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SERVING AUTHORS WORLDWIDE
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GESAC
EUROPEAN GROUPING OF SOCIETIES OF AUTHORS AND COMPOSERS

UCMR - ADA
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Mr. Vlad Alexandrescu
Minister of Culture of Romania
Ministry of Culture of Romania
Bulevardul Unirii nr. 22, sector 3,
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Romania

Neuilly sur Seine/Brussels March 31st, 2016

By e-mail: cabinet.ministru@cultura.ro, legislativ@cultura.ro

Dear Mr. Alexandrescu,

Re: Draft Law implementing in Romania the EU CRM Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use ("CRM Directive")

We are writing to you as representatives of CISAC and GESAC – two international organisations protecting the interests of creators, based respectively in Paris and Brussels. CISAC unites 230 collective management organisations ("CMOs") from 120 countries representing around 4 million creators from all artistic fields all over the world: music, drama, film, literature, plastic arts, etc. GESAC groups 33 CMOs in the European Union, Iceland, Norway and Switzerland, and represents more than 1 million creators and rights holders in a variety of sectors. In Romania, UCMR-ADA is the only CISAC and GESAC member as of today. In addition to its management of local Romanian repertoire, UCMR-ADA was entrusted with the protection and management of international repertoire via numerous reciprocal agreements that it signed with similar CMOs throughout Europe and the world.

We have been informed by UCMR-ADA about the Draft Law aimed at implementing the CRM Directive in Romania, as published on the website of the Ministry of Culture on 17.03.2016. In the process of revising the Draft we have identified a number of important issues we would like to kindly draw your attention to. (For the rest, we concur with the opinion of our member UCMR-ADA, which has already sent a detailed written submission to the Ministry of Culture).

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First, we believe that even before the adoption of the CRM Directive, Romania had already quite an advanced level of copyright protection and a stable collective management system, with UCMR-ADA being the leader as far as transparency, accountability and governance is concerned. This is also due to the fact that UCMR-ADA, being a member of CISAC, was already subject to the CISAC Professional Rules: a comprehensive set of international collective management standards. In this context, the legitimate expectation of the creative community would be that the current implementation of the CRM Directive shall achieve its goal only if it further strengthens the collective management of rights system in Romania for the benefit of the creators, users and public at large. However, certain provisions of the Draft Law not only depart from the letter and spirit of the Directive, but also risk jeopardising the undisputable (but still fragile) progress in the collective management field. In particular, we have the following in mind:

1. **CMOs and Independent Management Entities ("IMEs")**

The CRM Directive states in Recital 2 that CMOs "enable rightholders to be remunerated for uses which they would not be in a position to control or enforce themselves, including in non-domestic markets" as well as underlining in Recital 3 the fact that they "play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightholders and the public." The main goal of the CRM Directive is to provide a proper EU legal framework for the activities of CMOs that are essential for the functioning of the market and to ensure an efficient, transparent and accountable collective management of rights regarding all kinds of CMOs operating in EU countries. The directive also sets up some specific rules regarding only the multi-territorial licensing of rights in musical works for online uses.

In a nutshell, the main subject matter of the CRM Directive is CMOs and their activities. However, due to the existence of certain private for profit companies in some member States that undertake licensing activities on behalf of authors, especially in the "HORECA" sector, without any transparency and control on their activities, the CRM Directive extended its key transparency rules to such companies as well. Regarding IMEs, whose role, function and justification are not comparable to those of CMOs as stressed by the CRM Directive's above mentioned recitals, the only goal is to provide specific and limited regulation to such entities, so as to allow a level playing field between CMOs and IMEs primarily as far as transparency is concerned (art. 2 p. 4).

In this context, we were surprised to see the amplitude of regulation the Draft Law provides regarding the IMEs activities, which somehow presents the role and function of IMEs in a comparable manner to CMOs. We believe that such regulation of IMEs goes far beyond the above mentioned aim of the Directive and its very limited scope regarding IMEs, especially where the real presence of such IMEs in Romania, is at best questionable. Moreover, there is a risk that such regulation will unjustifiably jeopardise one of the main achievements in Romania, namely the existence of proper "one-stop shops" licensing solutions via mandatory collective management and similar legal schemes (for more details please see our point 2 below).

2. Managing rights individually or collectively and the need for "one-stop shop" solutions

It shall be noted that the CRM Directive clearly states it "... does not interfere with arrangements concerning the management of rights in the Member States such as individual management, the extended effect of an agreement between a representative collective management organisation and a user, i.e. extended collective licensing, mandatory collective management, legal presumptions of representation and transfer of rights to collective management organisations" (Recital 12). In the specific context of Central and Eastern Europe ("CEE"), where countries still lack solid (private) copyright traditions and there are plenty of challenges to enforcement and the rule of law, we have always maintained that proper "one-stop shop" solutions of the kind listed above are a must for facilitating effective collective management to the benefit of right holders, users and the public at large. The current system in Romania (similar to other CEE countries) has successfully relied, and must continue relying, on such legal schemes. Therefore, we would kindly expect the transposition process, while respecting the possibility for individual management in accordance with national and international law, not to weaken such "one-stop shop" solutions, which have proven their efficiency. In this aspect, we refer to some unclear provisions in the Draft Law, which shall be precise taking due account of Recital 19 of the CRM Directive as well: "Where a Member State, in compliance with Union law and the international obligations of the Union and its Member States, provides for mandatory collective management of rights, rightholders' choice would be limited to other collective management organisations", which of course excludes individual management in such cases.

3. The definition of a "Director" and its related rights and obligations

It seems there is a misunderstanding regarding the definition of "Director" under art. 3g of the CRM Directive, and any other people that might be involved in the management of a CMO, as mentioned in the Art 10 of the Directive. Directors involved in the management of a CMO could be either members of the administrative board and/ or the supervisory board (depending on the concrete structure of the CMO). However, the Draft Law seems to wrongly link this notion to the figure of the "executive" (general) director of CMO only. This is not in accordance with the intention of the CRM Directive and all its provisions related to rights and obligations of a "Director" that try to achieve the desired democratic and good governance of a CMO.

4. Membership categories and electronic participation/voting in a General Assembly

In accordance with already existing international practices the CRM Directive provides for the possibility to define different membership categories based on certain criteria such as: duration of membership and/or income generated (art. 8, p. 9). However, such criteria are only options each CMO can choose to apply depending on the concrete national circumstances (legal, economic, cultural, etc.). It is neither within the letter nor the spirit of the CRM Directive that different membership categories (and related criteria) are mandatorily imposed, as apparently the Draft Law provides for. Each Romanian CMO shall be free to either set up different membership categories or for example, keep the current situation of "one member equals one vote", provided that membership criteria are "determined and applied in a manner that is fair and proportionate" and duly stipulated in the CMO's Statutes.

One of the CRM Directive's goals is to facilitate the active participation of the members in the decision making process and encourage the better communication between a CMO and its members ("...members to communicate with it by electronic means, including for the purposes of exercising members' rights"). However, this obligation should be implemented in a way that is reasonable and realistic both in terms of technical possibility, practical implementation and potential costs. The national transposition processes in some of our other member's countries, e.g. Germany, UK, Slovakia, also raised this issue and noted that virtual "on-line" GA seems to be impossible under the current technology to guarantee the required security, functionality and accuracy for online simultaneous participation to decision making. We believe the Draft Law's interpretation is not a realistic one, unproportioned, going far beyond the letter and spirit of the CRM Directive and risks jeopardising the democratic and legitimate decision making process in a CMO. In this aspect, it shall be noted that countries that have already implemented the directive, i.e. Slovakia, or about to implement it have taken a very cautious approach allowing only very limited use of electronic means regarding "remote" exercise of members' voting rights.

5. Discriminatory deadlines regarding CMO's distributions

Diligent, accurate and timely distribution is a key element of any well-functioning collective management system. Accordingly, the CRM Directive provides for a number of provisions to guarantee a proper distribution of collected amounts by a CMO, including a general 9 months deadline (subject to objective adjustments, art 13, p. 1) However, the Draft Law provides for a different term regarding local right holders, which, if implemented, would clearly be discriminatory, since an obligation for a shorter period for certain rightholders for the same type of usages could result in less accuracy of distribution for those rightholders contrary to what the Directive tries to ensure with its high standards. Therefore, we would recommend the Directive's 9 months term to apply equally to all rightholders to ensure the most accurate and efficient distribution of their royalties, without discriminating them based on being local or foreign right holders.

6. The need for proper and balanced state supervision

There is no doubt that CMOs, which in most cases act as de iure or de facto (natural) monopolies, shall be subject to proper anti-competition and/or state supervision by specialised bodies. As far as supervision is concerned, the CRM Directive expressly provides in art. 35 p. 1 that "Member States shall ensure that compliance by collective management organisations established in their territory with the provisions of national law adopted pursuant to the requirements laid down in this Directive is monitored by competent authorities designated for that purpose". However, in accordance with art. 35 p. 3, the eventual measures or sanctions that may be imposed by the national bodies in the field shall always be "effective, proportionate and dissuasive".

Accordingly, we have serious doubts that some of the supervisory measures, introduced now with the Draft Law, meet above criteria of being effective and proportionate, in particular where:

- We see absolutely no justification as to why the authorisation to act as a CMO is given only for 3 years and we are not aware of any similar and such a short term in any other EU country. Indeed, such a term may create only confusion and lack of legal certainty among right holders and users concerned, since even the term of their initial licences or mandates might not be covered for the time period of such an extremely and unreasonably short authorisation that the CMO holds to act and negotiate collectively. Undoubtedly, the role and the benefit of CMOs for the entire market depend on the legal certainty they provide, as well as their representativeness. Since CMOs are rightholders' (authors') organisations, rules on supervision should focus on their efficiency and good governance rather than putting their existence and credibility constantly into question that would be against the interests of such authors and rightholders that are member of the CMO. Such a periodic and short term renewal does not make any sense especially where ORDA (the body in the field) has very strong powers for annual control of the CMOs and accordingly can take on a yearly basis, a number of measures to redress eventual deficiencies, if any.

- We see no justification why ORDA shall have additional power to withdraw a CMO's authorisation of functioning and to impose fines on the society and its directors for any omissions, before such administrative decisions are duly challenged and eventually approved/rejected by the Courts, as the current system stands. In the past we have witnessed that many of ORDA's decisions were successfully challenged and quashed by the Courts before they were to produce their negative effects.

- We do not see the reason for why ORDA shall approve the CMO's Statutes before its adoption by the General Assembly, which according to the CRM Directive is the main body to govern a CMO. Moreover, the Draft Law provides an obligation for the CMO's Distribution Rules to be included in the Statutes. The exact rules on distribution are normally much more dynamic than the rules of "static" Statutes, as the former requires constant adjustments and amendments (sometimes minor ones) to make sure rightholders receive the maximum amount of revenues from the overall collections of the CMOs, as the factors regarding management costs vary and pending royalties arrive due to efforts of the CMO's administration. Therefore, the CRM Directive only requires that the GA decide on the "general policy" regarding distribution, where needed, and leaves the further adjustments to competent bodies. Therefore, it will be highly burdensome without any clear benefit, if such a provision is interpreted in a way that requires a CMO to notify ORDA of its Statutes for any change of its Distribution Rules no matter the nature of such a change.

- We do not see the justification as to why ORDA wants to have annual inspections of the CMOs together with ANAF (The National Fiscal Authority), given that the Romanian Fiscal Procedure Code stipulates other rules / terms of selection for tax inspections.

As a rule, our members would welcome any state intervention that increases their legitimacy e.g. by imposing strict legislative criteria allowing only legitimate (representative, efficient and transparent) CMOs to operate in the market, but would be against any actions (of the kind above) that may unjustifiably interfere with the private nature of the rights at stake and fiduciary duty of CMOs in question, and that are arbitrary and/or not subject to judicial review.

Therefore, while welcoming the wish of the Romanian Government to further implement a modern legislative framework regarding collective management of rights, we would like very much our concerns above to be duly considered and timely addressed. We thank you in advance for your kind attention to this very important matter for the local and international creative community and remain at your disposal should you need any further information or clarification on our side.

Sincerely yours,

Mitko Chatalbashev
Regional Director for Europe, CISAC

Véronique Desbrosses
General Manager, GESAC

cc: Mrs. Irina Lucan-Arjoca, Deputy Director General, ORDA
Mrs. Ana Achim, Director General, UCMR-ADA