither directly nor indirectly intended for the purpose of gaining or increasing income, and for which the performer does not claim any royalties, shall be considered as non-commercial.
- The performer concerned must inform EJI of the data necessary to identify the intended non-commercial use at least five working days prior to the commencement of the use, on the application form provided by EJI. The application shall clearly indicate also the first and last day of the non-commercial use.
- EJI shall decide on the approval or rejection of the application within three working days. In case the application is rejected due to non-compliance with the terms and conditions of a non-commercial licence, EJI shall duly inform the performer concerned of the reasons for it. If no decision is made within the specified deadline, EJI shall be deemed to have approved the application.
- The performer may only authorize the non-commercial use of his own performance. If there is more than one performer in the performance, the performers concerned may act only jointly, including the act of granting the licence and the application for its approval by EJI.

Filmjus (audiovisual authors and producers)

- If the rightholder wishes to grant a non-commercial licence in respect of a right collectively managed by Filmjus and, prior to the commencement of the use, properly notifies Filmjus thereof, Filmjus will acknowledge the notification and will not claim any royalties for that use.
- The notification must include an agreed statement of all rightholders who, in case of a commercial license of the right in question, would otherwise be covered by collective management.

3. Collective Management Organizations and Users

3.1 How does your jurisdiction prescribe private copying remuneration ("levies")?

Two types of private copy remuneration exists in the Hungarian copyright law: the blank carrier levy (Article 20 of CA) and the reprography levy (Article 21 of CA). In regard to the reproductions for private purposes discussed in Paragraph 35 of the Copyright Act, the authors are entitled to adequate remuneration for the reproduction of their works for private purposes (the free use of them).

First type of remuneration claims covers the reproduction of works broadcast in the programmes of television or radio organisations, included in the programmes of those who transmit their own

²⁵ Statutes 7.1 – 7.6.

programmes to the public through wire and the reproduction of works distributed through audiovisual media for private purposes. So here mainly the reproduction of audiovisual and audio works are concerned.

The blank carrier levy is enforced by the collective rights management society for all literary and musical works called Artisjus in the name of all rightholders in a one-window manner concerning the devices suitable for recording authors' works defined in the list of charges like CDs, DVDs, mobile phones, memory cards, cassettes, sticks, tablets. The tariff takes into account the exceptionally intensive case law of the CJEU, which stated in the Padawan case among others that the remuneration is to be paid after all types of media that are suitable to be used for private purposes.

The remuneration is to be paid by the manufacturer of the blank audio or video media or in case of foreign manufacturers the person who is obliged to pay the customs duties according to the regulations or in the absence of any obligation to pay customs fees, the person transporting the media into the country and the person who first distributes it inland within eight days after the customs declaration or in lack of it, after it was first distributed or, if it is earlier, after the start of storing it with the purpose of distribution. All the inland distributors of a given media as a body are responsible for the payment of the remuneration.

The second type of remuneration the author is entitled to for the reproductions for private purposes covers those reproductions which are made through photocopying or any other means (hereinafter comprehensively: through reprography).

The remuneration is to be paid by the manufacturer of the reprographic device or in case of foreign manufacturers the person who is obliged to pay the customs duties according to the regulations or in the absence of any obligation to pay customs fees, the person transporting the device into the country and the person who first distributes it inland. In addition to this remuneration, those operating the reprographic device in exchange for a compensation are also obliged to pay a remuneration. Both types of remuneration are enforced by the Hungarian Alliance of Reprographic Rights. A full list of those devices that are used for reprography is recorded in a government decree (158/2000. (IX.13.)). This list includes the printer, the photocopy machine, the scanner and the fax among others.

Is the general principle of freedom of a contract respected in this area (i.e. is the remuneration a subject of the negotiations between users and collecting societies) or is the size of the private copying levy stipulated by any legislative act (such as governmental decree)?

Principle of freedom of a contract can be applied with a limited scope in this area.

Rates of blanket carrier levy are set by Artisjus, the reprography levy is set by the Hungarian Reprographic Association (RSZ), the collective management organization charged with holding the common fund of payments from levies. Tariffs are approved by the Ministry of Justice (the procedure in detail see bellow).

RSZ must take account of factors such as the outputs and modes of operation of the devices in question, as well as the categories of businesses charged for copying. However, under Article

21(4), the equipment levy must not be higher than 2% of the price applied by the manufacturer or of the basis of the amount applied for the payment of customs fees, respectively.

Just as with the blanket carrier levy, 25% of the remuneration is transferred to the National Cultural Fund, which is supposed to use that amount transferred to it for "cultural purposes" determined in Act XXIII of 1993 on the National Cultural Fund for the benefit of the relevant categories of right-holders. The remaining 75% is distributed in the following way: 40% is due to publishers; from the remaining 60%, the following shares are due to the various categories of authors: 25% for the authors of scientific and other non-fiction literary works; 25% for the authors of other literary works; and 10% to the authors of works of art and photographic works.

The shares due to the various categories of right-holders must be transferred to the organizations representing the different categories of right-holders. The shares may be changed on the basis of an agreement between the interested organizations until March 21 of any year. The interested right-holders may exercise this right to remuneration only through collective management organizations representing them. Only after the allocation of remuneration, may they renounce the remuneration due them.

3.2 *Nowadays, the major use occurs on the Internet. Has there been any attempts in your country to set a private copying levies collected by CMOs or by different entities or state for the use of protected subject matters on the Internet (e.g. in the form of a so-called "flat fee" or a special tax)?*

No, we are not aware on any such an attempt.

3.3 *How are the tariffs set (by decision of the CMO, by negotiation with users, consumers or others?)?*

Articles 145 to 156 of the Collective Management Act govern how representative collective management organizations set tariffs and other conditions of authorizing uses. Such matters are generally subject to the Minister of Justice's approval on the basis of proposals by the National Intellectual Property Office to be prepared upon consultation with the major users and their representative organizations. If the parties do not agree with the proposed tariffs or other related conditions, they may submit their dispute to the Mediation Board functioning within the Council of Copyright Experts. When a mediation proposal is suggested, the party or parties having initiated the mediation procedure should inform the Office and the Ministry about it.

After the Minister's approval, each society is to publish its rates and conditions of use in the official gazette *Magyar Közlöny*. The provisions determine, in some detail, which organizations and individual users may object to draft royalty rates and conditions submitted by collective management organizations. In the absence of agreement to settle such objections, however, the Minister has no power to change royalty rates and conditions but must approve them, provided that it finds no conflict with the criteria that the Copyright Act sets out for collective management organizations. At that point, users' organizations and individual users may take their case against approved rates or conditions to court, but even then, the only basis for such recourse may be that there is a conflict with such statutory criteria.

What are the statutory criteria for the tariffs (e.g. assessing the value of the rights by experts, proportionality etc.)?

The tariff shall be determined and applied in accordance with the requirements of equal treatment, without any unjustified distinction of the users. When determining the extent of remunerations, all relevant circumstances of the use concerned shall be taken into account. In the course of determining the tariff, and in the procedure for the approval of the tariff, the agreement on remuneration and other conditions of use made between the parties in the procedure of the mediation board (Articles 102 to 105 of CA) shall also be taken into consideration.

Do they require approval of a regulatory authority (such as an IP Office, Ministry of Culture etc.)?

Such matters are generally subject to the Minister of Justice's approval on the basis of proposals by the National Intellectual Property Office to be prepared upon consultation with the major users and their representative organizations.

How can they be contested by the users? By general courts, by special ADR procedure or specialized tribunals?

Any organisation entitled to give opinion on the tariff and the collecting society concerned may request the review of the resolution on approval of the Minister responsible for justice, with reference to violation of the legislation, at the Budapest Metropolitan Court which shall decide on the request in accordance with the rules of administrative non-litigious proceedings. If the court repeals the resolution and orders the Minister responsible for justice to commence a new procedure, the difference between the remuneration to be paid on the basis of the resolution made in the new procedure and the remuneration to be paid on the basis of the resolution repealed shall be accounted for. If the resolution is appealed, the court may order the requesting party – who would be obliged to pay remuneration on the basis of the tariff affected by the resolution – to give a deposit. The amount of the deposit shall be equal to the remuneration to be paid on the basis of the tariff approved by the appealed resolution, or a contested or not yet paid part thereof, unless the court decides on the decrease thereof with respect of every circumstance of the case. From the aspect of appealability due to unfair terms and conditions of the contract, the tariff is not qualified as established by legislation or such that is determined in accordance with provisions of legislation. If the tariff is appealed before the court, the adverse party may be ordered by the court, upon request of the collecting society, to give a deposit.

3.4 *Does the competition law in your country recognize abuse of dominant position of a CMO? Are there any examples (cases) that the CMO has been held responsible for the distortion of the competition?*

3.5 *In some jurisdictions the problem may be the non-transparency of tariffs. Are there any rules on the statutory level or as the outcome of the self-regulatory activities which concern the transparency of the tariffs? Has there been any development in this area in recent years?*

Transparency of tariffs is guaranteed by the ministerial approval procedure and the publication of the tariffs in the Magyar Közlöny (Official Journal). Main principles of the approval procedure are in the Hungarian law since 2009, the official publication of the tariff is obligatory since 1996.

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