

# ALAI Congress 2019 in Prague

## Managing Copyright

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### Questionnaire

## 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?*

Under Czech law, a collective management organization (CMO) is a private legal entity licensed to exercise collective management by the Ministry of Culture. Under the Copyright Act,<sup>1</sup> only one CMO can be authorised to exercise collective management for a specific protected subject-matter or property rights. **This means that the exercise of collective management in a given field is subject to a statutory monopoly in the Czech Republic.** This statutory monopoly under Czech law was successfully defended at the Court of Justice: *national legislations are not precluded from reserving the exercise of collective management of copyright in respect of certain protected works in the territory of the Member State concerned to a single collecting society.*<sup>2</sup>

By implementing the Directive on Collective Management<sup>3</sup>, the legislation has been amended, effectively disrupting the statutory monopoly.<sup>4</sup> The first change relates to rights in musical works for online use: the law does not require any administrative authorization to grant licenses where a license is granted for the territory of several EU or EEC Member States by a CMO in territory of another EU or EEC Member State.<sup>5</sup> Under the new legislation, a rightholder is also allowed to choose its collective management organisation across national borders, regardless of the rightholder's nationality and regardless of where the CMO is established.<sup>6</sup> Another effective disruption of the monopoly of collective management organisations is the introduction of the so called Independent Management Entities (IME) that enable other organizations to exercise collective management in a way comparable to a CMO.<sup>7</sup> The only exception is mandatory collective management. IMEs do not have to obtain any license (authorization) for their activities. They only have to register with the Ministry of Culture to which they are entitled after proving that

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<sup>1</sup> Act No. 121/2000 Coll., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts, as amended (Copyright Act).

<sup>2</sup> Judgment of the Court of Justice of 27 February 2014 in case C-351/12, OSA - Ochranný svaz autorský pro práva k dílům hudebním, o. s. vs. Léčebné lázně Mariánské Lázně, a.s.,

<sup>3</sup> DIRECTIVE 2014/26/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

<sup>4</sup> Amendment to the Copyright Act, Act No. 102/2017 Coll.

<sup>5</sup> Sec. 95a (2) of the Copyright Act

<sup>6</sup> Sec. 97a (3) of the Copyright Act

<sup>7</sup> Sec. 104 *et seq.* of the Copyright Act

the statutory requirements have been met. In fact, IMEs shall be an alternative to CMOs, without having to fulfil all the obligations laid down for CMOs. This is expected to create a competitive environment for CMOs in which, however, CMOs will be put at a disadvantage compared to IMEs as regards extended and voluntary collective management.

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

The Czech Copyright Act distinguishes three collective management regimes: mandatory, extended and voluntary (contractual). Mandatory collective management and its scope is defined by cogent law and the parties may not contract otherwise.

Rights under **mandatory collective management** comprise of:

- a) The right to single equitable remuneration for:
  - 1. broadcasting of phonograms published for commercial purposes (“commercial recordings”) or for rebroadcasting and retransmission of such broadcast;
- b) The right to fair compensation for:
  - 1. the making of a reproduction for personal and/or internal use (“copyright levies”);
  - 2. resale of the original of a work of art;
  - 3. rental and the lending of the original or reproduction of a the protected subject matter;
- c) The exclusive right to use the protected subject matter by retransmission of its broadcast
- d) The right to annual supplementary remuneration of a performer (provided by the amended Copyright Term Directive).

**Extended collective licensing** (where rightholders may opt out) covers:

- a) in-store public performance of commercial recordings;
- b) non-theatrical public performance of music from a commercial recording;
- c) non-theatrical live public performance of music (concert) if of non-commercial nature;
- d) radio or television broadcasting of a work (except of audiovisual works);
- e) in-store public performance of radio and TV broadcast;
- f) lending to public libraries (where such lending is not covered by exceptions and limitations) and the right for libraries to make the subject matter available on its premises;
- g) licensing of out of print works to libraries;
- h) licensing reproduction right for organizations when copying for internal purposes, including education and research (beyond the exception).

**Voluntary collective management** is based on an agreement concluded between rightholders and a collective management entity which defines the scope of the exercise of management of rights, categories of rights, types of works or other subject-matter of protection (typical in the field of music). Nevertheless, a collective management organisation may only exercise the management of rights within the scope of the authorization granted by the Ministry of Culture.

## ***1.3 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.*

As stated in clause 1.1 above, there is a statutory monopoly in respect of collective management in the Czech Republic. The same type of subject-matter may be managed collectively only by a single CMO, which eliminates competition among CMOs. However, this does not apply to the relationship between collective management organisations and rightholders who are, by law, able to freely choose their collective management organisation across national borders, regardless of their nationality or the organisation's place of establishment.<sup>8</sup>

***1.4 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?***

As mentioned above (clause 1.1), collective management is subject to a statutory monopoly in the Czech Republic.

***1.5 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)?***

CMOs may be only a non-profit legal entity established by rightholders in the legal form of a civil association.

***1.6 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?***

CMOs are not obliged to contribute to cultural development of the society, however, they are allowed to provide social, cultural or educational services financed from income from the exercise of rights or from investments. Such services must be provided on the basis of fair and transparent criteria, guaranteeing equal access to such services. Thus, CMOs have the possibility of creating cultural and social funds to support authors and performers, whether at the start of their creation or in difficulties. The legal requirement of equality gives access to these services to anyone for whom they are provided, thereby not limiting the use to, for example, the members of the CMO. The procedure and

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<sup>8</sup> Sec. 97a (3) of the Copyright Act

conditions for the creation and the use of these funds are governed by the CMOs internal rules adopted by its members and in accordance with international practice.

## **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?***

CMOs are required to accept representation of any rightholder who so requests and demonstrates that the relevant subject-matter of protection was used, unless a foreign CMO exercises collective management in Czechia in respect of the same right and the same subject-matter. CMOs are required to exercise collective management for all rightholders under equal conditions.<sup>9</sup> A collective management organisation's failure to fulfil the above obligation constitutes an administrative offence for which the supervisory authority (Ministry of Culture) may impose a fine of up to CZK 500,000.<sup>10</sup>

However, a CMO is not required to accept any rightholder as its member (which is a different thing) but the conditions of membership must be based on objective, transparent and non-discriminatory criteria, two of which are given as an example in the Copyright Act: the amount of remuneration paid or payable to the rightholder over a given period of time and the period of time for which the collective management organisation has been exercising collective management of the rightholder's rights. Thus, specification of the conditions falls within the collective management organisation's competence, provided that the criteria set out are met. Should a collective management organisation reject an application for membership, it is legally obliged to provide reasons for its decision.<sup>11</sup> A rejected applicant for membership may lodge a complaint with the supervisory authority (Ministry of Culture) which may impose the obligation to remedy the situation on the CMO, and, if the CMO fails to fulfil the obligation, to impose a fine. In addition to that, rejected applicants have also the possibility of pursuing their rights by judicial process.

### ***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?***

When distributing and paying income from the exercise of rights, CMOs shall only take into account those rightholders whose rights it collectively manages on the basis of a contract or an application for registration<sup>12</sup>, in accordance with the law and their internal rules. The Copyright Act does not explicitly provide for a procedure to deal with cases where double claims are asserted by rightholders.

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<sup>9</sup> Sec. 97a (1) of the Copyright Act

<sup>10</sup> Sec. 105ba (2) (c) of the Copyright Act

<sup>11</sup> Sec. 96d (1), (2) of the Copyright Act

<sup>12</sup> Sec. 99c (1), (2) of the Copyright Act

In such cases, CMOs are governed by their internal rules, some of them establishing for this purpose conciliation committees, etc. where they may seek to resolve the dispute between rightholders or may suspend the payment of the disputed remuneration whether at the request of some of the rightholders concerned, on their own initiative or at a foreign collective management entity's request. Under the Czech Copyright Act, rightholders are allowed to use a registered intermediary to settle disputes arising during the exercise of collective management which is rarely utilized in this context. However, rightholders are not precluded from choosing a mediator to resolve their dispute or from taking legal proceedings.

### ***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?***

By implementing the Directive on Collective Management of Copyright<sup>13</sup>, the obligation of CMOs to provide for an effective mechanism for members to participate in decision-making process has been introduced to the Czech Copyright Act. Here, the Copyright Act sets out the condition that representation by members of different categories of creative activities in the participation in this decision-making must be fair and balanced.<sup>14</sup> This is to ensure protection of the interests of those rightholders whose category is, within the framework of collective management, inferior in numbers compared to rightholders falling within more strongly represented categories. Each member shall have the right to participate in and to vote at meetings of the supreme body of the CMO.<sup>15</sup> The CMO's statute may restrict this right depending on the duration of their membership or the amount of remuneration received over a specific accounting period, paid or accounted to the member, provided that these criteria are defined and applied in a fair and reasonable manner.<sup>16</sup>

The Copyright Act lays down the conditions for membership in a CMO which is an essential prerequisite for being eligible to be elected to its bodies. Other conditions for the election to the collective management organisation's bodies may be governed by its statute.

Membership provides additional opportunities to participate in the CMO's activities to the extent specified in its statute. Besides the right to vote, elect and stand as a candidate, members may also make their own proposals and present initiatives, lodge complaints, attend events held by the collective management organisation, and enjoy other benefits.

To be candidate for certain bodies, certain minimal amount of collected remuneration from the CMO may be required.

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<sup>13</sup> DIRECTIVE 2014/26/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

<sup>14</sup> Sec. 96d (3) of the Copyright Act

<sup>15</sup> Sec. 96f odst. 1 of the Copyright Act

<sup>16</sup> Sec. 96f odst. 7 of the Copyright Act

## ***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?***

A CMO distributes the remuneration collected among rightholders who have registered. If a CMO has collected remuneration for unregistered rightholder, it shall call on such rightholders to register in the records. The CMO distributes remuneration in accordance with the distribution plan without undue delay unless there are objective reasons for extending the deadline. This may happen, for example, where it is necessary to identify a rightholder, where a rightholder's reporting is missing, etc. The rules of distribution are approved by the supreme body in whose decision-making all members of the CMO may participate.<sup>17</sup> The rules of distribution can be based on different principles. As a rule, CMO strive to distribute remuneration according to the actual use based on rightholders' reports (*Census*). As, however, this method is, in certain cases, not useful and economical, further distribution methods are used, based on sample analysis of usage at a time randomly chosen in a given period (*Sample*). This method is used in certain cases by OSA when distributing remuneration from the use of music in radio and television broadcasts. Another method is the distribution based on an analogy (*Analogies*), which is used in cases where not enough information is available to make distribution according to the actual use. Under this method, fees are distributed using statistically valid data reflecting the actual patterns of use of subject-matter of protection. This method is used for the distribution of royalties e.g. for sales of carriers and online usages for the blank tape levies distribution. In certain cases, scores are applied, defining the rating of each item of protection and quantifying the value of one point as its share in the total revenue collected. The income arising from compensations and lending are distributed according to rules defined by law, collective management organisations being bound by those rules.<sup>18</sup>

CMO are subject to corporate income tax. However, only the part corresponding to the CMO's deductions is subject to income tax. As a rule, collective management organisations are VAT payers. The remuneration distributed is subject to tax, however, the tax shall be borne by rightholders to whom the remuneration was paid.

## ***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.***

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<sup>17</sup> Sec. 96f (1), (4) (c), (e) of the Copyright Act

<sup>18</sup> Sec. 99e of the Copyright Act



The Czech Copyright Act provides for the right to use own work and grant another person the authorization to exercise that right<sup>19</sup>. This right shall be limited only by statutory exceptions (free uses and compulsory licenses<sup>20</sup>) as well as by the exception relating to rights that are subject to mandatory collective management where individual exercise of rights is excluded by law. If a rightholder grants a license in respect of rights covered by the regime of mandatory collective management, such a license would be void due to conflict with the imperative (cogent) law.

Under extended collective management, rightholders are allowed to opt-out (to exclude the effects of a collective agreement), thereby reserving the option to decide whether and under what conditions they grant their consent to the use of their subject-matter of protection. In practice, granting a licence individually by the rightholder would be contrary to the contractual arrangements with the CMO. Nevertheless, the license so granted would remain valid even if the rightholder himself would face the risk of penalty for breach of contract. This does not apply to cases where a rightholder grants a license without having any direct or indirect economic or commercial benefit.<sup>21</sup> The rightholders shall have this right also in cases where full management of the relevant right has been entrusted to a CMO. The granting of such an authorization shall be notified in advance to the competent CMO. The rightholder may also revoke, in whole or in part, the authorization to exercise collective management in respect of all or some rights, categories of rights or types of work or other subject-matter entrusted, by the rightholder or by law, to the CMO, for a territory of the rightholder's choice. Should the rightholder revoke the authorization to exercise collective management for rights subject to mandatory collective management, they would not be able to exercise their management themselves.

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

The Copyright Act provides rightholders with the possibility of granting an authorisation for non-commercial use of a work. Even rightholders who have entrusted the full management of their copyright to a collective management organisation shall have this possibility.<sup>22</sup> However, this does not apply to mandatory collective management.

As a rule, collective management organisations grant licenses to use subject-matter of protection for non-commercial purposes such as charity, school performances (beyond the statutory exception) if no or only symbolic entrance fees are collected and if it is obvious that the cost of production will not be covered. For this purpose, collective managing organisations usually reserve this right in their agreements on collective management of copyright concluded with rightholders. As

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<sup>19</sup> Sec. 12 of the Copyright Act

<sup>20</sup> Sec. 29 *et seq.* of the Copyright Act

<sup>21</sup> Sec. 97a (5) of the Copyright Act

<sup>22</sup> Sec. 97a (5) of the Copyright Act

already mentioned, rightholders who entrusted the management of their copyright to a CMO, are also entitled to grant an authorisation for non-commercial use directly.

### 3. Collective Management Organizations and Users

#### **3.1 How does your jurisdiction prescribe private copying remuneration (“levies”)? 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)?**

The system of so-called copyright compensatory remuneration is generally regulated in the Czech law in Section 25 of the Czech Copyright Act<sup>23</sup> and specifically in the Decree of the Ministry of Culture No. 488/2006 Coll., defining types of devices for making reproductions, types of blank record carriers and the amount of lump-sum remuneration, as amended.<sup>24</sup> Section 25 of the Czech Copyright Act classifies the author's right to compensatory remuneration as the specific economic right of the author.<sup>25</sup> The national remuneration system has its foundations in EU legislation. Pursuant to Article 5 (2) (a): (b) Directive No. 2001/29/EC<sup>26</sup> EU Member States are allowed to provide for exceptions to the author's exclusive right to make reproductions of the work and to enable the use of the protected copyright works without the author's consent. However, these exceptions must be supported by the granting a fair compensation to copyright holders.

The remuneration system allows users to make copies of copyrighted works for their personal use (i.e. for themselves, family members and closest friends)<sup>27</sup> non-commercially, free of charge and without the consent of rightholders. Similarly, legal persons may produce print copies for their internal use (Section 30a of the Czech Copyright Act). Rightholders are provided with compensatory remuneration, which is administered and distributed by collecting societies. Persons who are obliged to pay the levies are importers or manufacturers of blank media [Section 25 (2) Czech Copyright Act] in the first place. However, importers of copiers must pay compensatory fees as well. Collecting societies then distribute the collected remuneration among rightholders (authors, musicians, actors, record companies, film producers, publishers) according to their distribution rules.

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<sup>23</sup> English translation is available at: <https://www.mkcr.cz/predpisy-v-anglickem-prekladu-711.html> [Accessed on 30.07.2019].

<sup>24</sup> English translation is available [online] at: <https://www.mkcr.cz/predpisy-v-anglickem-prekladu-711.html> [Accessed on 30.07.2019].

<sup>25</sup> Telec/Tůma, 2007, p. 294 ff.

<sup>26</sup> „[...] 2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases: (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation; (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned“ [Art. 5 (2) Directive No. 2001/29/EC].

<sup>27</sup> Telec/Tůma, 2007, p. 345.



The concept of “fair remuneration“ has been the subject of interpretation before the Court of Justice of the European Union in the reference for a preliminary ruling in the *Padawan* case<sup>28</sup>. The term "fair compensation" in Article 5 para. 2 (b) of the Directive No. 2001/29/EC must be regarded as an autonomous concept of EU law and interpreted uniformly in all Member States (C-467/08, para 33). It is up to the Member States, within the limits of that uniform interpretation, to determine the form, the method of collection, and the amount of fair compensation (C-467/08, para 37). The amount of this compensation, according to the CJEU, must be measured against the harm caused to the rights holders by the private copying exception (C-467/08, para 42). However, because of the practical difficulties in identifying the actual private users, Member States are free to set the remuneration system on levies which are imposed upon those who make available to the consumers digital duplicating equipment, devices and carriers. Such compensation necessarily requires a connection between the application of the levy upon the equipment and their presumed use for private copying (C-467/08, para 52).

The general regulation of compensatory remuneration can be found in Section 25 of the Czech Copyright Act and also in Annex 1, which regulates the amount of levies from the reprography or remuneration for the resale of the original artwork (*droit de suite*).

A particular legal regulation for determining the amount of fair remuneration is the Decree No. 488/2006 Coll. (further also referred to as „Decree“) which was issued by the Ministry of Culture of the Czech Republic based on the statutory authorization in Section 25 (7) of the Czech Copyright Act.

The Decree sets the amount of flat-rate remuneration from printers, whether ink or other (Section 1 of the Decree) and the amount of remuneration from the copiers (Section 2 of the Decree). A multifunctional machine that allows printing of copies in both ways (i.e. making printed reproductions or other than a printed base) is charged in the same way as copiers (Section 3 of the Decree). Furthermore, the Decree sets forth the remuneration from blank media (analog or optical media). The Decree also provides for remuneration from a non-built-in storage medium and a storage medium built into or embedded in the machine and from a hard disk not built into a personal computer (Section 5 of the Decree).

The Czech system of private copying levies as opposed to the system of general tariffs of the collecting societies (see below) is not based on the negotiations by the contracting parties but is regulated at the statutory basis. This should ensure legal certainty for users and to prevent possible discrimination.<sup>29</sup>

The right to remuneration for making a reproduction for personal or internal use [Section 97 (1) of the Czech Copyright Act] is administered upon mandatory basis (see 1.2.)

### **3.2 Nowadays, the major use occurs on the Internet. Have there been any**

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<sup>28</sup> CJEU decision in *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)*, C-467/08.

<sup>29</sup> Possible discrimination between the different types of media that are subject to a private copying levies was highlighted in the opinion of the Public Defender of Rights of 31.01.2007, where the Czech National Ombudsman commented on Decree No. 488/2006 Coll. [available in the system ASPI; Accessed on 31.07.2019]. The Ombudsman did not find discrimination, but stated that "*the charging method for flash disks and portable hard drives could eventually run counter to the principle of proportionality. It is clear that there is a sharp increase in storage capacity in this field of technology. The Ministry of Culture is bound to reflect this development and adjusts the charge of these media annually to the current average market capacity*". In reality, this requirement of the Ombudsman has not been accepted since the last amendment of the Decree is from 2008.

***attempts in your country to set 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)?***

So far, no attempt has been made in the Czech Republic to introduce a flat fee from Internet use.

However, this issue is affected by the new Directive (EU) of the European Parliament and of the Council No. 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and directives 96/9/EC and 2001/29/EC where we can find a new right for press publishers to press publications. Article 15 (5) of Directive 2019/790/EU stipulates that “*Member States shall provide that authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers for the use of their press publications by information society service providers*”. This is likely to mean that authors will obtain a reward, for example, for the use of news articles that content aggregators (such as Google) publish on the Internet.

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

In the Czech Republic, tariffs are set by collecting societies [Section 98 (e) of the Czech Copyright Act] after prior negotiations with user representatives.

The initial draft of the tariffs the collecting societies must first publish on their website. At the same time, this proposal must be sent to the representatives of users who are then invited to submit comments on the proposal. If the users raise their objections, then the collecting society is obliged to open the negotiations, and the tariffs shall have no legal effect against their members. If no amicable solution is met, the court shall decide the dispute about the level of the tariffs [Section 98 (e) para. 3 of the Czech Copyright Act]. This is without prejudice to the possibility of using a mediation according to Section 101 et seq. of the Czech Copyright Act.

The collecting society is also legally obliged to notify the Ministry of Culture about the proposal of the tariffs [Section 98f (1) of the Czech Copyright Act]. Section 98f (2) of the Czech Copyright Act then regulates in detail situations in which a collecting society wishes to increase the rate of the tariffs. However, the increase is subject to the approval by the Ministry of Culture if the collecting society intends to increase the level of tariffs by more than the inflation rate in the preceding year.

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

The criteria for setting up the tariffs are defined in Section 98e of the Czech Copyright Act. Here it is stipulated that “*the rates of remuneration set by the tariffs must be based on objective and non-discriminatory criteria and be proportionate*”<sup>30</sup> [Section 98 (2) of the Czech Copyright Act]. When setting tariffs, the purpose, manner, scope, and circumstances of the use [Section 98 (3) of the Czech Copyright Act] should also be taken into account. List of tariffs must be published on the website of the Ministry of Culture (§ 98e of the Czech Copyright Act).

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<sup>30</sup> Concerning the proportionality of tariffs see (3.4) also the decision of the Office for the Protection of Competition from 10. 3. 2006.

As regards the proportionality of the tariffs, the collecting society must take into account whether the copyrighted works are used in the course of business, whether the use is of a direct economic character, taking into account the specificity of the place where the use of copyrighted works occurred. Another criterion is the frequency of the use in the accommodation places where the works are used (typically in hotels or guest houses). The Czech Copyright Act also specifies the criterion of the number of rights' holders for which the collecting society carries out collective management or the number of persons to whom the work has been notified [Section 98 (3) of the Czech Copyright Act].

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

Neither the Ministry of Culture nor any other public administration authority shall give any approval to the level of tariffs. If the parties who are involved in collective negotiations do not find an agreement, the level of tariffs shall be determined by the court's decision [Section 98f) (4) of the Czech Copyright Act]. However, the approval of the Ministry of Culture is required when tariffs are increased by more than the rate of inflation in the previous calendar year [Section 98f (2) of the Czech Copyright Act].

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

See above.

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

There is still no relevant case law on the abuse of a dominant position by collecting societies in the Czech Republic. However, the CJEU in the *Mariánské lázně a.s.*<sup>31</sup> concluded, that „[...] Article 102 TFEU must be interpreted as meaning that the imposition by the 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.“

Possible abuse of a dominant position of collecting societies was also addressed by the Office for the Protection of Competition, specifically in its decision of 10 March 2006.<sup>32</sup> The Office for the Protection of Competition considered a violation of the competition in the application of unduly high tariffs for the use of records via jukeboxes. Another problematic issue was employing different conditions between classic CD jukeboxes and hard disk jukeboxes. The investigation and the administrative proceedings were initiated by the classical jukebox operator, who pointed to the discrimination and abusive practices of the collecting society. In its decision, the Office for the Protection of Competition declared, that the collecting society has abused its dominant position for applying different conditions on the use of phonograms in different kinds

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<sup>31</sup> CJEU decision in *OSA – Ochranný svaz autorský pro práva k dílům hudebním, o.s. v Léčebným lázním Mariánské lázně a.s.*, C-351/12.

<sup>32</sup> The Office for the Protection of Competition, INTERGRAM, 10 March 2006, file No. S 130 / 04-184 / 05-OHS [online], Available at: <https://www.uohs.cz/cs/hospodarska-soutez/sbirky-rozhodnuti/detail-5932.html> [Accessed on 31.07.2019].

of jukeboxes without objectively justifiable reason.

***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?***

The rules for setting up tariffs are regulated at the statutory level (Czech Copyright Act). The requirement for transparency in collective management has already been highlighted by Directive No. 2014/26/EU, which addressed this issue in Chapter 5 of Title II. Article 4 of the Directive No. 2014/26 lays down a general principle requiring the EU Member States to ensure that collecting societies act in the best interests of right holders and impose only those obligations on right holders which are objectively necessary. In order to ensure transparency, Directive No. 2014/26 also included a list of information that collecting societies must publish on their websites.

The Czech legislator implemented all the requirements of transparency of collective management into the Czech Copyright Act (amendment came into effect on 20 April 2017). However, the Czech Copyright Act also includes other transparency rules institutes, for example, the publication of annual reports or the requirement to provide information upon request (Section 100d Czech Copyright Act).

If the collecting society would not respect the statutory requirements, it could be fined by the Ministry of culture up to the amount of CZK 500,000 (19,400 EUR).<sup>33</sup>

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<sup>33</sup> See Section 105ba of the Czech Copyright Act.