



**EUROPEAN COMMISSION**  
Directorate-General for Communications Networks, Content and Technology

The Director General

Brussels,  
CONNECT/12/*askbz.(2016)66.54.946*

*By registered letter with  
acknowledgment of receipt:*

Brussels,

Mr Andreas PAVLOU  
ALTER-EU, Mundo B  
Rue d'Edimbourg 26  
1050 Brussels  
BELGIUM

*Advance copy by email:*

ask+request-3249-  
93c79a18@asktheeu.org

**Subject: Your application for access to documents – Ref GestDem No 2016/4774**

Dear Mr Pavlou,

I refer to your e-mail dated 30/08/2016 wherein you make a request for access to documents. I also refer to our holding reply of 05/09/2016 concerning the extension of the deadline.

Your application concerns: "*documents which contain the following information*

*- any record/minutes of meetings between DG Connect officials/representatives [1] and any interest representatives [2] on the topic of the EU 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 (the 'CRM Directive').*

*- any emails or other correspondence between DG Connect officials/representatives and all interest representatives [2] on the topic of the EU 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 (the 'CRM Directive').*

*[1] excluding the European Commissioner, his Cabinet and the Director-General*

*[2] including companies, consultancies and law firms, trade/business/professional associations, think tanks and NGOs. "*



When I answered your request by the letter dated 12/10/2016, the consultations of third parties, in accordance with Article 4(4) of Regulation 1049/2001, regarding the documents in Annex II, were still ongoing. I am pleased to inform you that those consultations are now accomplished. Based on the received answers, we are able to grant you partial access to all the remaining documents, with the exception of the following ones for which access is refused in its entirety:

- 1) Documents 2, 6, 9, 14, 18 and 20. Those documents contain commercially sensitive business information of the companies that submitted them or are mentioned therein. Consequently, disclosure of these documents would undermine the protection of the commercial interests of the senders in terms of the first indent of Article 4(2) of Regulation 1049/2001.
- 2) Moreover, documents 9 and 18 contain information on ongoing national court proceedings and their disclosure would undermine the protection of those court proceedings in terms of the first indent (first alternative) of Article 4(2) of Regulation 1049/2001.

I have considered whether partial access could be granted to these documents referred to above under points 1 and 2. However, this has not been possible as I consider that they are entirely covered by the exceptions.

With regard to the documents which are partially released, certain parts of these documents have been blanked out as we believe their disclosure is prevented by the exception to the right of access laid down in Article 4 of the above Regulation. All expunged parts of the documents contain **personal data** the disclosure of which would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

Pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. The applicable legislation in this field is Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data<sup>1</sup>.

When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable<sup>2</sup>. According to Article 8(b) of that Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced. I consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Therefore, we are disclosing the documents requested expunged from this personal data.

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<sup>1</sup> Official Journal L 8, 12.1.2001, p. 1.

<sup>2</sup> Judgment of the Court of Justice of the EU of 29 June 2010 in case C-28/08 P, Commission/The Bavarian Lager Co. Ltd, ECR 2010 I-06055.



In addition, as regards documents 16 and 17, the partial access is granted except for each time the last page of those documents, containing the power of attorney that are out of the scope of your request and are accordingly not disclosed.

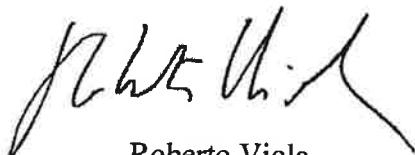
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In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review the above positions.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission  
Secretary-General  
Transparency unit SG-B-4  
BERL 5/282  
B-1049 Bruxelles  
or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours faithfully,



Roberto Viola  
Director-General

Contact: [CNECT-I2@ec.europa.eu](mailto:CNECT-I2@ec.europa.eu)

Enclosure (1) : Annex II



## Annex II

1. Letter from GESAC with questions on the Transposition of CRM directive into national laws of the Member States, 27/01/2015, (Ref.Ares(2016)5818998) p.2
2. Email from CISAC, CRM question, 12/05/2015, (Ref.Ares(2016)5819133) p.8
3. Letter from Kastell Advokatbyra on behalf "Anvandargruppen", regarding the Sweden's implementation of the CRM Directive (2014/26/EU), 17/07/2015, (Ref.Ares(2016)5819721) p.9
4. Email from Tribe Of Noise, on Directive 2014/26, 18/01/2016, (Ref.Ares(2016)5819541) p.19
5. Email from a citizen, 28/01/2016, (Ref.Ares(2016)5819642) p.22
6. Email from AEPI regarding the draft Greek law implementing Directive 2014/26/EU, 17/02/2016, (Ref. Ares, (2016)834682) p.26
7. Email from IFPI (Legal Advisor) to DG CNECT about art. 16(2) of the CRM directive, 18/03/2016, (Ref.Ares(2016)5819832) p.27
8. Email from AUDIOSPARX, on music policy, 26/03/2016, (Ref.Ares(2016)5838320) p.30
9. Email from Genna Cabinet SPRL (IT) on copyright management in Italy, 21/04/2016, (Ref.Ares(2016)5819994)p.34
10. Emails from AUDIOSPARX, 06/05/2016, (Ref.Ares(2016)5838428)p.35
11. Email from a complainant to DG CNECT regarding the confidential treatment of its complaint, 08/05/2016, (Ref.Ares(2016)5820517)p.39
12. Email from KODA regarding the CRM Directive Title III Licensing hub and competition law, 11/05/2016, (Ref.Ares(2016)5820352)p.41
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16. Letter from the Law Firm Rojs, Pelijhan, Prelesnik & Partners on behalf of SAZAS regarding the transposition of the CRM directive in Slovenia, 11/05/2016, (Ref. Ares(2016)2208409) p.50
17. Letter from the Law Firm Rojs, Pelijhan, Prelesnik & Partners on behalf of SAZAS regarding the Directive 2014/26/EC and the problematic legislative activity in the Republic of Slovenia, 17/05/2016, (Ref. Ares(2016)2348423) p.73
18. Email from GENNA Cabinet SPRL, 21/06/2016, (Ref.Ares (2016)2882350) p.98
19. Letter from ZAPIS regarding the transposition of the CRM directive in Slovenia, 28/07/2016, (Ref. Ares(2016)3973336) p.99
20. Email from SKY Italia S.r.l on the implementation in Italy of the CRM directive, 8/07/2016, (Ref. Ares(2016)5839013)p.113
21. Email from SESAC, Independent management entities, 16/08/2016, (Ref. Ares(2016)5835576) p.114

## **Document 1**

Letter from GESAC with questions on the Transposition of CRM  
directive into national laws of the Member States, 27/01/2015,  
(Ref.Ares(2016)5818998)

**From:** [REDACTED]@gesac.org]  
**Sent:** Tuesday, January 27, 2015 11:41 AM  
**To:** [REDACTED] (CNECT)  
**Cc:** [REDACTED] (CNECT); [REDACTED]  
**Subject:** RE: Legal Committee meeting

Dear [REDACTED],

As I previously indicated, we would extremely appreciate your participation to our next legal committee meeting on 26<sup>th</sup> February to discuss on the transposition of the CRM Directive.

If it suits your agenda as well, we would be glad to welcome you at 11.30h for discussion with the group and for the lunch following that (at 13.00h).

Please find attached a letter that includes our specific questions on the directive, which could be the basis of our discussions on 26 February. Please do not hesitate to contact me for any questions on this.

I look forward to hearing from you at your best convenience.

Best regards,

[REDACTED]



Brussels, 27.01.2015  
03BO15

To: [REDACTED]  
**European Commission – DG CONNECT**  
**Copyright Unit**

**Re: Transposition of CRM Directive into national laws of the Member States**

Dear [REDACTED],

As a follow-up to our conversations and your participation to the GESAC legal committee meeting in November, I am writing to submit some questions on which our members feel the need to have more clarification from the Commission and on which it also appears necessary to provide further explanations to the Member States at a time when they are preparing to transpose the CRM Directive.

Before sharing these questions, I should tell you how much our members value your participation at our legal committee meetings given your expertise and knowledge on the directive and on the intention of the legislator. Your help in clarifying some key provisions of the CRM Directive will benefit them and Member States and contribute to a smooth, coordinated and meaningful transposition of the directive into national laws. They therefore regretted to miss the chance of your attendance at the last legal committee meeting, although they completely understand your need to attend to the other urgent priorities on the Commission's agenda.

GESAC believes that we worked closely and constructively during the process of the drafting and adoption of the directive and that such cooperation can be further developed during the transposition period given the impact of the transposition on the rights of our creators/rightholders and on the day-to-day operations of our members.

I hope the below questions could help to shape our discussion at the next meeting we will hold on 26 February. Some of these questions were already raised at our November meeting and we look forward to have further views from you while others are new and are raised in light of current national transposition discussions.

*Questions that we asked at the November meeting and on further thinking and preparation were needed in order to answer:*

**1. Granularity of categories in Transparency Report (Art 22 + Annex)**

What is the balance to strike to ensure efficiency of and comparability between the CMOs regarding the financial information to be provided in the transparency report and to the rightholders/CMOs? The costs that some CMOs may face in implementing these provisions could have an impact on the efficiency of their services.

**2. Interaction between Article 8.5(b) and 8.5(e)**

Given that Article 8.5(b) provides for a General Assembly decision on the general policy on the use of non-distributable amounts and that the effective use of such amounts shall be based on such general policy and is controlled by the entity in charge of the supervisory function, can Article 8.5(e) be interpreted as not imposing a prior decision on the use of non-distributable amounts but only a decision of the General Assembly which can be a ratification decision?

**3. Interpretation of the 2<sup>nd</sup> sentence of Article 16.2, 1<sup>st</sup> paragraph**

Can you clarify that the introduction of such sentence, which is specific to online services, does not restrict the freedom of CMOs to agree non-precedential licensing conditions with offline services.

**4. Tariffs applied for online usages**

When there is a copyright tribunal setting the tariffs for one country, should such tariffs be considered compulsory? Can they prevent CMOs from setting pan-European tariffs? Would that be considered a discriminatory treatment or as obligations imposed by the MSs that go beyond Title III?

*New questions:*

**1. Rec. 9 of the Directive** gives the possibility to Members States to apply **more stringent standards** to collective management societies than those laid down in Title II. What is the appropriate balance between government intervention and the rights of rightsholders to decide on the manner of management their rights (thus the functioning of their CMO)? Would the following transpositions be considered as going too far or within the scope of a national legislation:

- a. Specific number of members or other represented rightsholders that needs to be met in order to hold an ad hoc General Assembly.
- b. Quorum that needs to be met so that the General Assembly is empowered to make resolutions.
- c. Quorum that needs to be met to in order to adopt a particular decision.
- d. Specific sanctions (e.g. suspension from the office) with respect to breach of obligations of the person who manage the business of CMOs in Art. 10.2 (a) to (d).
- e. Obligation to disclose to public the representation agreements concluded with other collective management organizations.

2. **Individual v. collective licensing:** We have a serious concern regarding the interpretation of the last sentence of **Recital 19** by the Slovakian legislator. Recital 19 of the Directive reads: “*This Directive should not prejudice the possibility for rightholders to manage their rights individually, including for non-commercial uses.”?*

We firmly believe that this should be interpreted as meaning: “National law shall not prevent rightholders from managing their rights individually independently from the collective rights management regime”.

Any other interpretation implying a general parallel licensing possibility would jeopardize the fundamental principles of collective management and the right balance that the European legislator tried so hard to strike during the negotiations. We believe that this was our common understanding and we count on your pro-active cooperation on this very important matter.

3. **Independent management entities:** You already mentioned that some of the Member States raised this issue in your first expert group. Art 41(a) of the directive vests on the Expert Group the responsibility to examine the implementation of the directive on the functioning of CMOs, as well as independent management entities. This would require a common understanding among the Expert Group on the meaning and scope of the “independent management entities” and their difference from CMOs.

What are your current considerations on this, especially as regards:

- How to apply requirement of managing rights on behalf of authors but without their involvement (owned or controlled)
- Acting on “collective interest” of rightholders
- Being for-profit
- What else could be considered under Rec 15 based on the “*inter alia*” wording
- Whether non-CMO music libraries would be considered as independent management entity

4. **Supervisory function:** Following a meeting Ms Martin Prat had with some stakeholders, we would like to ask clarification on the situation where there is a Board of directors and a CEO. In such a situation, can the supervisory function be considered as being carried out by such Board of directors (and the management by the CEO) without any need to change the organization of the society even though :

- a. the Board of directors in such society is entrusted by the society’s statutes with the administration of the society and “decides on dealing, contracting, pleading, compounding and agreeing to go to arbitration in the name of the Society and, generally, on doing all acts of administration”;
  - b. the CEO manages the society, in accordance with the instructions and decisions of the Board of directors?
5. **Appointment/dismissal of directors:** Art 8.4 reads: “*The general assembly of members shall decide on the appointment **OR** dismissal of the directors, review their general performance and approve their remuneration and other benefits such as monetary and non-monetary benefits, pension awards and entitlements, rights to other awards and rights to severance pay*” (emphasis added).

Could you please provide us with your opinion on whether Article 8.4 is to be interpreted as meaning that both *appointment* and *dismissal* should be decided directly by the general assembly or rather that a model (under a unitary board system) where the statute provides for that the board members are *appointed* by other organisations representing popular composers, art composers, and music publishers respectively could be possible? The latter is the system that has been applied in Sweden and our question is whether the specific use of “*or*” language in the Art 8.4 can be a way to preserve a system that has been satisfactorily exercised for many years. This becomes particularly more relevant, as Art. 8.8 specifically uses an “*and*” wording when referring to the decision power of the general assembly on “*appointment and removal of the auditor*”.

6. **Dual board:** We would like to ask clarification as to what a “dual board system” means in Article 8.4. Some CMOs have a Board of Directors and an Executive Committee, integrated by a reduced number of members of the Board. Would that be considered a “dual system”? In such situation, can the supervisory function be considered as being carried out by the Board of directors and the management by the Executive Committee?
7. **Annual transparency report:** Could the annual transparency report be part of the annual report or should be a separate report?
8. **Licensing of certain online services:** Some of our members (e.g. BUMA) ask:
  - a. For the CMOs that can fulfill the criteria of Title III to license their own repertoire on a multi-territory basis, licensing certain services that do not generate sufficient revenue could still be difficult, since applying Title III criteria fully would create extra cost for them. Would it be possible to refuse to deliver MTL to such services based on this cost consideration that might e.g. exceed the actual revenues that could be received from them? This is particularly important considering maximum level of costs that the Dutch legislator has imposed upon collecting societies.  
And the other way around: Can the service providers that are active in more than one country be asked to accept a multi-territorial license?
  - b. Certain services focus only on a very few countries (e.g. NL and BE only) and on a specific repertoire/usage. Would application of different tariffs for such services create discrimination vis-à-vis the other online music services that the same CMO licenses for a wider repertoire and/or territorial scope?

Please do not hesitate to contact me for any questions in this respect.

Thank you and kind regards,

Cc | [REDACTED]

## **Document 2**

Email from CISAC, CRM question, 12/05/2015,  
(Ref.Ares(2016)5819133)

Non disclosure

## **Document 3**

Letter from Kastell Advokatbyra on behalf "Anvandargruppen",  
regarding the Sweden's implementation of the CRM Directive  
(2014/26/EU), 17/07/2015, (Ref.Ares(2016)5819721)

17 July 2015

**ON SWEDEN'S IMPLEMENTATION OF THE CMR DIRECTIVE (2014/26/EU)  
AND REPORT ON THE COLLECTIVE MANAGEMENT OF RIGHTS IN THE AREA  
OF COPYRIGHT (SOU 2015:47)**

**1 Brief introduction to this letter and the senders**

- 1.1 This letter is from Com Hem, Dell, MTG/Viasat, Samsung, Discovery Networks Sweden, Telenor/Canal Digital, TeliaSonera, Teracom/Boxer and TV4. Prior to implementation of the CRM Directive, these companies and groups of companies formed a user group, Användargruppen. Användargruppen hired law firm Kastell and PR agency Deliberately as external coordinators and advisors.
- 1.2 Användargruppen consists of TV channels, TV distributors, distributors of film, TV programmes and music as well as manufacturers and distributors of technology that need to acquire rights from collective rights organisations, for example Copyswede and STIM. The companies want to work together to modernise the market for collective rights management in Sweden and they take it for granted that Sweden will seize the opportunity and make all the improvements laid down in 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 ("the Directive").
- 1.3 According to Användargruppen, however, the proposal made in the inquiry shows that the Directive is not being implemented correctly, not even as regards all of the binding parts of the Directive. Användargruppen finds that this is of great concern. Therefore we want to inform the Commission of those parts of the inquiry's proposal that, in Användargruppen's view, do not comply with the Directive. In particular, we want to

draw attention to the lack of an audit and checking function and of an alternative dispute resolution mechanism.

## **2 The proposal's incompatibility with the Directive**

**2.1** In summary, we would like to highlight five Articles of the Directive:

- Parts of Article 16 (conducting negotiations in good faith)
- Parts of Article 17 (users' obligation to provide information)
- Article 34 (alternative dispute resolution procedures)
- Article 35 (dispute resolution)
- Article 36 (compliance)

**2.2** The inquiry proposes that Articles 16 and 17 be implemented in full except for the parts referred to below. The committee proposes that Articles 34 and 35 should not be implemented at all. It is proposed that Article 36 be transposed but with a significant exception: the competent control authority (the Swedish Patent and Registration Office, PRV) would not be responsible for supervising compliance with the user protection rules in the Directive.

- **Parts of Article 16**  
(Licensing)

- **Article 16(1)(1)**  
(conducting negotiations in good faith)

*"Member States shall ensure that collective management organisations and users conduct negotiations for the licensing of rights in good faith."*

Objectives of the inquiry (see inquiry, pp. 297 and 301-304):

- *"As indicated in Section 10.1.1, it is one of the general principles of Swedish law that the parties must conduct negotiations with each other in good faith."*
- *"As regards the exact wording of the provision, it can be stated that the expression "förhandlar ... i ärligt uppsät" (in English "conduct negotiations ... in good faith", in French "négocient de bonne foi" and in German "nach Treu und Glauben ... verhandeln") may be considered foreign to the Swedish language (cf. proposal 2013/14:206 p. 29). Section 10.1.1 states that according to the general principles of Swedish law a party must conduct negotiations in accordance with honest practices ("förhandlar i enlighet med god affärssed"). This expression corresponds to the Directive's requirement and is also in line with the legal tradition in Sweden. There is a risk that an alternative expression such as "conduct negotiations according to the principle of good faith and fair dealing" ("förhandla i enlighet med tro och heder", cf. the German version above)*

*might lead to legal uncertainty as regards the provision's legal effect (cf. Section 33 of the Contracts Act). Therefore the law should lay down a requirement whereby collective management organisations and users conduct negotiations for the licensing of rights in accordance with honest practices."*

- **Parts of Article 17**  
(users' obligation to provide information)

- **Article 17(1)**  
(relevant information)

*"Member States shall adopt provisions to ensure that users provide a collective management organisation, within an agreed or pre-established time and in an agreed or pre-established format, with such relevant information at their disposal on the use of the rights represented by the collective management organisation as is necessary for the collection of rights revenue and for the distribution and payment of amounts due to rightholders."*

Objectives of the inquiry (see inquiry, pp. 309-313):

- *"The obligation to provide information laid down in Article 17 and its corresponding recital 33 concerns the information on use required for the organisation to be able to collect royalties for use and distribute and pay any amounts due to rightholders. In Section 8.3.2 on the requirement that organisations distribute and pay any outstanding amounts it is pointed out that no requirements are imposed regarding the need to distribute and pay such amounts in absolute accordance with actual use. Such exemptions are possible, for example, to the extent allowed by the organisation's distribution policy and taking into account any practical obstacles to the distribution of the amounts. As suggested by KB (the National Library of Sweden) and SKL (the Swedish Association of Local Authorities and Regions), the obligation to provide information should be limited to information that is at the disposal of users and should not be more extensive than what is necessary for the organisations to meet their obligation to correctly distribute and pay any outstanding amounts in accordance with their distribution guidelines. Since these organisation are relatively free to decide on their own distribution policies, in this way it is also possible to influence the level of detail of the information that must be provided to meet the distribution requirements. In its agreement with users, an organisation can usually impose reporting requirements. At the same time, as pointed out by SAMI (Swedish Artists' and Musicians' Interest Organisation) and STIM (Swedish Performing Rights Society), among others, the providing of information by users is often a necessary condition for the collective management organisations to be able to fulfil their mandate towards rightholders and meet the obligations stemming from the Directive. Furthermore, in certain areas, such as SAMI's, collection can take place without concluding any agreement with users, as royalties are based on a provision on compulsory licences (or the right to compensation, etc.) Therefore the provision of information does not necessarily depend on the organisation and the user agreeing on providing information or on how extensive it should be. The obligation to provide*

*information should be objective and based on a legal provision. The wording of the provision should resemble closely that of Article 17. The English version of the Directive, unlike the Swedish one, states that the provision of information by users should be limited to information that is at their disposal. This limitation is laid down also in recital 33 of the Directive, in both the Swedish and the English version. This limitation has great practical significance, as users can hardly be required to provide information on use if it is not at their disposal; such a reporting obligation would not be proportionate. Therefore this limitation should be laid down in legislation."*

- **Articles 34 and 35**  
(Alternative dispute resolution procedures and Dispute resolution)

#### Article 34

1. "Member States may provide that disputes between collective management organisations, members of collective management organisations, rightholders or users regarding the provisions of national law adopted pursuant to the requirements of this Directive can be submitted to a rapid, independent and impartial alternative dispute resolution procedure.
2. Member States shall ensure, for the purposes of Title III, that the following disputes relating to a collective management organisation established in their territory which grants or offers to grant multi-territorial licences for online rights in musical works can be submitted to an independent and impartial alternative dispute resolution procedure:
  - a) disputes with an actual or potential online service provider regarding the application of Articles 16, 25, 26 and 27;

...."

#### Objectives of the inquiry (see inquiry, pp. 402-408):

- "The provision in Article 34(1) whereby Member States may provide that certain disputes may be submitted to an alternative dispute resolution procedure does not mean that Member States are obliged to enable such a dispute resolution procedure. Therefore, in order to fulfil the Directive's requirement, it is not necessary to lay down in national legislation the possibility of an alternative dispute resolution procedure in the cases referred to in Article 34(1).

*While carrying out the inquiry the question arose of whether the provisions on alternative dispute resolution contained in Swedish law (see Section 14.2.1) were sufficient. Discussions held in the inquiry with the representatives of different users revealed that users want more binding ("effective") rules on alternative dispute resolution. For example, they find it problematic that the act on mediation in certain copyright law disputes is non-mandatory; its objective (to encourage the conclusion of an agreement) accordingly has no practical effect. They have also expressed the wish that it should be possible for a party to unilaterally submit issues concerning the setting of licensing conditions to an independent and impartial body for dispute resolution. Such a body exists for certain types of cases (i.e. for certain types of use) in other countries, for example Kabeltvistnemnda in*

*Norway and Ophavsrettslicensnævnet in Denmark. The need for "more efficient" arrangements for alternative dispute resolution has also been expressed in letters sent by users, among others IT&Telekomföretagen and Com Hem AB, that were received by the authors of the inquiry. According to these letters, the lack of effective arrangements for alternative dispute resolution has led to a situation where, for many years now, the market parties have often not been able to conclude a licensing agreement on a voluntary basis and where both collective management organisations and commercial users incur substantial costs for dispute resolution. These factors may ultimately hamper the market, to the detriment of consumers as well as individual rightholders.*

*As stated in Section 14.2.1, the Government has on several occasions considered introducing solutions based on binding rules but has gone no further as it has seen no sufficient reason to do so. As can be seen from the instructions for the inquiry, legislative amendments may be proposed that are not based directly on the Directive but are nonetheless deemed appropriate in connection with the implementation of the Directive. Owing to the scope of the issues and the required analysis, it is not possible to treat them as part of this inquiry. At the same time, the Directive underlines that its implementation must not restrict freedom of contract more than is necessary. The fact that the Directive does not affect the parties' fundamental right to assert and defend their rights by bringing an action before a court indicates that the Directive, too, considers freedom of choice between the parties as a basic principle.*

*If the collective management organisations have a dominant position and abuse this power on the market, it is possible to review competition legislation. For these reasons, this legislative work is not the right occasion for analysing in more depth whether new, binding provisions on alternative dispute resolution should be enacted. This applies likewise to the possibility to enact additional provisions on alternative dispute resolution between collective management organisations and rightholders, members and other collective management organisations. Therefore no new legal provisions should be enacted on the basis of Article 34(1) of the Directive".*

- *"As already stated, Article 34(2) of the Directive requires Member States to enable certain disputes relating to a collective management organisation which grants or offers to grant multi-territorial licences for online rights in musical works to be submitted to an alternative dispute resolution procedure. It is clear from that Article and corresponding recital 49 that the Directive does not provide for a specific type of alternative resolution procedure, but that the procedure must fulfil general conditions relating to independence, impartiality and efficiency. Additionally, Article 34(2) should impose as a condition for its implementation that the parties must agree on settling disputes through an alternative resolution procedure. The need for such a condition for the implementation of Article 34(2) has been confirmed in discussions with the Commission during the inquiry. The provisions in Article 34(2) of the Directive have no direct equivalent in Swedish law. However, existing arrangements for alternative dispute resolution, such as mediation and arbitration, should at least to a certain extent be applicable to the disputes referred to in points a-c of Article 34(2). It is necessary to analyse*

*more closely how existing provisions relate to the Directive's requirements. This is done below."*

- *"Article 34(2)(a) concerns disputes between a collective management organisation and an actual or potential online service provider regarding the application of Articles 16, 25, 26 and 27. A number of different issues are addressed in those Articles. As regards Article 16, the focus should be on existing and proposed licensing conditions or a breach of contract (cf. Article 35(1)). It is possible already under existing Swedish law to submit to arbitration disputes concerning existing licensing conditions or a breach of contract. Consequently, for such disputes, no new provisions need be introduced into Swedish law in order to fulfil the Directive's requirements. As regards proposed licensing conditions, "disputes" should refer to situations where the parties cannot agree on which licensing conditions to apply or where one of the parties rejects the other party's request for negotiations. In certain cases, such situations are covered in Swedish law by the act on mediation in certain copyright law disputes. In all circumstances, the parties may submit a dispute to the decision of arbitrators. Therefore no new legal provisions need to be enacted in order to fulfil the Directive's requirements in that respect."*

*In the case of disputes between a collective management organisation and actual or potential online service providers as referred to in Articles 25, 26 and 27, the conditions referred to below should apply. These Articles, and the way in which it is proposed they be transposed into Swedish law (see Sections 13.3.2, 13.4.2 and 13.5.2), lay down certain obligations and rights for organisations and online service providers. More particularly, online service providers should have the right to receive information from the organisation about the online music repertoire it represents (Article 25), to request a correction of the data if they are inaccurate (Article 26) and to challenge the accuracy of an invoice (Article 27). While Article 25 may concern both situations where there is an agreement between the organisation and the online service provider and those where none (yet) exists, Articles 26 and 27 should only cover situations where an agreement is in place. Whatever the case, the parties should always have the possibility to decide on how to fulfil an obligation laid down in the provision in individual cases, i.e. between the parties. Such an agreement, for example as part of an arbitration procedure, would not be binding on a third party. However, such an effect can hardly be inferred from the Directive's requirement that it should be possible to submit a dispute to an alternative dispute resolution procedure. Nor can it be considered that the Directive requires the alternative dispute resolution procedure under Article 34(2) to be enforceable. The Directive simply seems to require that it should be possible to resolve such a dispute between the parties. In conclusion, no new legal provisions need to be enacted in order to transpose Article 34(2)(a)."*

- *"Article 34(2)(b) concerns certain disputes between a collective management organisation and one or more rightholders regarding the application of Articles 25, 26, 27, 28, 28, 30 and 31. These Articles, and the way in which it is proposed they be transposed into Swedish law, lay down certain obligations and rights for organisations and rightholders. For the same reasons as mentioned above, it should be possible to fulfil the requirements for alternative dispute resolution in Article 34(2) in Swedish law by providing for the possibility of arbitration. Therefore no new legal provisions need to be enacted in order to transpose Article 34(2)(b)."*

- "Article 34(2)(c) concerns certain disputes between a collective management organisation and another collective management organisation regarding the application of Articles 25, 26, 27, 28, 28 and 30. These Articles, and the way in which it is proposed they be transposed into Swedish law (see Sections 13.3.2, 13.4.2, 13.5.2, 13.6.2, 13.7.2 and 13.8.2), lay down certain obligations and rights for organisations. For the same reasons as for Articles 34(2)(a) and 34(2)(b), it should be possible to fulfil the requirements for alternative dispute resolution in Article 34(2)(c) in Swedish law by providing for the possibility of arbitration. Therefore no new legal provisions need to be enacted in order to transpose Article 34(2)(c) either."

## Article 35

1. "Member States shall ensure that disputes between collective management organisations and users concerning, in particular, existing and proposed licensing conditions or a breach of contract can be submitted to a court or, if appropriate, to another independent and impartial dispute resolution body where that body has expertise in intellectual property law.
2. Articles 33 and 34 and paragraph 1 of this Article shall be without prejudice to the right of parties to assert and defend their rights by bringing an action before a court."

### Objectives of the inquiry (see inquiry, pp. 412-413):

- "As explained in Section 14.3.1, dispute resolution that is optional is handled by a general court pursuant to the Swedish Code of Judicial Procedure. Disputes between collective management organisations and users concerning existing licensing conditions or a breach of contract are types of disputes that may be submitted to a general court. If the parties agree, the dispute may also be submitted to an arbitration procedure. Therefore it is not necessary to enact new legal provisions in order to meet the requirements of Article 35(1) of the Directive as regards the possibility to refer to a court disputes concerning existing licensing conditions or a breach of contract."
- "As regards the reference in Article 35(1) to "proposed licensing conditions", the situation is possibly less clear. The basis in Swedish law is that in areas where there is freedom of contract there are no "disputes" between parties until an agreement has been concluded that can be brought before a court. This is not the case with mediation, for example, which can be used to encourage the parties to conclude an agreement if negotiations have not settled the matter or to persuade a party to participate in mediation proceedings comparable to structural negotiations (see Section 14.2.1)."
- "As explained in Section 14.3.1 above, the act on unfair contract terms between traders contains provisions also covering conditions set by a trader planning to enter into an agreement with another trader. Consequently that act also covers proposed terms of contract, which should cover a situation where a collective management organisation imposes certain licensing conditions on a user or vice versa (cf. MD 2006:30 concerning the relationship between a TV company and a group of authors). Although a prohibition under the act on unfair contract terms should be issued only if

*this is necessary for reasons of public interest, when the case concerns terms of contract (e.g. tariffs) imposed by a collective management organisation on a user, they often tend to be comparable to standard terms or can be expected to be applied in similar situations (see Section 3.3.2). The requirement "necessary for reasons of public interest" should thus be considered fulfilled (cf. MD 2006:30). The possibility laid down by Article 35(1) to submit to a court a dispute between a collective management organisation and a user concerning proposed licensing conditions should thus be ensured by the aforementioned provisions of the act on unfair contract terms between traders. For this reason, the new act on collective management of copyright need not lay down any provisions for the purpose of implementing the provisions of Article 35(1) on the possibility to submit to a court disputes between collective management organisations and users concerning proposed licensing conditions."*

- **Article 36**

(Compliance)

*"1. 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.*

*2. Member States shall ensure that procedures exist enabling members of a collective management organisation, rightholders, users, collective management organisations and other interested parties to notify the competent authorities designated for that purpose of activities or circumstances which, in their opinion, constitute a breach of the provisions of national law adopted pursuant to the requirements laid down in this Directive.*

*3. Member States shall ensure that the competent authorities designated for that purpose have the power to impose appropriate sanctions or to take appropriate measures where the provisions of national law adopted in implementation of this Directive have not been complied with. Those sanctions and measures shall be effective, proportionate and dissuasive."*

**Objectives of the inquiry (see inquiry, pp. 418-423):**

- *"In the case of relations governed solely by civil law, it is a matter of general principle that such cases may, as a rule, be the subject of proceedings before a general court, e.g. in connection with an action for performance or a declaratory action (Chapter 13, Sections 1 and 2 of the Swedish Code of Judicial Procedure). As a rule, an action for performance concerns an injunction requiring the defendant to perform an action, though the defendant may also be required to abstain from certain acts or activities. An action for performance concerning obligations other than financial ones may, as a rule, be subject to a conditional fine<sup>1</sup>. The court should be able to impose a penalty even without an application by the plaintiff (See Westerberg, Domstols officialprövning, 1988, p. 432 and references). As regards provisions on relations governed solely by civil law*

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<sup>1</sup> The provisions on an action for performance are supplemented with the possibility of having the judgment enforced by the Swedish Enforcement Agency under the rules laid down in the Enforcement Code. The provisions in the Enforcement Code apply to the enforcement of a judgment concerning "a financial or other obligation" (See Chapter 1, Section 1 of the Enforcement Code).

*contained in the act transposing the Directive on collective management, compliance with them may be monitored by providing for the possibility of judicial review. Thus as regards relations governed solely by civil law, compliance with Articles 36(1) (on monitoring), 36(2) (on enabling interested parties to notify the competent authorities designated for that purpose of circumstances which, in their opinion, constitute a breach of the provisions of national law adopted pursuant to the requirements laid down in the Directive) and 36(3) (on ensuring that the competent authorities designated for that purpose have the power to impose appropriate sanctions or to take appropriate measures) is ensured through the possibility to initiate court proceedings.*

*In this light, as regards provisions pertaining solely to civil law, it is not necessary to enact any additional provisions on monitoring in order to fulfil the Directive's requirement. ..."*

- ... At the same time, as can be seen from the instructions for the inquiry, monitoring should be carried out to the extent possible by providing for the possibility of judicial review. As broader monitoring can also be considered more cost-effective, it can be concluded that monitoring need not be more extensive than required by the Directive. To summarise, it is reasonable to limit monitoring to those parts of the law that for the most part pertain to business law.*

Stockholm, date as above

For Användargruppen

[REDACTED]  
Deliberately Communications

[REDACTED]  
Kastell Advokatbyrå

## **Document 4**

Email from Tribe Of Noise, on Directive 2014/26, 18/01/2016,  
(Ref.Ares(2016)5819541)

**From:** [REDACTED]@tribeofnoise.com>

**Date:** 18 January 2016 at 09:31:15 GMT+1

**To:** [REDACTED]@ec.europa.eu>, [REDACTED]@ec.europa.eu>

**Cc:** [REDACTED]

**Subject:** Update: EU Directive 2014/26/EU

Dear [REDACTED],

Last year March we have met at your office in Brussels to discuss our concerns about collection societies not acting in line with the EU Directive 2014/26/EU. We have discussed performance royalty organizations and the issues with some neighbouring rights organizations (like the ones in Belgium and Norway).

In our opinion the situation is getting out of hand in some countries and we need your professional opinion / advice on this.

Recap: As you might remember from our last meeting my company is representing 27,000 artists of which some upload their music to our services for non-exclusive, all rights included, commercial exploitation after a very thorough legal screening process. Via multiple legal procedures the rightsholders understand, agree and state before uploading: I DO NOT WANT COLLECTING SOCIETIES OR ITS SISTER ORGANIZATIONS ANYWHERE IN THE WORLD TO COLLECT ROYALTIES/FEES FOR THE SONGS I HAVE UPLOADED TO TRIBE OF NOISE.

#### SITUATION 1: SABAM - BELGIUM

Until Q4, 2015 SABAM was ok with the legal procedures of Tribe of Noise and SABAM's sister organization Buma/Stemra in the Netherlands to (double/triple) check the repertoire used in our all rights included commercial streaming music services. In Q4 they have identified a few tracks (10 out of 1000+) they also have in their database. I have many reasonable arguments why their response (telling us to stop or pay them) is worth a legal fight but for now I just would like to know: **who is supervising / monitoring the actions of SABAM in Belgium? Is this the European Commission or maybe "FOD Economie"? We are considering to file an official complaint. FYI: Feb 3, we will be in Brussel to talk to SABAM one more time. The dossier of them ignoring our arguments or not giving us any tools to do a better job in the future is getting thicker and thicker.**

#### SITUATION 2: TONO - NORWAY

A bit similar to SABAM. They were fine with all our legal checks with their sister organization Buma/Stemra to prevent copyright infringements and all of a sudden they found 4 tracks in our repertoire they state to represent and no longer accept our service in Norway. Bigger issue here is they are hardly replying and they are not answering my questions. I have offered to fly over to Norway with the feedback of the rightsholders to find a solution, no response and I have contacted the Ministry of Culture in Norway (Kulturdepartementet) several times but they are not responding either (btw, I will keep on trying). **My question here is: although Norway is not an EU member do they have to obey the EU Directive 2014/26/EU? They are EEA member and have access to the EU internal market. And who is watching TONO in Norway?**

Thank you so much in advance to answer our questions. We will continue to represent the interest of our rightsholders. We sincerely hope the collection societies will make this their #1 priority too and this year the position of the rightsholders / musicians will improve.

Warm regards, [REDACTED]



[REDACTED]  
[REDACTED]

[www.tribeofnoise.com](http://www.tribeofnoise.com)

## **Document 5**

Email from a citizen, 28/01/2016, (Ref.Ares(2016)5819642)

**From:** [REDACTED]@gmail.com>  
**Date:** 28 January 2016 at 13:05:55 GMT+1  
**To:** [REDACTED]ec.europa.eu>, "guenther-oettinger-contact@ec.europa.eu" <guenther-oettinger-contact@ec.europa.eu>, [REDACTED]  
**Cc:** [REDACTED]

**Subject: Bitte um Hilfe.Die Justiz stimmt zu. Musiker 8 Jahre ohne zustehende Vergütung von Verwertungsgesellschaft GVL.**

An die EU Kommission und Herrn Oettinger,

Sehr geehrte Damen und Herren der EU Kommission,

bitte helfen Sie und schützen sie uns Musiker vor den Unrecht der Deutschen Verwertungsgesellschaften mit Beihilfe der Justiz und den Gesetze machenden Politiker die mehr die Interessen der Lobbyisten und Verbänden vertritt anstatt der Bürger.. Die diese Machenschaften fördern und sich darauf berufen das dieses System sich bewehrt und ein Monopol bleiben muß.

Das ist der Falsche Weg!!!

Es wäre sehr, sehr wichtig und gut das Musiker, Komponisten, Kreative dieses unrecht entgehen kann in dem wir eine Verwertungsgesellschaft aussuchen können der wir vertrauen und wo meine Interessen als Musiker, Kreativer vertreten werden. Es sollten keine Monopole Verwertungsgesellschaften geben.

Sondern ein freier Wettbewerb der sich durch Konkurrenz selbst regelt. Anstatt Monopole die mit ihren Machthabenden Elite und Verbänden einseitige Interessen vertreten und damit Vielfalt, Kultur, Demokratie entgegen wirken und zerstören. Und Arbeitsplätze vernichten in dem Sie Reiche reicher und Arme ärmer macht in dem sie die Gelder zum größten Teil einseitig der dominierende Elite auszahlt.

Ich habe gegen die GVL geklagt und meine Klage ist abgewiesen worden.  
Das System Deutschland hilft uns Kreativen nicht. Deswegen bitte ich die EU um Hilfe.

- 1.Keine Monopole Verwertungsgesellschaften sondern selbst regelnden Wettbewerb.
2. Keine Rechte für Verlage und Labels an das Urheberrecht bei den Verwertungsgesellschaften.

Hier im Video Bundestag wieder zusehen "Urheberrecht" die Scheindemokraten CDU/CSU und SPD!!!

Verlage sorgen dafür das nur die wenigen Urheber und Musiker Künstler in den Medien erscheinen die bei ihnen unter Vertrag stehen. Ein Urheber der nicht in einem Elite Verlag unter Vertrag steht hat so gut wie keine Chance in den großen Medien zu erscheinen um dort auch von GEMA und GVL nutzen zu haben. Da die Verlage dort in den Verwertungsgesellschaften die ausschüttungs Regel dominieren und dafür sorgen das die Gelder pauschal abgerechnet werden und zu den Radio und TV sendungen hinfokussieren. Dieses Einseitige verhalten arbeitet gegen Vielfalt , Kultur , Demokratie und Gerechtigkeit. Nur Wettbewerb bei den Verwertungsgesellschaften kann dieses Eliteverhalten aufbrechen und für mehr Demokratie und Gerechtigkeit sorgen. Aber genau dieses undemokatische für Monopole verhalten wird von der CDU/CSU und SPD unterstützt. Seit 2010 bekommen alles Musiker keine Gelder mehr von der GVL die nicht in bestimmten Radio und TVsender gesendet werden, dank der Unterstützung des DPMA, SPD,CDU und der Justiz. Und auch die neuen Richtlinien der EU die für mehr Demokratie und Gerechtigkeit sorgen will, wird wieder von den Scheindemokraten unterwandert in dem Sie die ausbeutende Elite Monopole unterstützen. Obwohl die EU die Ungerechtigkeiten der Verwertungsgesellschaften erkannt haben sagen immer wieder unsere Scheindemokraten das alte System hat sich bewert. Besonders die SPD ist für mich sehr enttäuscht die Eliten und Monopole ausbeuter unterstützt. Aber zum Glück hat der Bürger dieses scheinverhalten erkannt und zu recht viel vertrauen an CDU und besonders SPD verloren. Ich bin mir sicher das die SPD zurecht bei den nächsten wahlen ihr schlechteste ergebniss aller Zeiten erhalten wird. Weil sie Demokratie nur vorgaukelt nicht lebt und ausbeutende Eliten nicht nur in der Kreativwirtschaft fördert und (Mafiose) Monopole unterstützt. Ein Musiker braucht keine Verlage mehr. Verlage ist ein auslaufendes Elitemodel was die Kreativwirtschaft hemd. Aber Lobbyisten Parteien wie CDU und SPD wollen das nicht erkennen.

Permalink:

<http://dbtg.tv/fvid/6424072>



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## **Document 6**

Email from AEPI regarding the draft Greek law implementing Directive 2014/26/EU, 17/02/2016, (Ref. Ares, (2016)834682)

Non disclosure

## **Document 7**

Email from IFPI (Legal Advisor) to DG CNECT about art. 16(2) of the CRM directive, 18/03/2016, (Ref.Ares(2016)5819832)

**From:** [REDACTED]@ifpi.org]  
**Sent:** Friday, March 18, 2016 4:20 PM  
**To:** [REDACTED] (CNECT)  
**Cc:** [REDACTED]  
**Subject:** CRM Directive - question on Article 16(2)

Dear [REDACTED],

Many thanks for taking the time to discuss the CRM Directive recently. As promised, below is the question regarding the interpretation of Article 16(2). We would very much appreciate having your view on this issue, knowing, of course, that it is not an official interpretation of the Directive.

Many thanks in advance.

Kind regards,

[REDACTED]

#### **Article 16(2) – duty to ensure that tariffs are “reasonable”.**

In some Member States, like UK, the government is considering to create a duty on CMOs to ensure that tariffs are reasonable. The relevant UK draft provision (Regulation 15 – Licensing, paragraph 4(b)) states that a CMO:

“must ensure that ... b. tariffs it determines for exclusive rights and rights to remuneration are reasonable in relation to matters such as i) the economic value of the use of the rights in trade taking into account the nature and scope of the use of the work and other subject matter; and ii) the economic value of the service provided by the CMO...”

As a consequence, such duty placed on the CMO could create an additional appeal route for users to challenge the rates set by the CMO before the national supervisory authority (on the basis of “non-compliance” with the CMO regulations). This would mean that the body supervising the compliance with the law (in the case of the UK, the Secretary of State) would also obtain formal jurisdiction over the tariff rates, which normally is a matter of competence of a court or a tribunal.

We would like to hear your view on whether the correct interpretation of this Article is that:

- a. it offers a legal standard for dispute resolution bodies/tribunals which are competent to intervene in case of disputes between CMOs and users over the tariff setting;
- b. it does not intend to vest the state body (with competence to monitor compliance of the national law with the Directive) with powers to decide the CMOs' tariffs and/or to create an additional appeals instance for users to challenge the CMO tariffs. In our view, granting the monitoring body jurisdiction over the tariff would create

a competing and potentially contradicting jurisdiction with that of existing tribunals and other dispute resolution instances.



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## **Document 8**

Email from AUDIOSPARX, on music policy, 26/03/2016,  
(Ref.Ares(2016)5838320)

**From:** [REDACTED]@audiosparx.com]  
**Sent:** Saturday, March 26, 2016 11:05 AM  
**To:** [REDACTED]@ec.europa.eu; [REDACTED]@ec.europa.eu  
**Subject:** Attn [REDACTED] re Inquiry on music policy in the EU from Navarr Enterprises, Inc.

Dear [REDACTED],

Our company seeks clarification from the European Commission concerning various music-related issues, as discussed in the attached PDF file.

Please let me know if you can provide the needed guidance on the issues or if I should contact a different party at the European Commission.

Thanks and regards,

[REDACTED], AudioSparx  
[REDACTED]@audiosparx.com  
[REDACTED]



Navarr Enterprises Inc • 2800 N. 6th St, Saint Augustine, FL 32084  
Email: Info@navarr.net • [REDACTED]

March 23, 2016

**RE. Questions concerning European music rightholders regarding European music society conduct**

Dear Sirs,

Our company Navarr Enterprises, Inc., started in 1996, is a large music publisher and Independent Management Entity (IME in accordance with European Directive 2014/26/EU) based in the United States. We have direct music licensing relationships with almost 5,200 content providers (composers, music artists, publishers, music labels, etc.) around the world. We license music from them and in turn, via our RadioSparx website ([www.radiospark.com](http://www.radiospark.com)), sub-license the music to clients around the world for use as in-store/background music to play in their stores, restaurants, etc.

In our attempts to utilize the music of our European composers and artists (i.e. rightholders) in our RadioSparx service, we are encountering a particularly troubling situation all over Europe. Specifically, for any rightholders who have licensed their music to a Collective Management Organization (CMO) in Europe, the CMOs are asserting exclusive licensing control over the public performance rights for the rightholders' music, and are refusing to relinquish exclusive control, even in light of the new Directive. And for prospective new CMO members who wish to utilize the statutory/compulsory licensing services of the CMOs, and who wish to license their public performance rights to a CMO on a strictly non-exclusive basis are prevented from doing so by the stance of the CMOs throughout Europe. The European CMOs are continuing to insist on exclusive control of public performance licensing for their members' music. Thus, for any rightholders who have been or who become members of a CMO in Europe, this situation is preventing us from utilizing our European rightholders' music in RadioSparx since RadioSparx is strictly a direct-licensed service wherein the clients pay only us, and not any CMOs, for the use of our world-class music service.

We believe that any attempt by the CMO to still retain exclusive control over any aspect of their member's catalogs (and certainly with respect to the implementation of European Directive 2014/26/EU) to be a clearly excessive imposition on their members which is not objectively necessary for the CMOs to protect the rights and interests of their members, or for the effective management of their rights. The truth of this is readily observable by simply looking at the structure of the US PRO's non-exclusive control of music in the US, where it has been structured in a non-exclusive manner for decades now, and the marketplace functions perfectly well, with the PROs generating billions of dollars in revenue annually, and independent entrepreneurial companies conduct direct-licensing of the same music in parallel and simultaneously.

While it is true that the new Directive provides for rightholders to be able to withdraw certain categories of rights for their own management, it's not possible for rightholders to withdraw control over their public performance rights because to do so would remove the ability for the CMOs to be able to issue statutory/compulsory licenses for the rightholders' music in such a situation. Logically, the CMOs do not even consider public performance licensing a category of

right that can be withdrawn. Hence it is essential that the CMOs simply control the public performance rights on strictly a non-exclusive basis, rather than an exclusive basis.

And further, by the European CMOs requiring exclusive control over the public performance rights of their members' music, this is putting the music of European rightholders at a tremendous competitive disadvantage to American society-registered music since, faced with this situation, we can only currently utilize our American music in RadioSparx within Europe. It is creating a situation wherein European rightholders music cannot be utilized within Europe on RadioSparx and other similar privately-held and operated in-store/background music services, which is ironic and entirely unfair to European rightholders. Participation with CMOs is supposed to enhance the ability for artists and composers to earn money from their music, not impair their ability to do so.

Therefore, before we continue further discourse with the CMOs all across Europe, as well as frequent legal confrontation, we humbly wish to know what is the position of the European Commission on this matter, and seek clarification from you on this topic. While the new Directive does not clearly and directly address this matter, it does indicate that CMOs should not impose excessive conditions on its members which are not objectively necessary, and we believe that forcing artists and composers to lose control over the ability to direct-license their music simply for the sake of availing themselves of the statutory / compulsory licensing services provided by the CMOs in Europe is a clearly excessive imposition on their rights that is not objectively necessary and, as a result, appears to be a breach of the intent of the Directive.

**Please clarify your position on this extremely important matter, so that we may know where we stand.**

Sincerely,

@audiosparx.com

## **Document 9**

Email from Genna Cabinet SPRL (IT) on copyright management in Italy, 21/04/2016, (Ref.Ares(2016)5819994)

Non disclosure

## **Document 10**

Emails from AUDIOSPARX, 06/05/2016, (Ref.Ares(2016)5838428)

**From:** [REDACTED]@audiosparx.com]  
**Sent:** Friday, May 06, 2016 6:15 PM  
**To:** [REDACTED] (CNECT)  
**Cc:** [REDACTED] (CNECT)  
**Subject:** RE: Hi [REDACTED] - re Previous inquiry on music policy in the EU from Navarr Enterprises, Inc.

Hi [REDACTED],

I understand. Considering this, I would urge the EC to alter its stance on this matter and issue a new directive that prevents and eliminates the ability for CMOs from mandating exclusive control of public performance rights. Doing this will solve the six critical problems that I have mentioned in my previous email, and have the following tremendous advantages for the music market environment in Europe:

1. It will stop European CMO members' music from being at a competitive market disadvantage in relation to non-European music.
2. It will allow companies providing direct-licensing services to utilize European CMO member's music.
3. It will substantially reduce, if not eliminate, the discord between European CMOs and direct-licensing companies such as ours.
4. It will eliminate the preferential market advantage for major label music and allow smaller independent artists and minor labels to thrive.
5. It will increase music choices for clients in Europe, allowing them to direct-license high-quality society-registered music, while helping to reduce licensing costs by increasing healthy competition.
6. It will allow artists and composers to participate in both direct-licensing commerce and statutory/compulsory licensing commerce simultaneously – these things should not be mutually exclusive.

Thanks for your consideration.

Regards,

[REDACTED]  
[REDACTED]@audiosparx.com

**From:** [REDACTED]@ec.europa.eu [mailto:[REDACTED]@ec.europa.eu]  
**Sent:** Friday, May 06, 2016 11:16 AM  
**To:** [REDACTED]@audiosparx.com  
**Cc:** [REDACTED]@ec.europa.eu  
**Subject:** RE: Hi [REDACTED] - re Previous inquiry on music policy in the EU from Navarr Enterprises, Inc.

Dear [REDACTED],

Thank you for the additional information that you have sent to us this Monday.

After analysing the information submitted, it appears to us that there is no contradiction between the practice of exclusive mandates by CMO's for a category of rights (here, public performance) and the provisions of the Collective Rights Management Directive. The

Directive did not take a position on this specific issue. It referred to different rights of right holders in its Article 5, including the possibility for them to withdraw any of the rights and categories of rights from a CMO. It did not however impose any obligation upon CMO's to allow for non-exclusive mandates of representation.

In any event, we would like to mention that the competent authorities of Member States of the European Union referred to in Article 36 of the Directive will be responsible for monitoring the compliance of CMO's with the national provisions implementing the Directive. In turn, the Court of Justice of the European Union is responsible for the official interpretation of the Directive.

We trust that this information replies to your query.

Kind regards,

[REDACTED]

**From:** [REDACTED]@audiosparx.com]  
**Sent:** Monday, May 02, 2016 8:13 PM  
**To:** [REDACTED] (CNECT)  
**Cc:** [REDACTED] (CNECT)  
**Subject:** RE: Hi [REDACTED] - re Previous inquiry on music policy in the EU from Navarr Enterprises, Inc.

Hi [REDACTED],

I just wanted to share with you the highly relevant news about ASCAP's most recent full year earnings report, with domestic receipts up 9.3% from prior year's total, with total earnings again exceeding \$1B USD:

**ASCAP Reports \$1 Billion in Revenue, Again.** Within that, domestic receipts grew to \$716.8 million, up 9.3 percent from the prior year's total of \$655.8 million. ASCAP also increased domestic distribution by 6.2 percent, to \$573.5 million.

This is certain confirmation that PROs and CMOs do not need exclusive control of music in order to provide highly lucrative statutory/compulsory licensing services.

I sincerely hope the EC will finally support a move away from allowing PROs/CMOs throughout Europe to require their members to turn over exclusive control over the public performance licensing rights for their members, which creates the following problems:

1. It puts European society member's music at a competitive disadvantage to US-society-registered music, which can be direct-licensed in Europe in general.
2. It prevents services like our own RadioSparx site from using European society member's music in Europe, which is a really terrible and ironic twist for European composers and artists.
3. It creates constant acrimony and frequent lawsuits between societies and private companies such as ours, with the societies trying to enforce monopolistic control over their territory for commercial background music service (i.e. one of the most lucrative parts of the music business), including trying to exclude US-society-registered music and act as if they are the only legal source for licensing music for commercial background uses in their

respective countries. I've had confrontations with no less than 15 European societies in the past year, asserting our right to direct-license US-society-registered music in their countries. In most cases they have backed down, but in some cases continue to harass and try to bill our clients.

4. It creates an unfair advantage for major label music over independent music in Europe, in that much of the royalties that societies in Europe pay out is based on such things as radio airplay statistics, live performance statistics, etc., so even when minor unsigned artists participate in societies, the use of their music as commercial background music via society-licensing remains largely or completely uncompensated, since the societies do not perform detailed track-level usage accounting, but instead pay out based on unrelated sampling techniques from unrelated, ancillary music uses.
5. It limits music choices and increases licensing costs for clients throughout Europe, especially in countries where the societies aggressively try to assert monopolistic control (e.g. Romania, Hungary, Service, France, Spain, etc.)
6. It forces European rightholders who wish to participate in direct-licensing to completely forego statutory/compulsory earnings, or to completely forego direct-licensing earnings. They can't participate in both simultaneously, which makes no logical sense. Statutory/compulsory licensing services should be a value-added music rights aggregation and licensing service functionality that is available for all rightholders whose music is utilized for large-scale situations such as broadcast TV, satellite TV, non-interactive Internet streaming, and other similar large-scale uses, without simultaneously preventing European rightholders the customary European freedom of association, freedom of commerce, freedom of choice, self-directed control over their own music for direct-licensing commerce. Artists and composers should not have to choose one or the other types of commerce, but should be able to participate in both simultaneously.

Thanks for your consideration.

Regards,

[REDACTED] @audiosparx.com

## **Document 11**

Email from a complainant to DG CNECT regarding the confidential treatment of its complaint, 08/05/2016, (Ref.Ares(2016)5820517)

**(CNECT)**

**From:** [REDACTED]  
**Sent:** 08 May 2016 19:04  
**To:** CNECT CAD  
**Cc:** [REDACTED] (CNECT)  
**Subject:** CHAP([REDACTED])

Egregio Capo Unità Martin Prat, spett.le DG Reti di comunicazione, contenuti e tecnologie, chiedo che la mia denuncia CHAP([REDACTED]) venga trattata in modo riservato.  
Cordiali saluti.

## **Document 12**

Email from KODA regarding the CRM Directive Title III Licensing hub and competition law, 11/05/2016, (Ref.Ares(2016)5820352)

**From:** [REDACTED] @koda.dk>  
**Date:** 11 May 2016 at 10:13:27 GMT+2  
**To:** [REDACTED] @ec.europa.eu" <[REDACTED] @ec.europa.eu>  
**Subject:** CRM Directive Title III licensing hub and competition law [Koda]

Dear [REDACTED]

I hope that you are doing well and I look forward to seeing you later today at the GESAC general assembly.

I am reaching out to you because I am currently investigating our options with regard to creating or participating in a licensing hub in conformity with Title III of the CRM directive.

We are conscious, however, that we of course need to comply with competition law and to that end I am looking for the best point of contact within DG COMP in order to have an informal discussion about the competition law aspects of CMOs participating in a joint licensing hub.

Would you by any chance know what would be the best point of contact within DG COMP for such an informal discussion?

I hope that you are in a position to point me in the right direction.

I wish you a good day and look forward to hearing from you,  
All the best,

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]



[REDACTED]  
[REDACTED]@koda.dk

Lautrupsgade 9  
2100 København Ø  
[REDACTED]  
www.koda.dk

## **Document 13**

Email from Swedish Composers' International (STIM) on the CRM Directive, 10/06/2016, (Ref.Ares(2016)5839170)

**From:** [REDACTED]@stim.se]  
**Sent:** 10 June 2016 15:18  
**To:** [REDACTED] (CNECT)  
**Cc:** [REDACTED]; [REDACTED]  
**Subject:** CRM Dir in Sweden: Proxy holders

Dear [REDACTED],

I am writing to you on Sweden's implementation of the CRM Directive.

Here at the Swedish collective management organisation STIM, we would very much appreciate your view on our government's interpretation on **proxy holders** (CRM Dir, Article 8:10 on the General Assembly).

The government's proposal is to open up for an unspecified number of members/music creators per proxy holder, as long as there are no conflicting interests or different rightholder categories within that group. This is fully in accordance with the wording of the Directive. But without restrictions, this means in theory that one person can represent a huge number of rightholders.

For Sweden, the UK interpretation of the Directive and decision on the wording (Part 2, Article 7) was - according to our Ministry of Justice - an important point of reference. Though the wording on proxy holders in the UK legislation is along the lines with existing British company law and traditions. The new legislation will therefore not bring along any changes for eg PRS for Music and their members (I just spoke to their legal department).

Today, according to STIM's statutes, a proxy holder can represent only **one** member, 1+1. The effects of the proposed proxy rules could therefore be radically different than in the UK. We fear this unlimited scope will create chaos and negatively affect the members' participation and the overall longterm decision making.

Therefore, we proposed our Ministry to insert the following message into the Swedish legislation: "A collective management organization may, **in their statutes**, restrict who may act as a proxy holder and the number of members a proxy may represent. This should not prevent members from taking part in the decision-making in an appropriate and efficient manner."

At least a few governments in the EU have opted for some kind of restriction (Germany, Denmark, Finland etc). But our Ministry responded that this would be against the overall aim of the CRM Directive, and thereby a future case for the European Court of Justice.

What is your /EC:s view on this - which is the correct interpretation of Article 8:10 of the CRM Directive?

I would be very grateful for a reply shortly. The Director and Deputy Director at the Ministry of Justice, Mr Anders Olin and Mr Rickard Sobocki, are copied in.

Many thanks,

[REDACTED]  
[REDACTED]  
[REDACTED]  
STIM  
Swedish Composers' International  
[REDACTED]  
Hornsgatan 103  
Stockholm, SWEDEN  
[www.stim.se](http://www.stim.se)

*STIM is a Sweden-based collective management organisation for musical works, operating on a non-profit basis, owned by those who create music and lyrics – the authors – and music publishers.*

## **Document 14**

Email from Genna Cabinet SPRL on transposition of Directive  
2014/26/EU, 15.06.2016, (Ref.Ares(2016)5820531)

Non disclosure

## **Document 15**

Email from ERA on "Member States and transposition of CRM Directive", 14/07/2016, (Ref.Ares(2016)5821226)

**From:** [REDACTED] [REDACTED]@era.org.uk]  
**Sent:** Thursday, July 14, 2016 10:56 AM  
**To:** [REDACTED] (CNECT)  
**Cc:** [REDACTED]  
**Subject:** Member States and transposition of the CRM Directive  
**Importance:** High

Dear [REDACTED]

I wonder whether you might be able to point me in the right direction to confirm a point needed for a Copyright Council presentation which I and John Mottram are giving this evening?

We have been told that only 5 Member States formally transposed the CRM Directive provisions into national law prior to 10 April 2016.

These include the United Kingdom, Ireland and Sweden.

Is this in fact the case?

Have other Member States completed transposition since 10 April 2016, and, if so, which Member States have done this?

It would be really helpful to have this update.

With thanks and best wishes

[REDACTED]

[REDACTED]  
[REDACTED]

ERA Ltd  
60 Gray's Inn Road  
London  
WC1X 8LU

[REDACTED]



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## **Document 16**

Letter from the Law Firm Rojs, Pelijhan, Prelesnik & Partners on behalf of SAZAS regarding the transposition of the CRM directive in Slovenia, 11/05/2016, (Ref. Ares(2016)2208409)

**From:** LO GIUDICE Maria Angela (CAB-BIENKOWSKA)  
**Sent:** Wednesday 11 May 2016 16:57  
**To:** CAB BIENKOWSKA ARCHIVES  
**Subject:** Rojs, peljhan, Prelesnik & partnerji



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Doc. 16

# ROJS, PELJHAN, PRELESNIK & PARTNERJI

European Commission  
Rue de la Loi 200  
B-1049 Brussels  
BELGIUM

Evropska komisija  
Rue de la Loj 200  
B-1049 Bruselj  
BELGIJA

To the attention of:

European Commissioner for Internal Market  
and Services  
**Elzbieta Bienkowska**

Za:

Evropska Komisarka za notranji trg in storitve  
**Elzbieta Bienkowska**

May 11, 2016

11. 5. 2016

Združenje SAZAS (*in English translation: the SAZAS Society*) is the largest Slovenian collective management organisation within the meaning of the *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* (hereinafter referred to as the “Directive”), and the only one enforcing and managing copyright on musical works. Since 1 May 1996, Združenje SAZAS is also a member of CISAC – Confederation Internationale des Societes d’Auteurs et Compositeurs (in English translation: *The International Confederation of Authors and Composers Societies*).

Združenje SAZAS je največja slovenska organizacija za kolektivno upravljanje pravic v pomenu *Direktive 2014/26/EU Evropskega parlamenta in Sveta z dne 26. Februarja 2014 o kolektivnem upravljanju avtorske in sorodnih pravic ter izdajanju več ozemeljskih licenc za pravice za glasbena dela za spletno uporabo na notranjem trgu* (v nadaljevanju: “Direktiva”) in tudi edina, ki se ukvarja z uveljavljanjem in upravljanjem avtorske pravice na glasbenih delih. Od 1. 5. 1996 je Združenje SAZAS tudi član CISAC – Confederation Internationale des Societes d’Auteurs et Compositeurs (v slovenskem prevodu: *Mednarodna konfederacija društev avtorjev in skladateljev*).

The undersigned law firm hereby on behalf of Združenje SAZAS (on the basis of attached power of attorney) respectfully submits this letter

Spodaj podpisana odvetniška družba (na podlagi priloženega pooblastila) v imenu Združenja SAZAS na Vas naslavlja to pismo z namenom,

partnerji: Aleš ROJS, Grega PELJHAN, Robert PRELESNIK, Tomaž ILEŠIČ, Matija TESTEN,  
David PREMELČ, Bojan ŠPORAR, Sergej OMLADIČ, Gregor PAJEK, Matic NOVAK

Odvetniška družba Rojs, Peljhan, Prelesnik & partnerji o.p., d.o.o., Tivolska cesta 48, p.p. 539, 1000 Ljubljana, Slovenija  
Tel.: +386 1 23 06 750, Fax: +386 1 43 25 123, E-mail: info@rppp.si, www.rppp.si

Vpisana v sodni register Okrožnega sodišča v Ljubljani, št. vr. 1/31396/00, osnovni kapital: 10 000,00 EUR,  
davčna št.: SI86830708, matična št.: 1362917000

in order to draw your attention to the current legislative activity revolving around the transposition of the Directive into the legal order of the Republic of Slovenia. As shall be established below, the anticipated reform of the Slovenian legal framework related to the collective management of authors' rights either thoroughly contradicts the Directive or stretches the scope thereof to an unlawful and unacceptable degree. Worse still, it does so under the pretence of merely implementing the necessary requirements of the Directive into the Slovenian legal order.

The Directive lays down requirements necessary to ensure the proper functioning of the management of copyright and related rights by collective management organisations, as well as requirements licensing by collective management organisations of authors' rights in musical works for online use (Article 1). As per Article 43 of the Directive, Members States should have had to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 10 April 2016. In Slovenia, the Directive has not been transposed yet.

Collective management of authors' rights is currently regulated in the Copyright and Related Rights Act (published in the Official Gazette of the Republic of Slovenia, no. 21/95, with the following amendments, hereinafter referred to as the "Copyright and Related Rights Act"), i.e. in Article 146 et seq. In order to meet the requirements set forth by the Directive, a short

da Vas opozori na trenutno zakonodajno aktivnost v zvezi z implementacijo Direktive v pravni red Republike Slovenije. Kot bo prikazano spodaj, je načrtovana reforma slovenskega pravnega okvira, ki ureja kolektivno upravljanje avtorskih pravic, bodisi v neposrednem nasprotju z Direktivo ali pa domet le-te protipravno in nedopustno razširja. Še več – to stori pod pretezo, češ da gre zgolj za implementacijo nujnih zahtev Direktive v slovenski pravni red.

Direktiva določa zahteve, potrebne za zagotovitev pravilnega izvajanja upravljanja avtorske in sorodnih pravic s strani organizacij za kolektivno upravljanje pravic, ter zahteve za večozemeljsko licenciranje s strani organizacij za kolektivno upravljanje pravic za pravice avtorjev za glasbena dela za spletno uporabo (1. člen). Skladno s 43. členom Direktive bi morale države članice sprejeti zakone in druge predpise, potrebne za uskladitev z Direktivo, do 10. 4. 2016. V Sloveniji Direktiva še ni implementirana.

Kolektivno upravljanje avtorskih pravic je trenutno urejeno v Zakonu o avtorski in sorodnih pravicah (objavljenem v Uradnem listu Republike Slovenije, št. 21/95, s kasnejšimi spremembami in dopolnitvami, v nadaljevanju: "Zakon o avtorski in sorodnih pravicah"), in sicer v členu 146 in naslednjih. Da bi v okviru implementacije zadostili zahtevam Direktive, bi

(and straightforward) amendment of the Copyright and Related Rights Act would be sufficient. Despite the foregoing, the Slovenian Ministry of Economic Development and Technology proposed adoption of a new Collective Management of Copyright and Related Rights Act<sup>1</sup> (hereinafter referred to as the "Act"). It should be noted that none of the stakeholders in the matter (authors, societies of authors or collective management organizations) have been engaged in the process.

Pursuant to Article 2, the Act implements the Directive and partially implements the *Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission*, as well as the *Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights*. However, although the Act is framed as an implementing act of said Directives, the proposed provisions extend far beyond the necessary requirements set forth thereby. As such, the Act serves as a prime example of gold-plating, as shall be elaborated on in more detail below. In addition to implementing a plethora of (excessive) measures that are not foreseen by the Directive, the Act also – to a substantial degree – directly contradicts either the wording and/or the regulatory goals thereof.

zadoščala kratka (in jasna) sprememba Zakona o avtorski in sorodnih pravicah. Kljub temu pa je slovensko Ministrstvo za gospodarski razvoj in tehnologijo v sprejem predložilo nov Zakon o kolektivnem upravljanju avtorske in sorodnih pravic<sup>4</sup> (v nadaljevanju: "ZKUASP"). Ob tem poudarjamo, da pri pripravi ZKUASP ni bil angažiran nihče od deležnikov, na katere se materija nanaša (avtorji, združenja avtorjev ali organizacije za kolektivno upravljanje).

Skladno z 2. členom ZKUASP le-ta v slovenski pravni red prenaša Direktivo in delno prenaša Direktivo Sveta 93/83/EGS z dne 27. septembra 1993 o uskladitvi določenih pravil o avtorski in sorodnih pravicah v zvezi s satelitskim radiodifuznim oddajanjem in kabelsko retransmisijsko ter Direktivo 2006/116/ES Evropskega parlamenta in Sveta z dne 12. decembra 2006 o trajanju varstva avtorske pravice in določenih sorodnih pravic. Četudi pa je ZKUASP osnovan kot implementacijski akt navedenih direktiv, predlagane določbe znatno presegajo nujne zahteve, ki direktiv izhajajo. V tej luči se ZKUASP izkaže kot **prvovrsten primer t.i. pojava "gold-plating"**<sup>5</sup>, kot bo podrobneje obrazloženo spodaj. Poleg implementacije številnih (pretiranih) ukrepov, ki jih Direktiva sploh ne predvideva, pa ZKUASP tudi – v veliki meri – neposredno nasprotuje bodisi dikeljji Direktive ali pa zakonodajnim ciljem le-te.

<sup>1</sup> The proposed Collective Management of Copyright and Related Rights Act was first published and put into public discussion on 14 August 2015.

<sup>4</sup> Predlagan Zakon o kolektivnem upravljanju avtorske in sorodnih pravic je bil prvič objavljen in posredovan v javno razpravo dne 14. 8. 2015.

<sup>5</sup> Izraz za proces, pri katerem implementacija določene direktive v nacionalni pravni red države članice rezultira v pretirani regulaciji oz. se imlementirani direktivi pripisuje moči, ki jih le-ta sicer nima.

In this respect, the Act does not implement the Directive effectively, but quite the contrary. As a result of overregulation, the Act brings about legal uncertainty, increases costs, reduces effectiveness, sets out new administrative burdens, and destabilizes the (otherwise) well established system of collective managements of authors' rights as set out in the Copyright and Related Rights Act. Additionally, by not complying with some of the Directive's provisions aimed at increasing authors' protection, a number of the proposed provisions outrightly breach the authors' rights related to the collective management thereof. Should the proposed reform in fact enter into force, it could lead to *de facto* nullification of intellectual property rights in the Republic of Slovenia.

For the purpose of this letter, we shall focus on a few most notably problematic aspects of the Act, although – to say the least – the Act is troublesome as a whole.

V tem smislu ZKUASP Direktive ne implementira učinkovito, pač pa prav nasprotno. Zavoljo pretirane regulacije ZKUASP povzroča pravno negotovost, povečuje stroške, zmanjšuje učinkovitost, postavlja nove administrativne ovire in destabilizira (sicer) dobro delujoč sistem kolektivnega upravljanja avtorskih pravic, kot je določen v Zakonu o avtorski in sorodnih pravicah. Poleg tega številne določbe ZKUASP v delu, ki se nanaša na zaščito avtorjev, Direktive sploh ne upoštevajo, s tem pa neposredno kršijo pravice avtorjev v zvezi s kolektivnim upravljanjem. Kolikor bo predlagana reforma dejansko sprejeta, bi to lahko vodilo v *de facto* izničenje pravic intelektualne lastnine v Republiki Sloveniji.

Za namen tega pisma se bomo osredotočili le na nekaj najbolj problematičnih aspektov ZKUASP, četudi je le-ta – milo rečeno – težaven v celoti.

### **1. The burden of overregulation**

As per Recital 5 of the Directive, problems with the functioning of collective management organisations lead to inefficiencies in the exploitation of copyright and related rights across the internal market, to the detriment of the members of collective management organisations, rightholders and users. Pursuant to Recital 19 of the Directive, it is important that the rights and categories of rights be determined in a

### **1. Breme pretirane regulacije**

Skladno s 5. uvodno izjavo Direktive je izkorisčanje avtorske in sorodnih pravic na notranjem trgu neučinkovito v škodo članov organizacij za kolektivno upravljanje pravic, imetnikov pravic in uporabnikov tudi zaradi težav pri delovanju organizacij za kolektivno upravljanje pravic. V skladu z 19. uvodno izjavo Direktive je pomembno, da so pravice in kategorije pravic določene na način, ki ohranja

manner that maintains a balance between the freedom of rightholders to dispose of their works and other subject-matter and the ability of the organisation to manage the rights effectively. Further, Recital 42 emphasizes the importance of effective processing of data, and Recital 49 sets forth that it is necessary to ensure the effective enforcement of the provisions of national law adopted pursuant to this Directive. Moreover, Article 4 of the Directive ("General principles") explicitly provides that Member States shall ensure that collective management organisations act in the best interests of the rightholders whose rights they represent and that they do not impose on them any obligations which are not objectively necessary for the protection of their rights and interests or for the effective management of their rights. In addition, also the statute of a collective management organisation shall provide for appropriate and effective mechanisms for the participation of its members in the organisation's decision-making process (Article 6 of the Directive). Effective participation of members in the decision-making process of a collective management organisation is further reaffirmed in Article 8(10) of the Directive.

Given the above, effectiveness of all processes related to collective management organisations is clearly one of the primary focuses of the Directive. To that effect, the Directive sets forth minimum requirements – sufficient to reach the goals of the Directive – but does not overregulate the subject-matter thereof. More so, the Directive does not strive for wider transparency of

ravnovesje med svobodo imetnikov pravic, da razpolagajo s svojimi deli in drugimi vsebinami, ter sposobnostjo organizacije, da pravice upravlja učinkovito, ob upoštevanju zlasti vrste pravic, ki jih upravlja, in ustvarjalnega sektorja, v katerem deluje. Dalje, 42. uvodna izjava poudarja pomembnost učinkovite obdelave podatkov, 49. uvodna izjava pa določa, da je treba zagotoviti učinkovito izvrševanje določb nacionalnega prava, sprejetih na podlagi te Direktive. Poleg tega 4. člen Direktive ("Splošna načela") izrecno določa, da morajo države članice zagotoviti, da organizacije za kolektivno upravljanje pravic delujejo v najboljšem interesu imetnikov pravic, katerih pravice zastopajo, in da jim ne nalagajo nobenih obveznosti, ki niso objektivno potrebne za varstvo njihovih pravic in interesov ali za dejansko upravljanje njihovih pravic. Tudi statut organizacije za kolektivno upravljanje pravic mora predvideti primerne in učinkovite mehanizme za sodelovanje članov organizacije pri njenem postopku sprejemanja odločitev (6. člen Direktive). Učinkovito sodelovanje članov v postopku sprejemanja odločitev je ponovno izpostavljeno tudi v členu 8(10) Direktive.

Z ozirom na navedeno je učinkovitost vseh postopkov, ki se nanašajo na organizacije za kolektivno upravljanje pravic, več kot očitno eden izmed temeljnih ciljev Direktive. V ta namen Direktiva določa minimalne zahteve – zadostne, da se cilji Direktive dosežejo – vendar materije ne regulira pretirano. Ali drugače: Direktiva ne sledi cilju večje transparentnosti

collective management organisations at the expense of efficiency, and effectively treats them as two sides of the same coin. Both can coexist hand in hand and be reached at the same time if the authors are given (enough) autonomy to independently regulate their own internal affairs and day-to-day operations. To this end, administrative burdens should be kept to a minimum, i.e. only to the extent necessary to comply with demands of transparency.

Unfortunately, the proposed Act is conceptually far away from such guidelines (set forth by the Directive!). Should the Act in fact come into force, the collective management organisations will be overburdened with various administrative constraints, even to such a degree that they will be unable to perform their tasks effectively and (cost-) efficiently. As a consequence, this may lead to *de facto* prevention of their existence.

The Act sets out a number of unreasonable provisions – and from the text alone, it is not even possible to discern (legitimate) objectives or reasons behind the proposed solutions. For example, with respect to administrative-technical tasks, collective management organisations may cooperate only with one external entity (and even then in relation to only three out of nine activities of a collective management organization –

Paragraph 3 of Article 16 of the Act), and the latter may not authorize another person to perform any of its tasks (Paragraph 3, Article 16 of the Act); the general assembly of a collective management organisation has to approve the agreement with such an external entity as well as

organizacij za kolektivno upravljanje pravic na škodo učinkovitosti, pač pa ju dejansko obravnava kot dve plati iste medalje. Tako večja transparentnost kot učinkovitost lahko obstojita hkrati, če je avtorjem dana (zadostna) avtonomija, da neodvisno regulirajo svoja lastna interna razmerja in dnevne operativne zadeve. V tej luči bi morale biti administrativne ovire minimalne, tj. le tolikšne, da je zadoščeno zahtevam transparentnosti.

Na žalost je ZKUASP konceptualno daleč od takšnih smernic (ki jih določa Direktiva!). Kolikor bo ZKUASP dejansko sprejet, bodo organizacije za kolektivno upravljanje pravic pretirano obremenjene z najrazličnejšimi administrativnimi omejitvami, celo do te mere, da svojih nalog ne bodo mogle upravljati učinkovito in stroškovno vzdržno, kar lahko vodi v de-facto preprečitev njihovega obstoja.

ZKUASP vsebuje številne nerazumne določbe – iz samega besedila pa niti ni možno izluščiti, kateri so bili (legitimni) cilji oz. razlogi za določene predlagane rešitve. Denimo, kar zadeva administrativno-tehnične naloge, lahko organizacije za kolektivno upravljanje pravic sodelujejo le z enim zunanjim izvajalcem (in še to zgolj za tri od devetih dejavnosti kolektivne organizacije – 3. odstavek 16. člena ZKUASP),

le-ta pa prenesenih nalog ne sme prenesti na tretjo osebo (3. odstavek 16. člena ZKUASP); skupščina organizacije za kolektivno upravljanje pravic mora potrditi pogodbo s takšnim zunanjim izvajalcem, kot tudi kakršne koli spremembe ali odpoved le-te (1. odstavek 25. člena ZKUASP);

any amendments and the termination thereof (Paragraph 1, Article 25 of the Act); in addition, the general assembly is to decide on multiple other issues which are not foreseen by the Directive (Paragraph 1, Article 25 of the Act); further, in Article 39, the Act sets out a number of additional information to be regularly disclosed to the public, substantially beyond the scope of the Directive; the Act also stipulates a set number of people to be employed by the collective management organisation as a condition to obtain the authorisation (Paragraph 2, Article 14 of the Act); authorization procedures are overregulated, burdensome and complicated (Article 14 of the Act) which will surely lead to decrease in the number of authorizations, etc. This list is obviously not exhaustive, and the overregulation is implicit in the high number of Articles contained in the Act as well (87 Articles in the Act as opposed to 45

Articles in the Directive). In addition, the Act also contradicts the existing practice with respect to managing the administrative-technical tasks, regardless of the demands of the Directive.

As previously set out, some of the anticipated provisions may even prevent the sole existence of collective management organizations. For example, in order to be granted the authorization, the Act demands that a collective management organization employs a certain number of people.

Taking into account the minimum wage requirements in the Republic in Slovenia, the costs related to such set number of employees may exceed the budget of collective management organizations, especially the smaller ones.

poleg tega skupščina odloča o mnogih drugih vprašanjih, ki jih Direktiva ne predvideva (1. odstavek 25. člena ZKUASP); dalje, v 39. členu ZKUASP določa številne dodatne informacije, ki morajo biti posredovane javnosti, bistveno nad dometom Direktive; ZKUASP določa tudi število ljudi, ki jih mora organizacija za kolektivno upravljanje pravic zaposlovati, kot pogoj za pridobitev dovoljenja za delovanje (2. odstavek 14. člena ZKUASP); postopki za pridobitev dovoljena so prav tako pretirano regulirani, preobremenjujoči in komplikirani (14. člen ZKUASP), kar bo gotovo vodilo v zmanjšanje števila izdanih dovoljenj, ipd. Navedeni seznam seveda ni izčrpen, pretiranost regulacije pa implicira že visoko število členov v ZKUASP (87 členov v primerjavi z Direktivo, ki jih ima le 45). ZKUASP pa tudi nasprotuje obstoječi praksi upravljanja administrativno-tehničnih poslov.

Kot že omenjeno, nekatere od predvidenih določb bi lahko celo dejansko preprečile sam obstoj organizacij za kolektivno upravljanje pravic. Denimo, če želi organizacija za kolektivno upravljanje pravic pridobiti dovoljenje pristojnega organa, mora zaposlovati določeno število ljudi. Glede na zahteve v zvezi z minimalno plačo v Republiki Sloveniji bi lahko stroški za takšno določeno število zaposlenih presegli proračun organizacij za kolektivno upravljanje pravic, še posebej

Hence, such smaller collective management organizations will not be even able to exist. How is it possible to claim that this is "*in the best interests of the rightholders*"<sup>2</sup>?

manjših. Le-te tako sploh ne bodo mogle obstajati. Kako je potem mogoče trditi, da se s tem zasleduje "*najboljši interes imetnikov pravic*"<sup>3</sup>

## **2. The issues of control**

Further to our main points under (1), a substantial portion of excessive norms regulate the control of the state. The objectives of the Directive are clear (Recital 55): it intends to improve the ability of the collective management organisations' members to exercise control, to guarantee sufficient transparency, and to improve the multi-territorial licensing as regards the online use of musical works. Thus, the right to control the collective management organisations vests in its members, not the state. In light of the principles of human rights law, as shall be briefly established under (3) below, any limitations of intellectual property rights (which include, above all, state intervention) are legitimate and justifiable only if necessary to protect the public interest (order) and/or other human rights in collision. However, the conception of the proposed Act is clearly not grounded in these assumptions. As such, it contradicts the provisions of the Directive – which promotes supervisory powers of collective management organisations members', not the authorities' – as well as the principles of (international and domestic) human rights law.

## **2. Težave v zvezi z nadzorom**

Poleg točk, ki smo jih izpostavili v 1. razdelku, bistven del pretiranega števila norm regulira nadzor države. Cilji Direktive so jasni (uvodna izjava 55): izboljšanje možnosti članov organizacij za kolektivno upravljanje pravic za izvajanje nadzora nad dejavnostmi teh organizacij, zagotovitev zadostne preglednosti in izboljšanje večozemeljskega licenciranja za pravice avtorjev za spletno uporabo glasbenih del. Pravica do nadzora nad organizacijo za kolektivno upravljanje pravic je tako pridržana njenim članom. V luči načel prava človekovih pravic, kot bodo na kratko predstavljena v 3. razdelku spodaj, so kakršnekoli koli omejitve pravic intelektualne lastnine (kar prvenstveno vključuje posege s strani države) legitimne in upravičene le tedaj, če so nujne za varstvo javnega interesa (reda) in/ali drugih človekovih pravic v koliziji. Koncept predlaganega ZKUASP pa očitno ne temelji na takšnih predpostavkah. S tem nasprotuje Direktivi – ki določa, da imajo nadzorno moč člani organizacij za kolektivno upravljanje pravic – pa tudi načelom (mednarodnega in nacionalnega) prava človekovih pravic.

<sup>2</sup> Reference to Article 4 of the Directive.

<sup>3</sup> Referenca na 4. člen Direktive.

The powers granted to the Slovenian Intellectual Property Office (which is a body within the Slovenian Ministry of Economic Development and Technology, i.e. the ministry that proposed adoption of the Act!) are excessive. For example, pursuant to Article 70 of the Act, the Slovenian Intellectual Property Office as the competent authority may exercise these powers at will, i.e. without any prerequisites, without any safeguards, and without any limitations. The existing Copyright and Related Rights Act, on the other hand, sets forth at least some minimal requirements for the competent authority to comply with (Article 162), aimed at proportionality and necessity of the competent authority's use of powers. There are absolutely no legitimate reasons for these requirements to be omitted in the Act. Even within the existing framework pursuant to the Copyright and Related Rights Act, the Slovenian Intellectual Property Office often exceeded its powers, which was later recognized by the competent courts as well. If there is no minimal requirements prescribed by the law, this would be even a stronger incentive for the Slovenian Intellectual Property Office to exercise its powers excessively and disproportionately.

Furthermore, in comparison with the Copyright and Related Rights Act, the Act – again, for no apparent (legitimate) reason – expands the list of circumstances that legitimate immediate withdrawal of an authorization. For example, the competent authority may immediately withdraw an authorization if the collective management organisation authorizes an external entity to

Moč, ki je dana slovenskemu Uradu za intelektualno lastnino (ki je organ pod okriljem Ministrstva za gospodarski razvoj in tehnologijo, torej ministrstva, ki je predlagalo sprejem ZKUASP!), je pretirana. Denimo, skladno s 70. členom ZKUASP sme slovenski Urad za intelektualno lastnino kot pristojni organ navedene pristojnosti izvajati povsem po svoji volji, tj. brez vezanosti na kakršen koli pogoj, brez kakršnih koli varovalk in brez kakršnih koli omejitev. Obstojecí Zakon o avtorski in sorodnih pravicah, po drugi strani, vsebuje vsaj določene minimalne zahteve, ki jim mora pristojni organ zadostiti (162. člen), vezane na sorazmernost in nujnost izvajanja pristojnosti. Ne obstaja noben legitimen razlog za opustitev teh zahtev v ZKUASP. Tudi v okviru obstoječe pravne podlage, ki jo uokvirja Zakon o avtorski in sorodnih pravicah, je slovenski Urad za intelektualno lastnino pogosto presegel svoje pristojnosti, kar je bilo kasneje tudi ugotovljeno s strani pristojnih sodišč. Če v zakonu sploh ni določenih nikakršnih minimalnih zahtev, pa je to še večja vzpodbuda za slovenski Urad za intelektualno lastnino, da svoje pristojnosti izvaja preko svojih pooblastil in nesorazmerno.

Dalje, v primerjavi z Zakonom o avtorski in sorodnih pravicah, ZKUAPS – ponovno, brez očitnega (legitimnega) razloga – razširja seznam okoliščin, ob obstoju katerih sme pristojni organ organizaciji za kolektivno upravljanje pravic nemudoma odvzeti dovoljenje. Denimo, pristojni organ sme nemudoma odvzeti dovoljenje, če organizacija za kolektivno upravljanje v

perform certain tasks against provisions of the Act, or if the collective management organization distributes the amounts due to rightholders against the provisions of the Act or the rules on such distribution (Paragraph 3, Article 72 of the Act). By virtue of such powers – for example – only a marginal mistake or non-compliance with some administrative technicalities (completely overregulated in the Act!) is sufficient for withdrawal of an authorisation. A provision which allows for such consequences on the grounds of such factual basis is *prima facie* too strict to be considered proportional. What is more, a provision this wide almost calls for arbitrariness on the side the competent authority, and gives no protection to the collective management organizations and their members. In addition, it also contradicts the Directive. Namely, while the Directive "*does not provide for specific types of sanctions*", it does demand that they be "*effective, proportionate and dissuasive*" (Recital 50 of the Directive). This notion is reaffirmed in Paragraph 3 of Article 36: "*Member States shall ensure that the competent authorities designated for that purpose have the power to impose appropriate sanctions or to take appropriate measures where the provisions of national law adopted in implementation of this Directive have not been complied with. Those sanctions and measures shall be effective, proportionate and dissuasive.*" Even if withdrawal of an authorization with immediate effect may be deemed "*effective*" and "*dissuasive*", it is certainly not proportional.

nasprotju z določbami ZKUASP prenese opravljanje svojih nalog na zunanjega izvajalca, ali če deli zbrana sredstva imetnikom pravic v nasprotju s tem zakonom ali pravili o delitvi zbranih avtorskih honorarjev (3. odstavek 72. člena ZKUASP). Na podlagi takšnih pristojnosti – denimo – je zgoj manjša napaka oz. neupoštevanje določenih marginalnih administrativnih ovir (ki so v ZKUAPS povsem pretirano regulirane!) dovolj za odvzem dovoljenja. Določba, ki na podlagi takšnega dejanskega okvira dopušča takšne posledice, je že *prima facie* preveč stroga, da bi jo lahko ocenili za sorazmerno. Še več, tako široka določba skorajda kliče po arbitarnosti na strani pristojnega organa, in organizacijam za kolektivno upravljanje pravic ter njihovim članom ne nudi nikakršne zaščite. Poleg tega pa tudi nasprotuje Direktivi. Namreč, četudi Direktiva "ne določa podrobnosti o vrstah sankcij ali ukrepov", zahteva, da so le-ti "*učinkoviti, sorazmerni in odvračilni*" (50. uvodna izjava Direktive). Slednje potrjuje tudi 3. odstavek 36. člena Direktive: "*Države članice zagotovijo, da pristojni organi, imenovani v ta namen, lahko odredijo ustrezne sankcije in sprejmejo ustrezne ukrepe v primeru neusklajenosti z nacionalnimi določbami, sprejetimi za izvajanje te direktive. Te sankcije in ukrepi so učinkoviti, sorazmerni in odvračilni.*" Četudi bi se lahko štelo, da je takojšen odvzem dovoljenja "*učinkovit*" in "*odvračilen*", pa se zagotovo ne more štetiti, da je tudi sorazmeren.

**3. Mandatory collective management of rights and monopoly**

In Recital 2, the Directive provides that “*it is normally for the rightholder to choose between the individual or collective management of his rights, unless Member States provide otherwise, in compliance with Union law and the international obligations of the Union and its Member States.*” Based on the foregoing, the authors – as a rule – should be able to freely choose between individual or collective management of their rights, and any limitations of such a right shall be recognized as legitimate and justified only if compliant with Union law and international obligations of the Union or the Member States.

Amongst other, Member States are obliged to respect the provisions of the Charter of Fundamental Rights of the European Union which is as a part of Union law. More so, such an obligation is even expressly set forth in Recital 54 of the Directive: “*This Directive respects the fundamental rights and observes the principles enshrined in the Charter of Fundamental Rights of the European Union*”. To this end, the Directive should be construed and interpreted in accordance with the Charter of Fundamental Right of the European Union (hereinafter referred to as the “Charter”).

In Article 17, the Charter recognizes intellectual property rights as inherent in one of the most basic human rights – the right to property. In accordance with the general principle of

**3. Obvezno kolektivno upravljanje pravic in monopol**

V 2. uvodni izjavi Direktiva določa, da “*običajno lahko imetnik pravic izbira med individualnim ali kolektivnim upravljanjem svojih pravic, razen če države članice določijo drugače, v skladu s pravom Unije ter mednarodnimi obveznostmi Unije in njenih držav članic.*” Na tej podlagi bi morali imeti avtorji praviloma pravico, da prosto izberejo med individualnim ali kolektivnim upravljanjem svojih pravic, in kakršne koli omejitve v tem oziru so legitimne in upravičene le, kolikor so skladne s pravom Unije in mednarodnimi obveznostmi Unije ali držav članic.

Med drugim so države članice dolžne spoštovati določila Listine EU o temeljnih pravicah, ki je del prava Unije. Še več, ta dolžnost je celo izrecno določena v 54. uvodni izjavi Direktive: “*Ta direktiva spoštuje temeljne pravice in upošteva načela iz Listine Evropske unije o temeljnih pravicah*”. Z ozirom na navedeno je treba Direktivo razumeti in interpretirati skladno z Listino Evropske Unije o temeljnih pravicah (v nadaljevanju: “Listina”).

V 17. členu Listina izrecono šteje pravice intelektualne lastnine kot inherentne v eni izmed najbolj temeljnih človekovih pravic – pravici do lastnine. Skladno z načelom

proportionality (as one of the foundational principles of the European Union law<sup>3</sup>), such a right may be only interfered with to the extent necessary in the public interest or other human rights in collision. This notion is also consistent with the Directive, which deems mandatory collective management of rights exceptional.

Furthermore, International Covenant on Economic, Social and Cultural Rights of 16 December 1966 (hereinafter referred to as the "Covenant") to which Slovenia is a party, likewise recognizes the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (Article 15 (1(c))), and the steps to be taken to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture (Article 15(2)). Again, this international obligation (!) very clearly provides for little leverage as regards limitation of intellectual property rights.

These principles, however, are not reflected in the Act. Namely, in Article 9, the Act anticipates mandatory collective management of rights even in non-exceptional cases, for example with respect to communication to the public of non-theatrical musical works and literary works (save

sorazmernosti (kot enim osnovnih načel prava Evropske Unije<sup>7</sup>) je lahko takšna pravica omejena le, kolikor je to uujno za varstvo javnega interesa ali drugih človekovih pravic v koliziji. Slednje je tudi skladno z Direktivo, ki šteje, da velja obvezno kolektivno upravljanje pravic predpisati zgolj izjemoma.

Dalje, Mednarodni pakt o ekonomskih, socialnih in kulturnih pravicah z dne 16. 12. 1966 (v nadaljevanju: "Pakt"), katerega pogodbenica je tudi Slovenija, prav tako priznava pravico vsakogar, da uživa varstvo moralnih in materialnih koristi, ki izhajajo iz kateregakoli znanstvenega, književnega ali umetniškega dela, katerega avtor je (člen 15 (1(c)); ukrepi, s katerimi države pogodbenice Pakta zagotavljajo polno uresničevanje te pravice, pa morajo obsegati ukrepe, ki so potrebni za ohranitev, razvoj in širjenje znanosti in kulture (člen 15(2)). Ponovno, ta mednarodna obveznost (!) ne daje veliko prostora za omejitve pravic intelektualne lastnine.

Kljud temu pa ZKUASP navedenih načel ne odraža. Namreč, v 9. členu ZKUAP predpisuje obvezno kolektivno upravljanje pravic tudi v neizjemnih primerih, denimo če gre za priobčitev javnosti neodrskih glasbenih in pisanih del (razen pravice dajanja na voljo javnosti iz 32.a člena

<sup>3</sup> See, for example, Federation Charbonniere de Belgique v. High Authority [1954] ECR 245 Case C8/55; Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle Getreide [1970] ECR 1125 Case 11/70; R v. Minister of Agriculture, Fisheries and Food ex parte Fedesa [1990] ECR 1-4023 Case C-331/88.

<sup>7</sup> Glej, denimo, Federation Charbonniere de Belgique v. High Authority [1954] ECR 245, opr. št. C8/55; Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle Getreide [1970] ECR 1125, opr. št. 11/70; R v. Minister of Agriculture, Fisheries and Food ex parte Fedesa [1990] ECR 1-4023, opr. št. C-331/88.

for the right from Article 32.a of the Copyright and Related Rights Act). In view of the undersigned Združenje SAZAS, there are no legitimate and justifiable grounds for such a provision, neither does its necessity stem from the provisions of the Directive. On the contrary, the Directive promotes free choice as a basis of protection of the authors' rights. In addition, the objectives of the Directive as set forth in Recital 55 – *to improve the ability of their members to exercise control over the activities of collective management organisations, to guarantee sufficient transparency by collective management organisations and to improve the multi-territorial licensing of authors' rights in musical works for online use* – do not demand any mandatory measures which could result in a decrease of the level of protection. What is more, the anticipated Article 9 of the Act does not only contradict the Directive, but also the principles of proportionality and respect for human rights as the core foundations of the European legal framework.

In addition, besides enforcing mandatory collective management of rights even when there are no reasonable and justifiable grounds for such system, the Act also establishes monopoly of only one collective management organization that can run the mandatory collective management of rights. Namely, Paragraph 3 of Article 14 sets forth that the competent authority does not issue an authorization for mandatory collective management of rights to a collective management organization if there is an existing collective management organization authorized

Zakona o avtorski in sorodnih pravicah). Po njenemu spodaj podpisanega Združenja SAZAS ni nikakršnih legitimnih ali upravičenih razlogov za takšno ureditev, nujnost leta pa tudi ne izhaja iz določb Direktive. Prav nasprotno, Direktiva določa prosto izbiro kot osnovo varstva pravic avtorjev. Poleg tega cilji Direktive, kot so opredeljeni v 55. uvodni izjavi – *izboljšanje možnosti članov organizacij za kolektivno upravljanje pravic za izvajanje nadzora nad dejavnostmi teh organizacij, zagotovitev zadostne preglednosti s strani organizacij za kolektivno upravljanje pravic in izboljšanje večozemeljskega licenciranja za pravice avtorjev za spletno uporabo glasbenih del* – ne zahtevajo nobenih obveznih ukrepov, ki bi lahko vodili v zmanjšanje ravni zaščite. Še več, predviden 9. člen Direktive ne nasprotuje zgolj Direktivi, pač pa tudi načelom sorazmernosti in spoštovanja človekovim pravic kot najbolj osnovnim temeljem, na katerih stoji Evropski pravni red.

Poleg določitve obveznega kolektivnega upravljanja pravic tudi kadar ni nobenih razumih ali upravičenih razlogov za takšen sistem, pa ZKUASP obenem vzpostavlja monopol zgolj ene organizacije za kolektivno upravljanje pravic, ki lahko vodi obvezno upravljanje pravic.

Namreč, 3. odstavek 14. člena določa, da pristojni organ, kadar gre za obvezno kolektivno upravljanje pravic, ne izda dovoljenja za kolektivno upravljanje avtorske pravice pravni osebi, če je za isto vrsto avtorskih del in za iste pravice že izdano dovoljenje za kolektivno

to manage the same type of copyright. Hence, the authors are denied the option to form their own or authorize another collective management organization for collective management of rights, despite the Directive's straightforward provision that "*the rightholders shall have the right to authorize a collective management organisation of their choice to manage the rights [...]*" (Paragraph 2, Article 5 of the Directive). Furthermore, Paragraph 2 of Recital 19 of the Directive emphasizes the importance of "*balance between the freedom of rightholders to dispose of their works and other subject-matter and the ability of the organisation to manage the rights effectively [...]. Taking due account of that balance, rightholders should be able easily to withdraw such rights or categories of rights from a collective management organisation and to manage those rights individually or to entrust or transfer the management of all or part of them to another collective management organisation or another entity [...]. 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.*"

upravljanje avtorske pravice drugi kolektivni organizaciji. To pomeni, da v tem primeru avtorji ne morejo sami ustanoviti ali pa pooblastiti druge organizacije za kolektivno upravljanje pravic, pa četudi Direktiva povsem jasno določa, da imajo imetniki pravic pravico, "da organizacijo za kolektivno upravljanje pravic po lastni izbiri pooblastijo za upravljanje pravic [...]" (2. odstavek 5. člena Direktive). Dalje, 2. odstavek 19. uvodne izjave Direktive tudi poudarja, da je pomembno "*ravnovesje med svobodo imetnikov pravic, da razpolagajo s svojimi deli in drugimi vsebinami, ter sposobnostjo organizacije, da pravice upravlja učinkovito [...]. Imetnikom pravic bi moralo biti ob ustremem upoštevanju tega ravnovesja omogočeno, da enostavno umaknejo takšne pravice ali kategorije pravic iz organizacije za kolektivno upravljanje pravic in te pravice upravljajo individualno ter za vse pravice ali kategorije pravic ali njihov del pooblastijo drugo organizacijo za kolektivno upravljanje pravic ali subjekt ali upravljanje nanj prenesejo [...]. Kadar država članica v skladu s pravom Unije in mednarodnimi obveznostmi Unije in njenih držav članic določi obvezno kolektivno upravljanje pravic, je izbira imetnikov pravic omejena na druge organizacije za kolektivno upravljanje pravic.«*

As established above – contrary to the Directive – in all cases of mandatory collective management of rights, the Act does not give the rightholders the right to authorize a collective management organization of their choice to manage their rights as there shall be only one collective management organization to choose

Kot že navedeno – v nasprotju z Direktivo – v vseh primerih obveznega kolektivnega upravljanja pravic, ZKUASP avtorjem ne daje pravice, da sami pooblastijo organizacijo za kolektivno upravlja pravic po svoji lastni izbiri, ker namreč v takšnih primerih obstoji zgolj ena organizacija za kolektivno upravljanje pravic. Z

from. In other words: there are no "other" drugimi besedami: ni nobenih "drugih" collective management organizations. organizacij za kolektivno upravljanje pravic.

In Paragraph 3 of Article 18, the Act also provides that such (an exclusive) collective management organization for mandatory collective management of rights may manage the rights of authors even if not authorized by the authors. Thus, the authors are not only denied the option to authorize a collective management organization of their choice to manage their rights, but worse so – the collective management organization for mandatory collective management of rights may even manage the authors' rights against their own will. This is in direct conflict with said Paragraph 2 of Recital 19 of the Directive ("[...] rightholders should be able easily to withdraw such rights or categories of rights from a collective management organisation [...]") and Paragraph 1 of Article 5 of the Directive – establishing that a collective management organization must be authorized to manage the authors' rights – as well as Paragraph 4 of Article 5 of the Directive, stipulating that "*the rightholders shall have the right to terminate the authorization to manage rights, categories of rights or types of works and other subject-matter granted by them to a collective management organisation or to withdraw from a collective management organisation any of the rights, categories of rights or types of works and other subject-matter of their choice [...]*". The Act clearly contradicts all of the aforementioned provisions of the Directive.

V 3. odstavku 18. člena ZKUASP dalje določa, da lahko takšna (ekskluzivna) organizacija za kolektivno upravljanje pravic upravlja avtorske pravice brez pooblastila imetnika pravic. Avtorjem tako ni le odvzeta možnost, da za upravljanje pravic pooblastijo organizacijo za kolektivno upravljanje pravic po svoji lastni izbiri, pač pa še več – organizacija za obvezno kolektivno upravljanje pravic sme celo upravljati z avtorjevimi pravicami proti njihovi lastni volji. Slednje je v neposrednem nasprotju z navedenim 2. odstavkom 19. uvodne izjave Direktive ("[...] imetnikom pravic bi moralo biti ob ustrezнем upoštevanju tega ravnovesja omogočeno, da enostavno umaknejo takšne pravice ali kategorije pravic iz organizacije za kolektivno upravljanje pravic [...]") in 1. odstavkom 5. člena Direktive – ki določa, da mora biti organizacija za kolektivno upravljanje pravic pooblaščena za upravljanje s pravicami avtorjev – kot tudi s 4. odstavkom 5. člena Direktive, ki določa, da imajo imetniki pravic pravico, "da prekinejo pooblastilo za upravljanje pravic, kategorij pravic ali vrst del in druge vsebine, ki so ga podelili organizaciji za kolektivno upravljanje pravic ali da iz organizacije za kolektivno upravljanje pravic umaknejo katere koli pravice, kategorije pravic ali vrste del in druge vsebine po lastni izbiri [...]" ZKUASP je v očitnem nasprotju z vsemi navedenimi določbami.

#### **4. The Act interferes with the Union's internal market**

As briefly set out under (1), the Act unacceptably restricts the conditions for authorizations and excessively regulates the authorization procedure (Article 14 of the Act). While this is a particular issue in itself (elaborated on under (1)), it also has certain distinctive implications with respect to the *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society* (hereinafter referred to as the "Directive 2001/29/EC").

In Article 2, the Directive 2001/29/EC sets forth the obligation of the Members States to provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, but further allows for an exception 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 (Article 5(2)). However, this exception may be only applied on the condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in the Directive 2001/29/EC ((Article 5(2)). The Republic of Slovenia has opted for such an exception, but at the same time failed to provide for any measures with respect to enforcement of the right to fair compensation.

#### **4. ZKSUAP posega v notranji trg**

Kot na kratko že izpostavljeno v 1. razdelku, ZKUASP nedopustno omejuje izdajo dovoljenj in pretirano regulira postopek izdaje dovoljenj (14. člen ZKUASP). Slednje je sicer problematično že samo po sebi (kot je to podrobneje pojasnjeno v 1. razdelku), ima pa tudi določene posebne implikacije v kontekstu Direktive 2001/29/ES Evropskega parlamenta in Sveta z dne 22. maja 2001 o usklajevanju določenih vidikov avtorske in sorodnih pravic v informacijski družbi (v nadaljevanju: "Direktiva 2001/29/ES").

V 2. členu Direktiva 2001/29/ES določa obveznost držav članic, da predvidijo izključno pravico dovolitve ali prepovedi, neposrednega ali posrednega, začasnega ali stalnega, reproduciranja na vsak način in v vsaki obliki, v celoti ali deloma, pri čemer dalje priznava izjemo v zvezi z reproducijami v katerem koli mediju, ki jih izdela fizična oseba za privatno uporabo in v namene, ki niso niti posredno niti neposredno komercialni (5. člen (2)), vendar le ob pogoju, da imetniki pravic prejmejo pravično nadomestilo, pri katerem se upošteva uporaba ali neuporaba tehničnih ukrepov, na katere se Direktiva sklicuje (5. člen (2)). Republika Slovenija je uveljavila takšno izjemno, vendar ni določila nobenih ukrepov, ki bi imetnikom pravic zagotavljal pravično nadomestilo.

Instead of appropriately and accurately implementing said Directive 2001/29/EC, the Act further restricts the conditions for authorizations, and puts in place numerous administrative burdens. The legal framework envisioned in the Act *de facto* prevents the collective management organisations from obtaining authorizations. The Act even omits a provision contained in the Copyright and Related Rights Act, which allowed the competent authority to grant temporary authorizations (although – it should be noted – the competent authority refused to grant such authorizations anyway). With this in mind, the Act does not aid in the improvement of the “fair compensation” system, but effectively prevents it from even developing. As a consequence, the authors’ are simply not compensated from the sales of, for example, blank carriers of sound and picture (for example USB flash drives, CDs), which finally enables the Slovenian market actors to set a lower price thereof. Without a doubt, such strategies (allowed and legitimized by the state!) may have negative effects on the internal market of the Union.

Namesto da bi ZKUASP ustrezno in pravilno implementiral navedeno Direktivo 2001/29/ES, je še nadalje zaostril pogoje za pridobitev dovoljenja in določil številna administrativna bremena. Pravni okvir, ki ga predvideva ZKUASP, organizacijam za kolektivno upravljanje avtorskih pravic *de facto* preprečuje, da bi pridobile dovoljenje. ZKUASP celo opusti določbo iz Zakona o avtorski in sorodnih pravicah, ki je pristojnemu organu omogočala, da izda začasna dovoljenja (pa četudi – kot velja poudariti – pristojni organ predmetnih začasnih dovoljenj tako ali tako ni izdajal). V tej luči ZKUASP nikakor ne vzpostavlja sistema “pravičnega nadomestila”, pač pa dejansko preprečuje, da bi se le-ta sploh razvijl. Posledično avtorji ne prejmejo nikakršnega nadomestila za, denimo, prazne nosilce zvoka in slike (npr. USB ključke, CD-je), kar omogoča slovenskim trgovcem, da le-tem določijo nižjo ceno. Nedvomno imajo lahko takšne strategije (ki jih dopušča in legitimizira država!) negativne vplive na notranji trg Unije.

##### **5. Other non-compliant provisions**

There is a plethora of other non-compliant provisions of note in the Act, including the following:

- the Directive defines a collective management organization as “*any organization which is authorized by law or*
- Direktiva definira organizacijo za kolektivno upravljanje pravic kot “*vsako organizacijo, ki je z zakonom ali z dodelitvijo, licenco ali*

##### **5. Druga neustrezna določila**

*by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright”* (Article 3(b) of the Directive), yet the Act only provides for the authorization system, i.e. the authors may not autonomously establish a collective management organization without the competent authority's approval, or authorize a collective management organization that does not have such an approval (Article 4 of the Act), although one cannot find any rational reason for that in the context of the existing system;

- the Directive provides that collective management organisations are authorized to manage copyright or rights related to copyright to as its sole or main purpose (Article 3(a) of the Directive), while the Act provides that collective management organisations may manage such rights only as their sole purpose (Article 4 of the Act), and thus preventing the authors and rightholders from undertaking any other or additional pursuits within a respective collective management organization;
- the Directive sets forth that collective management organisations should be free to have certain of their activities, such as the invoicing of users or the distribution of amounts due to rightholders, carried out by subsidiaries or by other entities that they control (Protocol 17 of the Directive). The Act, on the other hand, provides that

*katerim koli drugim pogodbenim dogovorom pooblaščena za upravljanje avtorske ali sorodnih pravic”* (člen 3(b) Direktive), medtem kot ZKUASP predvideva zgolj sistem dovoljenj, tj. avtorji organizacije za kolektivno upravljanje pravic ne morejo ustanoviti avtonomno, brez odobritve pristojnega organa, ali pooblastiti organizacije za kolektivno upravljanje pravic, ki nima takšne odobritve (4. člen ZKUASP), za kar v kontekstu obstoječega sistema ni najti razumnega razloga;

Direktiva določa, da so organizacije za kolektivno upravljanje pravic pooblaščene za upravljanje avtorske ali sorodnih pravic, pri čemer je to njen edini ali **glavni namen** (člen 3(a) Direktive), ZKUASP pa določa, da organizacije za kolektivno upravljanje pravic upravljajo s takšnimi pravicami kot s svojo edino dejavnostjo (4. člen ZKUASP), kar avtorjem in imetnikom pravic preprečuje, da bi v okviru določene organizacije za kolektivno upravljanje pravic opravljali katerokoli drugo aktivnost oz. dejavnost;

Direktiva predvideva, da bi moralo biti organizacijam za kolektivno upravljanje pravic na voljo, da za opravljanje določenih dejavnosti, kot sta izdajanje računov uporabnikom ali razdelitev pripadajočih zneskov imetnikom pravic, določijo podružnice ali druge subjekte pod njihovim nadzorom (17. uvodna izjava Direktive). Po

administrative-technical related to a very limited domain of the collective management organization's activities may be delegated, and exclusively to one external entity (Paragraph 3 of Article 16 of the Act). Hence, the Act prohibits delegation of activities of the collective management organization, and only allows delegation of certain administrative-technical tasks. The Directive anticipates no such limitations. It also sets out no limitation for delegation to only one external entity nor to only three out of nine activities. As set out above, the Act also prohibits the external entity to authorize a third person to perform any of its delegated tasks (Paragraph 3 of Article 16 of the Act), again without any grounds set forth by the Directive. In addition, pursuant to Paragraph 1 of Article 17 of the Act, such external entities – if they are not collective management organizations, but companies – have to be controlled by the collective management organization. The Directive stipulates that subsidiaries or other entities performing activities of a collective management organization must be controlled, but – again – sets out no limitations with respect to administrative-technical tasks, such as, for example, accounting or IT services;

drugi strani pa ZKUASP določa, da se lahko prenese zgolj izvajanje administrativno-tehničnih nalog v zvezi z zelo ozko določenimi dejavnostmi organizacije za kolektivno upravljanje pravic, pa še to zgolj enemu zunanjemu izvajalcu (3. odstavek 16. člena ZKUASP). ZKUASP tako prepoveduje prenos izvajanja dejavnosti organizacije za kolektivno upravljanje pravic in dovoljuje zgolj delegacijo določenih administrativno-tehničnih nalog. Direktiva takšnih omejitev ne predvideva, kaj šele omejitev zgolj na enega zunanjega izvajalca in še to zgolj za tri od devetih dejavnosti. Kot že navedeno, ZKUASP tudi določa, da zunanji izvajalec prenesenih nalog ne sme prenesti na drugo osebo (3. odstavek 16. člena ZKUASP), ponovno brez kakršnih koli razlogov, ki bi izhajali iz Direktive. Obenem morajo biti na podlagi 1. odstavka 17. člena ZKUASP zunanji izvajalci – če sami niso organizacije za kolektivno upravljanje pravic, pač pa pravne osebe – pod nadzorom kolektivne organizacije. Direktiva sicer določa, da morajo biti podružnice ali drugi subjekti pod njihovih nadzorom, vendar se to nanaša na izvajanje dejavnosti, Direktiva pa – ponovno – ne določa nikakršnih omejitev, kar zadeva administrativno-tehnične naloge, denimo računovodstvo ali računalniške storitve;

- the Act prohibits or at least *de facto* prevents the authors to manage the business of a collective management organization. Namely, in Paragraph 6 of Article 26, the Act - ZKUASP prepoveduje ali vsaj *de facto* preprečuje, da bi avtorji lahko upravljali posle organizacije za kolektivno upravljanje pravic. Namreč, v 6. odstavku 26. člena

provides that a member of the management board of a collective management organization may undertake other profitable activities or transactions on its or third person's behalf only upon obtaining an approval by the supervisory board of a collective management organization. No such limitation is set forth by the Directive. On the contrary, the Directive allows rightholders to hold a management position in a collective management organization. This (amongst other) logically derives from Paragraph 1 and 2(b) of Article 10 of the Directive, stipulating that persons who manage the business of a collective management organization shall provide an individual statement to the general assembly of members containing information "*any amounts received in the preceding financial year from the collective management organisation as a rightholder*". Hence, if the rightholders (authors) were prevented from managing the business of the collective management organization, such a provision would have been completely redundant. *Argumentum a contrario*, rightholders may hold managing positions, as long as they provide said statement to the general assembly of the collective management organization. The proposed amendments, set out in the last two paragraphs, also conflict with the existing practice.

As aforementioned, the non-compliant provisions of the Act set out above are not comprehensive, but merely exemplificatory. The

ZKUASP je določeno, da član poslovodstva ne sme brez soglasja nadzornega odbora opravljati druge pridobitne dejavnosti, pa tudi ne sklepati poslov za svoj ali tuj račun. Direktiva ne predvideva nobene takšne omejitve. Prav nasprotno, Direktiva imetnikom pravic dovoljuje, da v organizaciji za kolektivno upravljanje pravic zasedajo poslovne položaje. Slednje (med drugim) logično izhaja iz 1. in 2(b). odstavka 10. člena Direktive, ki določa, da morajo osebe, ki upravljajo posle organizacije za kolektivno upravljanje pravic, skupščini predložiti individualno izjavo, ki vsebuje informacijo "*o vseh zneskih, ki so jih v preteklem finančnem letu kot imetniki pravic prejeli od organizacije za kolektivno upravljanje pravic*". Če imetniki pravic (avtorji) ne bi smeli upravljati poslov organizacije za kolektivno upravljanje pravic, bi bila takšna določba povsem nesmiselna oz. nepotrebna. *Argumentum a contrario*, imetniki pravic lahko zasedajo poslovne funkcije, če skupščini organizacije za kolektivno upravljanje pravic predložijo zadevno izjavo. Predlagane spremembe, opisane v zadnjih dveh alinejah, tudi nasprotujejo obstoječi praksi.

Kot že navedeno, navedeni seznam neustreznih določb ZKUASP ni izčrpen, pač pa zgolj eksemplifikativen. Usodne pomanjkljivosti

fatal flaws of the Act, however, are not only non-compliant provisions, but also gold-plating, conceptual fallacies, and violations of the authors' rights.

The undersigned respectfully requests that the above considerations be addressed in accordance with your capacities.

ZKUASP pa niso zgolj neustrezne določbe, pač pa tudi t.i. gold-plating, konceptualne napake, in kršitve pravic avtorjev

Spodaj podpisani Vas s spoštovanjem prosi, da zgoraj navedene pomisleke naslovite skladno s svojimi pristojnostmi.

Združenje SAZAS,

on their behalf Law firm Rojs, Peljhan,  
Prelesnik & partners o.p., d.o.o.

Rojs, Peljhan, PRELESNIK

Združenje SAZAS,

zanje Odvetniška družba Rojs, Peljhan,  
Prelesnik & partnerji o.p., d.o.o.

cc: European Commission Representation  
Office in Slovenia  
Breg 14  
1000 Ljubljana

v vednost: Predstavništvo Evropske komisije  
v Republiki Sloveniji  
Breg 14  
1000 Ljubljana

## **Document 17**

Letter from the Law Firm Rojs, Pelijhan, Prelesnik & Partners on  
behalf of SAZAS regarding the Directive 2014/26/EC and the  
problematic legislative activity in the Republic of Slovenia,  
17/05/2016, (Ref. Ares(2016)2348423)

**From:** NOVEANU Miruna (CAB-OETTINGER) on behalf of OETTINGER Guenther (CAB-OETTINGER)  
**Sent:** 18 May 2016 09:41  
**To:** CAB OETTINGER ARCHIVES  
**Subject:** FW: Directive 2014/26/EC - problematic legislative activity in the Republic of Slovenia  
**Attachments:** SAZAS\_letter.pdf

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**From:** [REDACTED]  
**Sent:** Tuesday, May 17, 2016 10:09 AM  
**To:** OETTINGER Guenther (CAB-OETTINGER)  
**Cc:** [REDACTED]  
**Subject:** Directive 2014/26/EC - problematic legislative activity in the Republic of Slovenia

Dear Mr. Oettinger!

On behalf of the largest Slovenian collective management organization and the only one enforcing and managing copyright on musical works (»Združenje SAZAS«), I hereby attach a letter concerning the transposition of the *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* (the »Directive«) into the legal order of the Republic of Slovenia. The letter was sent to you via post as well. Attached is also the Power of Attorney, authorizing our law firm to submit such letter.

As elaborated in more detail in the letter, the anticipated reform of the Slovenian legal framework related to collective management of rights either thoroughly contradicts the Directive or stretches its scope to an unlawful and unacceptable degree. I respectfully ask you to review the letter and address our considerations in accordance with your capacities.

I trust you may have some additional queries or questions concerning the issues raised in the letter. If you do, please do not hesitate to reach out. I would gladly provide you with any additional information you may find useful.

Thank you for your time.

Sincerely Yours,

[REDACTED]

**Odvetniška družba Rojs, Peljhan, Prelesnik & partnerji o.p., d.o.o.**  
**Law Firm Rojs, Peljhan, Prelesnik & partners o.p., d.o.o.**

Tivolska cesta 48, 1000 Ljubljana, Slovenija

E-mail: [REDACTED]  
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**TLA Top-tier Legal Adriatic**  
SERBIA CROATIA SLOVENIA MONTENEGRO BOSNIA AND HERZEGOVINA MACEDONIA



**BAND 1 – TOP RANKED IN ALL PRACTICE AREAS**

To sporočilo pošilja odvetniška družba ter je zaupno in ima lahko poseben pomen. Namenjeno je zgoraj navedeni osebi. Če niste želeni naslovnik, Vas prosimo, da nas o tem nemudoma obvestite in ne berete, kopirate, uporabljate ali razkrivate tega sporočila drugim ter da iz svojega sistema takoj izbrišete sporočilo in morebitne pripombe.

*This message is being sent from a law firm and is confidential and may also be privileged. It is intended for the individual named above. If you are not the intended recipient, please notify us immediately and do not read, copy, use or disclose this communication to others and delete the message and any attachment thereof from your system without delay.*

Odvetniška družba Rojs, Peljhan, Prelesnik & partnerji o.p., d.o.o., Vpisana v sodni register Okrožnega sodišča v Ljubljani, št. vl. 1/31396/00, osnovni kapital: 10 000,00 EUR, davčna št.: SI86830708, matična št.: 1362917000.

*Law Firm Rojs, Peljhan, Prelesnik & partners o.p., d.o.o., entered in the Court Register of District Court in Ljubljana, file no. 1/31396/00, nominal capital: 10 000,00 EUR, tax no.: SI86830708, registration no.: 1362917000.*

# ◆ ROJS, PELJHAN, PRELESNIK & PARTNERJI

European Commission  
Rue de la Loi 200  
B-1049 Brussels  
BELGIUM

Evropska komisija  
Rue de la Loi 200  
B-1049 Bruselj  
BELGIJA

To the attention of:

European Commissioner for Digital Economy  
and Society

**Günther Hermann Oettinger**  
**Anna Herold**

Za:

Evropski Komisar za digitalno gospodarstvo in  
družbo

**Günther Hermann Oettinger**  
**Anna Herold**

May 16, 2016

16. 5. 2016

Združenje SAZAS (*in English translation: the SAZAS Society*) is the largest Slovenian collective management organisation within the meaning of the *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* (hereinafter referred to as the “**Directive**”), and the only one enforcing and managing copyright on musical works. Since 1 May 1996, Združenje SAZAS is also a member of CISAC – Confederation Internationale des Societes d’Auteurs et Compositeurs (in English translation: *The International Confederation of Authors and Composers Societies*).

Združenje SAZAS je največja slovenska organizacija za kolektivno upravljanje pravic v pomenu *„Direktive 2014/26/EU Evropskega parlamenta in Sveta z dne 26. Februarja 2014 o kolektivnem upravljanju avtorske in sorodnih pravic ter izdajanju več ozemeljskih licenc za pravice za glasbena dela za spletno uporabo na notranjem trgu* (v nadaljevanju: “**Direktiva**”) in tudi edina, ki se ukvarja z uveljavljanjem in upravljanjem avtorske pravice na glasbenih delih. Od 1. 5. 1996 je Združenje SAZAS tudi član CISAC – Confederation Internationale des Societes d’Auteurs et Compositeurs (v slovenskem prevodu: *Mednarodna konfederacija društev avtorjev in skladateljev*).

The undersigned law firm hereby on behalf of Združenje SAZAS (on the basis of attached

Spodaj podpisana odvetniška družba (na podlagi priloženega pooblastila) v imenu Združenja

partnerji: Aleš ROJS, Grega PELJHAN, Robert PRELESNIK, Tomaž ILEŠIČ, Matija TESTEN,  
David PREMELČ, Bojan ŠPORAR, Sergej OMLADIČ, Gregor PAJEK, Matic NOVAK

Odvetniška družba Rojs, Peljhan, Prelesnik & partnerji o.p., d.o.o., Tivolska cesta 48, p.p. 539, 1000 Ljubljana, Slovenija  
Tel.: +386 1 23 06 750, Fax: +386 1 43 25123, E-mail: info@rppp.si, www.rppp.si

Vpisana v sodni register Okrožnega sodišča v Ljubljani, št. vl. 1/31396/00, osnovni kapital: 10 000,00 EUR,  
davčna št.: SI86830708, matična št.: 1362917000

power of attorney) respectfully submits this letter in order to draw your attention to the current legislative activity revolving around the transposition of the Directive into the legal order of the Republic of Slovenia. As shall be established below, the anticipated reform of the Slovenian legal framework related to the collective management of authors' rights either thoroughly contradicts the Directive or stretches the scope thereof to an unlawful and unacceptable degree. Worse still, it does so under the pretence of merely implementing the necessary requirements of the Directive into the Slovenian legal order.

The Directive lays down requirements necessary to ensure the proper functioning of the management of copyright and related rights by collective management organisations, as well as requirements licensing by collective management organisations of authors' rights in musical works for online use (Article 1). As per Article 43 of the Directive, Members States should have had to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 10 April 2016. In Slovenia, the Directive has not been transposed yet.

Collective management of authors' rights is currently regulated in the Copyright and Related Rights Act (published in the Official Gazette of the Republic of Slovenia, no. 21/95, with the following amendments, hereinafter referred to as the **"Copyright and Related Rights Act"**), i.e. in Article 146 et seq. In order to meet the

SAZAS na Vas naslavljajo to pismo z namenom, da Vas opozori na trenutno zakonodajno aktivnost v zvezi z implementacijo Direktive v pravni red Republike Slovenije. Kot bo prikazano spodaj, je načrtovana reforma slovenskega pravnega okvira, ki ureja kolektivno upravljanje avtorskih pravic, bodisi v neposrednem nasprotju z Direktivo ali pa domet le-te protipravno in nedopustno razširja. Še več – to storiti pod pretvezo, češ da gre zgolj za implementacijo nujnih zahtev Direktive v slovenski pravni red.

Direktiva določa zahteve, potrebne za zagotovitev pravilnega izvajanja upravljanja avtorske in sorodnih pravic s strani organizacij za kolektivno upravljanje pravic, ter zahteve za večozemeljsko licenciranje s strani organizacij za kolektivno upravljanje pravic za pravice avtorjev za glasbena dela za spletno uporabo (1. člen). Skladno s 43. členom Direktive bi morale države članice sprejeti zakone in druge predpise, potrebne za uskladitev z Direktivo, do 10. 4. 2016. V Sloveniji Direktiva še ni implementirana.

Kolektivno upravljanje avtorskih pravic je trenutno urejeno v Zakonu o avtorski in sorodnih pravicah (objavljenem v Uradnem listu Republike Slovenije, št. 21/95, s kasnejšimi spremembami in dopolnitvami, v nadaljevanju: **"Zakon o avtorski in sorodnih pravicah"**), in sicer v členu 146 in naslednjih. Da bi v okviru

requirements set forth by the Directive, a short (and straightforward) amendment of the Copyright and Related Rights Act would be sufficient. Despite the foregoing, the Slovenian Ministry of Economic Development and Technology proposed adoption of a new Collective Management of Copyright and Related Rights Act<sup>1</sup> (hereinafter referred to as the “Act”). It should be noted that none of the stakeholders in the matter (authors, societies of authors or collective management organizations) have been engaged in the process.

Pursuant to Article 2, the Act implements the Directive and partially implements the *Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission*, as well as the *Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights*. However, although the Act is framed as an implementing act of said Directives, the proposed provisions extend far beyond the necessary requirements set forth thereby. As such, the Act serves as a **prime example of gold-plating**, as shall be elaborated on in more detail below. In addition to implementing a plethora of (excessive) measures that are not foreseen by the Directive,

implementacije zadostili zahtevam Direktive, bi zadoščala kratka (in jasna) sprememba Zakona o avtorski in sorodnih pravicah. Kljub temu pa je slovensko Ministrstvo za gospodarski razvoj in tehnologijo v sprejem predložilo nov Zakon o kolektivnem upravljanju avtorske in sorodnih pravic<sup>4</sup> (v nadaljevanju: “ZKUASP”). Ob tem poudarjamo, da pri pripravi ZKUASP ni bil angažiran nihče od deležnikov, na katere se materija nanaša (avtorji, združenja avtorjev ali organizacije za kolektivno upravljanje).

Skladno z 2. členom ZKUASP le-ta v slovenski pravni red prenaša Direktivo in delno prenaša *Direktivo Sveta 93/83/EGS z dne 27. septembra 1993 o uskladitvi določenih pravil o avtorski in sorodnih pravicah v zvezi s satelitskim radiodifuznim oddajanjem in kabelsko retransmisijsko ter Direktivo 2006/116/ES Evropskega parlamenta in Sveta z dne 12. decembra 2006 o trajanju varstva avtorske pravice in določenih sorodnih pravic*. Četudi pa je ZKUASP osnovan kot implementacijski akt navedenih direktiv, predlagane določbe znatno presegajo nujne zahteve, ki direktiv izhajajo. V tej luči se ZKUASP izkaže kot **prvovrsten primer t.i. pojava “gold-plating”**<sup>5</sup>, kot bo podrobneje obrazloženo spodaj. Poleg implementacije številnih (pretiranih) ukrepov, ki jih Direktiva sploh ne predvideva, pa ZKUASP

<sup>1</sup> The proposed Collective Management of Copyright and Related Rights Act was first published and put into public discussion on 14 August 2015.

<sup>4</sup> Predlagan Zakon o kolektivnem upravljanju avtorske in sorodnih pravic je bil prvič objavljen in posredovan v javno razpravo dne 14. 8. 2015.

<sup>5</sup> Izraz za proces, pri katerem implementacija določene direktive v nacionalni pravni red države članice rezultira v pretirani regulaciji oz. se implemetirani direktivi pripišejo moči, ki jih le-ta sicer nima.

the Act also – to a substantial degree – directly contradicts either the wording and/or the regulatory goals thereof.

In this respect, the Act does not implement the Directive effectively, but quite the contrary. As a result of overregulation, the Act brings about legal uncertainty, increases costs, reduces effectiveness, sets out new administrative burdens, and destabilizes the (otherwise) well established system of collective managements of authors' rights as set out in the Copyright and Related Rights Act. Additionally, by not complying with some of the Directive's provisions aimed at increasing authors' protection, a number of the proposed provisions outrightly breach the authors' rights related to the collective management thereof. Should the proposed reform in fact enter into force, it could lead to *de facto* nullification of intellectual property rights in the Republic of Slovenia.

For the purpose of this letter, we shall focus on a few most notably problematic aspects of the Act, although – to say the least – the Act is troublesome as a whole.

tudi – v veliki meri – neposredno nasprotuje bodisi dikciji Direktive ali pa zakonodajnim ciljem le-te.

V tem smislu ZKUASP Direktive ne implementira učinkovito, pač pa prav nasprotno. Zavoljo pretirane regulacije ZKUASP povzroča pravno negotovost, povečuje stroške, zmanjšuje učinkovitost, postavlja nove administrativne ovire in destabilizira (sicer) dobro delajoč sistem kolektivnega upravljanja avtorskih pravic, kot je določen v Zakonu o avtorski in sorodnih pravicah. Poleg tega številne določbe ZKUASP v delu, ki se nanaša na zaščito avtorjev, Direktive sploh ne upoštevajo, s tem pa neposredno kršijo pravice avtorjev v zvezi s kolektivnim upravljanjem. Kolikor bo predlagana reforma dejansko sprejeta, bi to lahko vodilo v *de facto* izničenje pravic intelektualne lastnine v Republiki Sloveniji.

Za namen tega pisma se bomo osredotočili le na nekaj najbolj problematičnih aspektov ZKUASP, četudi je le-ta – milo rečeno – težaven v celoti.

## **1. The burden of overregulation**

As per Recital 5 of the Directive, problems with the functioning of collective management organisations lead to inefficiencies in the exploitation of copyright and related rights across the internal market, to the detriment of the members of collective management

## **1. Breme pretirane regulacije**

Skladno s 5. uvodno izjavo Direktive je izkoriščanje avtorske in sorodnih pravic na notranjem trgu neučinkovito v škodo članov organizacij za kolektivno upravljanje pravic, imetnikov pravic in uporabnikov tudi zaradi težav pri delovanju organizacij za kolektivno

organisations, rightholders and users. Pursuant to Recital 19 of the Directive, it is important that the rights and categories of rights be determined in a manner that maintains a balance between the freedom of rightholders to dispose of their works and other subject-matter and the ability of the organisation to manage the rights effectively. Further, Recital 42 emphasizes the importance of effective processing of data, and Recital 49 sets forth that it is necessary to ensure the effective enforcement of the provisions of national law adopted pursuant to this Directive. Moreover, Article 4 of the Directive ("General principles") explicitly provides that Member States shall ensure that collective management organisations act in the best interests of the rightholders whose rights they represent and that they do not impose on them any obligations which are not objectively necessary for the protection of their rights and interests or for the effective management of their rights. In addition, also the statute of a collective management organisation shall provide for appropriate and effective mechanisms for the participation of its members in the organisation's decision-making process (Article 6 of the Directive). Effective participation of members in the decision-making process of a collective management organisation is further reaffirmed in Article 8(10) of the Directive.

Given the above, **effectiveness** of all processes related to collective management organisations is clearly one of the **primary focuses of the Directive**. To that effect, the Directive sets forth

upravljanje pravic. V skladu z 19. uvodno izjavo Direktive je pomembno, da so pravice in kategorije pravic določene na način, ki ohranja ravnotesje med svobodo imetnikov pravic, da razpolagajo s svojimi deli in drugimi vsebinami, ter sposobnostjo organizacije, da pravice upravlja učinkovito, ob upoštevanju zlasti vrste pravic, ki jih upravlja, in ustvarjalnega sektorja, v katerem deluje. Dalje, 42. uvodna izjava poudarja pomembnost učinkovite obdelave podatkov, 49. uvodna izjava pa določa, da je treba zagotoviti učinkovito izvrševanje določb nacionalnega prava, sprejetih na podlagi te Direktive. Poleg tega 4. člen Direktive ("Splošna načela") izrecno določa, da morajo države članice zagotoviti, da organizacije za kolektivno upravljanje pravic delujejo v najboljšem interesu imetnikov pravic, katerih pravice zastopajo, in da jim ne nalagajo nobenih obveznosti, ki niso objektivno potrebne za varstvo njihovih pravic in interesov ali za dejansko upravljanje njihovih pravic. Tudi statut organizacije za kolektivno upravljanje pravic mora predvideti primerne in učinkovite mehanizme za sodelovanje članov organizacije pri njenem postopku sprejemanja odločitev (6. člen Direktive). Učinkovito sodelovanje članov v postopku sprejemanja odločitev je ponovno izpostavljeno tudi v členu 8(10) Direktive.

Z ozirom na navedeno je **učinkovitost** vseh postopkov, ki se nanašajo na organizacije za kolektivno upravljanje pravic, več kot očitno eden izmed temeljnih ciljev Direktive. V ta

minimum requirements – sufficient to reach the goals of the Directive – but does not overregulate the subject-matter thereof. More so, the Directive does not strive for wider transparency of collective management organisations at the expense of efficiency, and effectively treats them as two sides of the same coin. Both can coexist hand in hand and be reached at the same time if the authors are given (enough) autonomy to independently regulate their own internal affairs and day-to-day operations. To this end, administrative burdens should be kept to a minimum, i.e. only to the extent necessary to comply with demands of transparency.

Unfortunately, the proposed Act is conceptually far away from such guidelines (set forth by the Directive!). Should the Act in fact come into force, the collective management organisations will be overburdened with various administrative constraints, even to such a degree that they will be unable to perform their tasks effectively and (cost-) efficiently. As a consequence, this may lead to *de facto* prevention of their existence.

The Act sets out a number of unreasonable provisions – and from the text alone, it is not even possible to discern (legitimate) objectives or reasons behind the proposed solutions. For example, with respect to administrative-technical tasks, collective management organisations may cooperate only with one external entity (and even then in relation to only three out of nine activities of a collective

namen Direktiva določa minimalne zahteve – zadostne, da se cilji Direktive dosežejo – vendar materije ne regulira pretirano. Ali drugače: Direktiva ne sledi cilju večje transparentnosti organizacij za kolektivno upravljanje pravic na škodo učinkovitosti, pač pa ju dejansko obravnava kot dve plati iste medalje. Tako večja transparentnost kot učinkovitost lahko obstojita hkrati, če je avtorjem dana (zadostna) avtonomija, da neodvisno regulirajo svoja lastna interna razmerja in dnevne operativne zadeve. V tej luči bi morale biti administrativne ovire minimalne, tj. le tolikšne, da je zadoščeno zahtevam transparentnosti.

Na žalost je ZKUASP konceptualno daleč od takšnih smernic (ki jih določa Direktiva!). Kolikor bo ZKUASP dejansko sprejet, bodo organizacije za kolektivno upravljanje pravic pretirano obremenjene z najrazličnejšimi administrativnimi omejitvami, celo do te mere, da svojih nalog ne bodo mogle upravljati učinkovito in stroškovno vzdržno, kar lahko vodi v de-facto preprečitev njihovega obstoja.

ZKUASP vsebuje številne nerazumne določbe – iz samega besedila pa niti ni možno izluščiti, kateri so bili (legitimni) cilji oz. razlogi za določene predlagane rešitve. Denimo, kar zadeva administrativno-tehnične naloge, lahko organizacije za kolektivno upravljanje pravic sodelujejo le z enim zunanjim izvajalcem (in še to zgolj za tri od devetih dejavnosti kolektivne organizacije – 3. odstavek 16. člena ZKUASP),

management organization – Paragraph 3 of Article 16 of the Act), and the latter may not authorize another person to perform any of its tasks (Paragraph 3, Article 16 of the Act); the general assembly of a collective management organisation has to approve the agreement with such an external entity as well as any amendments and the termination thereof (Paragraph 1, Article 25 of the Act); in addition, the general assembly is to decide on multiple other issues which are not foreseen by the Directive (Paragraph 1, Article 25 of the Act); further, in Article 39, the Act sets out a number of additional information to be regularly disclosed to the public, substantially beyond the scope of the Directive; the Act also stipulates a set number of people to be employed by the collective management organisation as a condition to obtain the authorisation (Paragraph 2, Article 14 of the Act); authorization procedures are overregulated, burdensome and complicated (Article 14 of the Act) which will surely lead to decrease in the number of authorizations, etc. This list is obviously not exhaustive, and the overregulation is implicit in the high number of Articles contained in the Act as well (87 Articles in the Act as opposed to 45 Articles in the Directive). In addition, the Act also contradicts the existing practice with respect to managing the administrative-technical tasks, regardless of the demands of the Directive.

As previously set out, some of the anticipated provisions may even prevent the sole existence of collective management organizations. For

le-ta pa prenesenih nalog ne sme prenesti na tretjo osebo (3. odstavek 16. člena ZKUASP); skupščina organizacije za kolektivno upravljanje pravic mora potrditi pogodbo s takšnim zunanjim izvajalcem, kot tudi kakršne koli spremembe ali odpoved le-te (1. odstavek 25. člena ZKUASP); poleg tega skupščina odloča o mnogih drugih vprašanjih, ki jih Direktiva ne predvideva (1. odstavek 25. člena ZKUASP); dalje, v 39. členu ZKUASP določa številne dodatne informacije, ki morajo biti posredovane javnosti, bistveno nad dometom Direktive; ZKUASP določa tudi število ljudi, ki jih mora organizacija za kolektivno upravljanje pravic zaposlovati, kot pogoj za pridobitev dovoljenja za delovanje (2. odstavek 14. člena ZKUASP); postopki za pridobitev dovoljena so prav tako pretirano regulirani, preobremenjujoči in komplikirani (14. člen ZKUASP), kar bo gotovo vodilo v zmanjšanje števila izdanih dovoljenj, ipd. Navedeni seznam seveda ni izčrpen, pretiranost regulacije pa implicira že visoko število členov v ZKUASP (87 členov v primerjavi z Direktivo, ki jih ima le 45). ZKUASP pa tudi nasprotuje obstoječi praksi upravljanja administrativno-tehničnih poslov.

Kot že omenjeno, nekatere od predvidenih določb bi lahko celo dejansko preprečile sam obstoj organizacij za kolektivno upravljanje

example, in order to be granted the authorization, the Act demands that a collective management organization employs a certain number of people. Taking into account the minimum wage requirements in the Republic in Slovenia, the costs related to such set number of employees may exceed the budget of collective management organizations, especially the smaller ones. Hence, such smaller collective management organizations will not be even able to exist. How is it possible to claim that this is "*in the best interests of the rightholders*"<sup>2</sup>?

pravic. Denimo, če želi organizacija za kolektivno upravljanje pravic pridobiti dovoljenje pristojnega organa, mora zaposlovati določeno število ljudi. Glede na zahteve v zvezi z minimalno plačo v Republiki Sloveniji bi lahko stroški za takšno določeno število zaposlenih presegli proračun organizacij za kolektivno upravljanje pravic, še posebej manjših. Le-te tako sploh ne bodo mogle obstajati. Kako je potem mogoče trditi, da se s tem zasleduje "*najboljši interes imetnikov pravic*"<sup>6</sup>

## **2. The issues of control**

Further to our main points under (1), a substantial portion of excessive norms regulate the control of the state. The objectives of the Directive are clear (Recital 55): it intends to improve the ability of the collective management organisations' members to exercise control, to guarantee sufficient transparency, and to improve the multi-territorial licensing as regards the online use of musical works. Thus, the right to control the collective management organisations vests in its members, not the state. In light of the principles of human rights law, as shall be briefly established under (3) below, any limitations of intellectual property rights (which include, above all, state intervention) are legitimate and justifiable only if necessary to protect the public interest (order) and/or other human rights in

## **2. Težave v zvezi z nadzorom**

Poleg točk, ki smo jih izpostavili v 1. razdelku, **bistven del pretiranega števila norm regulira nadzor države**. Cilji Direktive so jasni (uvodna izjava 55): izboljšanje možnosti članov organizacij za kolektivno upravljanje pravic za izvajanje nadzora nad dejavnostmi teh organizacij, zagotovitev zadostne preglednosti in izboljšanje večozemeljskega licenciranja za pravice avtorjev za spletno uporabo glasbenih del. Pravica do nadzora nad organizacijo za kolektivno upravljanje pravic je tako pridržana njenim članom. V luči načel prava človekovih pravic, kot bodo na kratko predstavljena v 3. razdelku spodaj, so kakršnekoli koli omejitve pravic intelektualne lastnine (kar prvenstveno vključuje posege s strani države) legitimne in upravičene le tedaj, če so nujne za varstvo javnega interesa (reda) in/ali drugih človekovih

<sup>2</sup> Reference to Article 4 of the Directive.

<sup>6</sup> Referenca na 4. člen Direktive.

collision. However, the conception of the proposed Act is clearly not grounded in these assumptions. As such, it contradicts the provisions of the Directive – which promotes supervisory powers of collective management organisations members', not the authoritics' – as well as the principles of (international and domestic) human rights law.

pravic v koliziji. Koncept predlaganega ZKUASP pa očitno ne temelji na takšnih predpostavkah. S tem nasprotuje Direktivi – ki določa, da imajo nadzorno moč člani organizacij za kolektivno upravljanje pravic – pa tudi načelom (mcdnarodnega in nacionalnega) prava človekovih pravic.

The powers granted to the Slovenian Intellectual Property Office (which is a body within the Slovenian Ministry of Economic Development and Technology, i.e. the ministry that proposed adoption of the Act!) are excessive. For example, pursuant to Article 70 of the Act, the Slovenian Intellectual Property Office as the competent authority may exercise these powers at will, i.e. without any prerequisites, without any safeguards, and without any limitations. The existing Copyright and Related Rights Act, on the other hand, sets forth at least some minimal requirements for the competent authority to comply with (Article 162), aimed at proportionality and necessity of the competent authority's use of powers. There are absolutely no legitimate reasons for these requirements to be omitted in the Act. Even within the existing framework pursuant to the Copyright and Related Rights Act, the Slovenian Intellectual Property Office often exceeded its powers, which was later recognized by the competent courts as well. If there is no minimal requirements prescribed by the law, this would be even a stronger incentive for the Slovenian Intellectual Property Office to exercise its powers excessively and disproportionately.

Moč, ki je dana slovenskemu Uradu za intelektualno lastnino (ki je organ pod okriljem Ministrstva za gospodarski razvoj in tehnologijo, torej ministrstva, ki je predlagalo sprejem ZKUASP!), je pretirana. Denimo, skladno s 70. členom ZKUASP sme slovenski Urad za intelektualno lastnino kot pristojni organ navedene pristojnosti izvajati povsem po svoji volji, tj. brez vezanosti na kakršen koli pogoj, brez kakršnih koli varovalk in brez kakršnih koli omejitev. Obstaječi Zakon o avtorski in sorodnih pravicah, po drugi strani, vsebuje vsaj določene minimalne zahteve, ki jim mora pristojni organ zadostiti (162. člen), vezane na sorazmernost in nujnost izvajanja pristojnosti. Ne obstaja noben legitimen razlog za opustitev teh zahtev v ZKUASP. Tudi v okviru obstoječe pravne podlage, ki jo uokvirja Zakon o avtorski in sorodnih pravicah, je slovenski Urad za intelektualno lastnino pogosto presegel svoje pristojnosti, kar je bilo kasneje tudi ugotovljeno s strani pristojnih sodišč. Če v zakonu sploh ni določenih nikakršnih minimalnih zahtev, pa je to še večja vzpodbuda za slovenski Urad za intelektualno lastnino, da svoje pristojnosti izvaja preko svojih pooblastil in nesorazmerno.

Furthermore, in comparison with the Copyright and Related Rights Act, the Act – again, for no apparent (legitimate) reason – expands the list of circumstances that legitimate immediate withdrawal of an authorization. For example, the competent authority may immediately withdraw an authorization if the collective management organisation authorizes an external entity to perform certain tasks against provisions of the Act, or if the collective management organization distributes the amounts due to rightholders against the provisions of the Act or the rules on such distribution (Paragraph 3, Article 72 of the Act). By virtue of such powers – for example – only a marginal mistake or non-compliance with some administrative technicalities (completely overregulated in the Act!) is sufficient for withdrawal of an authorisation. A provision which allows for such consequences on the grounds of such factual basis is *prima facie* too strict to be considered proportional. What is more, a provision this wide almost calls for arbitrariness on the side the competent authority, and gives no protection to the collective management organizations and their members. In addition, it also contradicts the Directive. Namely, while the Directive “*does not provide for specific types of sanctions*”, it does demand that they be “*effective, proportionate and dissuasive*” (Recital 50 of the Directive). This notion is reaffirmed in Paragraph 3 of Article 36: “*Member States shall ensure that the competent authorities designated for that purpose have the power to impose appropriate sanctions or to take appropriate*

Dalje, v primerjavi z Zakonom o avtorski in sorodnih pravicah, ZKUAPS – ponovno, brez očitnega (legitimnega) razloga – razširja seznam okoliščin, ob obstoju katerih sme pristojni organ organizaciji za kolektivno upravljanje pravic nemudoma odvzeti dovoljenje. Denimo, pristojni organ sme nemudoma odvzeti dovoljenje, če organizacija za kolektivno upravljanje v nasprotju z določbami ZKUASP prenese opravljanje svojih nalog na zunanjega izvajalca, ali če deli zbrana sredstva imetnikom pravic v nasprotju s tem zakonom ali pravili o delitvi zbranih avtorskih honorarjev (3. odstavek 72. člena ZKUASP). Na podlagi takšnih pristojnosti – denimo – je zgolj manjša napaka oz. neupoštevanje določenih marginalnih administrativnih ovir (ki so v ZKUAPS povsem pretirano regulirane!) dovolj za odvzem dovoljenja. Določba, ki na podlagi takšnega dejanskega okvira dopušča takšne posledice, je že *prima facie* preveč stroga, da bi jo lahko ocenili za sorazmerno. Še več, tako široka določba skorajda kliče po arbitarnosti na strani pristojnega organa, in organizacijam za kolektivno upravljanje pravic ter njihovim članom ne nudi nikakršne zaščite. Poleg tega pa tudi nasprotuje Direktivi. Namreč, četudi Direktiva “*ne določa podrobnosti o vrstah sankcij ali ukrepov*”, zahteva, da so le-ti “*učinkoviti, sorazmerni in odvračilni*” (50. uvodna izjava Direktive). Slednje potrjuje tudi 3. odstavek 36. člena Direktive: “*Države članice zagotovijo, da pristojni organi, imenovani v ta namen, lahko odredijo ustrezne sankcije in sprejmejo ustrezne ukrepe v primeru neusklajenosti z nacionalnimi določbami,*

*measures where the provisions of national law adopted in implementation of this Directive have not been complied with. Those sanctions and measures shall be effective, proportionate and dissuasive.” Even if withdrawal of an authorization with immediate effect may be deemed “effective” and “dissuasive”, it is certainly not proportional.*

*sprejetimi za izvajanje te direktive. Te sankcije in ukrepi so učinkoviti, sorazmerni in odvračilni.” Četudi bi se lahko štelo, da je takojšen odvzem dovoljenja “učinkovit” in “odvračilen”, pa se zagotovo ne more štetiti, da je tudi sorazmeren.*

### **3. Mandatory collective management of rights and monopoly**

In Recital 2, the Directive provides that “*it is normally for the rightholder to choose between the individual or collective management of his rights, unless Member States provide otherwise, in compliance with Union law and the international obligations of the Union and its Member States.*” Based on the foregoing, the authors – as a rule – should be able to freely choose between individual or collective management of their rights, and any limitations of such a right shall be recognized as legitimate and justified only if compliant with Union law and international obligations of the Union or the Member States.

Amongst other, Member States are obliged to respect the provisions of the Charter of Fundamental Rights of the European Union which is as a part of Union law. More so, such an obligation is even expressly set forth in Recital 54 of the Directive: “*This Directive respects the fundamental rights and observes the principles enshrined in the Charter of*

### **3. Obvezno kolektivno upravljanje pravic in monopol**

V 2. uvodni izjavi Direktiva določa, da “*običajno lahko imetnik pravic izbira med individualnim ali kolektivnim upravljanjem svojih pravic, razen če države članice določijo drugače, v skladu s pravom Unije ter mednarodnimi obveznostmi Unije in njenih držav članic.*” Na tej podlagi bi morali imeti avtorji praviloma pravico, da prosto izberejo med individualnim ali kolektivnim upravljanjem svojih pravic, in kakršne koli omejitve v tem oziru so legitimne in upravičene le, kolikor so skladne s pravom Unije in mednarodnimi obveznostmi Unije ali držav članic.

Med drugim so države članice dolžne spoštovati določila Listine EU o temeljnih pravicah, ki je del prava Unije. Še več, ta dolžnost je celo izrecno določena v 54. uvodni izjavi Direktive: “*Ta direktiva spoštuje temeljne pravice in upošteva načela iz Listine Evropske unije o temeljnih pravicah.*” Z ozirom na navedeno je treba Direktivo razumeti in interpretirati skladno

*Fundamental Rights of the European Union*". z Listino Evropske Unije o temeljnih pravicah To this end, the Directive should be construed (v nadaljevanju: "Listina"). and interpreted in accordance with the Charter of Fundamental Right of the European Union (hereinafter referred to as the "Charter").

In Article 17, the Charter recognizes intellectual property rights as inherent in one of the most basic human rights – the right to property. In accordance with the general principle of proportionality (as one of the foundational principles of the European Union law<sup>3</sup>), such a right may be only interfered with to the extent necessary in the public interest or other human rights in collision. This notion is also consistent with the Directive, which deems mandatory collective management of rights exceptional.

Furthermore, International Covenant on Economic, Social and Cultural Rights of 16 December 1966 (hereinafter referred to as the "Covenant") to which Slovenia is a party, likewise recognizes the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (Article 15 (1(c)), and the steps to be taken to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture (Article 15(2)). Again,

V 17. členu Listina izrecno šteje pravice intelektualne lastnine kot inherentne v eni izmed najbolj temeljnih človekovih pravic – pravici do lastnine. Skladno z načelom sorazmernosti (kot enim osnovnih načel prava Evropske Unije<sup>7</sup>) je lahko takšna pravica omejena le, kolikor je to nujno za varstvo javnega interesa ali drugih človekovih pravic v koliziji. Slednje je tudi skladno z Direktivo, ki šteje, da velja obvezno kolektivno upravljanje pravic predpisati zgolj izjemoma.

Dalje, Mednarodni pakt o ekonomskih, socialnih in kulturnih pravicah z dne 16. 12. 1966 (v nadaljevanju: "Pakt"), katerega pogodbenica je tudi Slovenija, prav tako priznava pravico vsakogar, da uživa varstvo moralnih in materialnih koristi, ki izhajajo iz katerenkoli znanstvenega, književnega ali umetniškega dela, katerega avtor je (člen 15 (1(c)); ukrepi, s katerimi države pogodbenice Pakta zagotavljajo polno uresničevanje te pravice, pa morajo obsegati ukrepe, ki so potrebni za ohranitev, razvoj in širjenje znanosti in kulture (člen 15(2)). Ponovno, ta mednarodna

<sup>3</sup> See, for example, Federation Charbonniere de Belgique v. High Authority [1954] ECR 245 Case C8/55; Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle Getreide [1970] ECR 1125 Case 11/70; R v. Minister of Agriculture, Fisheries and Food ex parte Fedesa [1990] ECR 1-4023 Case C-331/88.

<sup>7</sup> Glej, denimo, Federation Charbonniere de Belgique v. High Authority [1954] ECR 245, opr. št. C8/55; Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle Getreide [1970] ECR 1125, opr. št. 11/70; R v. Minister of Agriculture, Fisheries and Food ex parte Fedesa [1990] ECR 1-4023, opr. št. C-331/88.

this international obligation (!) very clearly provides for little leverage as regards limitation of intellectual property rights. obveznost (!) ne daje veliko prostora za omejitve pravic intelektualne lastnine.

These principles, however, are not reflected in the Act. Namely, in Article 9, the Act anticipates mandatory collective management of rights even in non-exceptional cases, for example with respect to communication to the public of non-theatrical musical works and literary works (save for the right from Article 32.a of the Copyright and Related Rights Act). In view of the undersigned Združenje SAZAS, there are no legitimate and justifiable grounds for such a provision, neither does its necessity stem from the provisions of the Directive. On the contrary, the Directive promotes free choice as a basis of protection of the authors' rights. In addition, the objectives of the Directive as set forth in Recital 55 – *to improve the ability of their members to exercise control over the activities of collective management organisations, to guarantee sufficient transparency by collective management organisations and to improve the multi-territorial licensing of authors' rights in musical works for online use* – do not demand any mandatory measures which could result in a decrease of the level of protection. What is more, the anticipated Article 9 of the Act does not only contradict the Directive, but also the principles of proportionality and respect for human rights as the core foundations of the European legal framework.

Kljub temu pa ZKUASP navedenih načel ne odraža. Namreč, v 9. členu ZKUAP predpisuje obvezno kolektivno upravljanje pravic tudi v ne-izjemnih primerih, denimo če gre za priobčitev javnosti neodrskih glasbenih in pisanih del (razen pravice dajanja na voljo javnosti iz 32.a člena Zakona o avtorski in sorodnih pravicah). Po mnenju spodaj podписанega Združenja SAZAS ni nikakršnih legitimnih ali upravičenih razlogov za takšno ureditev, nujnost le-te pa tudi ne izhaja iz določb Direktive. Prav nasprotno, Direktiva določa prosto izbiro kot osnovo varstva pravic avtorjev. Poleg tega cilji Direktive, kot so opredeljeni v 55. uvodni izjavi – *izboljšanje možnosti članov organizacij za kolektivno upravljanje pravic za izvajanje nadzora nad dejavnostmi teh organizacij, zagotovitev zadostne preglednosti s strani organizacij za kolektivno upravljanje pravic in izboljšanje večozemeljskega licenciranja za pravice avtorjev za spletno uporabo glasbenih del* – ne zahtevajo nobenih obveznih ukrepov, ki bi lahko vodili v zmanjšanje ravni zaščite. Še več, predviden 9. člen Direktive ne nasprotuje zgolj Direktivi, pač pa tudi načelom sorazmernosti in spoštovanja človekovim pravic kot najbolj osnovnim temeljem, na katerih sloni Evropski pravni red.

In addition, besides enforcing mandatory collective management of rights even when there are no reasonable and justifiable grounds for such system, the Act also establishes monopoly of only one collective management organization that can run the mandatory collective management of rights. Namely, Paragraph 3 of Article 14 sets forth that the competent authority does not issue an authorization for mandatory collective management of rights to a collective management organization if there is an existing collective management organization authorized to manage the same type of copyright. Hence, the authors are denied the option to form their own or authorize another collective management organization for collective management of rights, despite the Directive's straightforward provision that "*the rightholders shall have the right to authorize a collective management organisation of their choice to manage the rights [...]*" (Paragraph 2, Article 5 of the Directive). Furthermore, Paragraph 2 of Recital 19 of the Directive emphasizes the importance of "*balance between the freedom of rightholders to dispose of their works and other subject-matter and the ability of the organisation to manage the rights effectively [...]. Taking due account of that balance, rightholders should be able easily to withdraw such rights or categories of rights from a collective management organisation and to manage those rights individually or to entrust or transfer the management of all or part of them to another collective management organisation or another entity [...]. Where a Member State,*

Poleg določitve obveznega kolektivnega upravljanja pravic tudi kadar ni nobenih razumih ali upravičenih razlogov za takšen sistem, pa ZKUASP obenem vzpostavlja monopol zgolj ene organizacije za kolektivno upravljanje pravic, ki lahko vodi obvezno upravljanje pravic. Namreč, 3. odstavek 14. člena določa, da pristojni organ, kadar gre za obvezno kolektivno upravljanje pravic, ne izda dovoljenja za kolektivno upravljanje avtorske pravice pravnim osebam, če je za isto vrsto avtorskih del in za iste pravice že izdano dovoljenje za kolektivno upravljanje avtorske pravice drugi kolektivni organizaciji. To pomeni, da v tem primeru avtorji ne morejo sami ustanoviti ali pa pooblastiti druge organizacije za kolektivno upravljanje pravic, pa četudi Direktiva povsem jasno določa, da imajo imetniki pravic pravico, "*da organizacijo za kolektivno upravljanje pravic po lastni izbiri pooblastijo za upravljanje pravic [...]*" (2. odstavek 5. člena Direktive). Dalje, 2. odstavek 19. uvodne izjave Direktive tudi poudarja, da je pomembno "*ravnotesje med svobodo imetnikov pravic, da razpolagajo s svojimi deli in drugimi vsebinami, ter sposobnostjo organizacije, da pravice upravlja učinkovito [...]. Imetnikom pravic bi moralo biti ob ustreznom upoštevanju tega ravnotesja omogočeno, da enostavno umaknejo takšne pravice ali kategorije pravic iz organizacije za kolektivno upravljanje pravic in te pravice upravljajo individualno ter za vse pravice ali kategorije pravic ali njihov del pooblastijo drugo organizacijo za kolektivno upravljanje pravic ali subjekt ali upravljanje nanj prenesejo [...]. Kadar država članica v*

*in compliance with Union law and the Member States, provides for mandatory collective management of rights, rightholders' choice would be limited to other collective management organisations."*

*skladu s pravom Unije in mednarodnimi obveznostmi Unije in njenih držav članic določi obvezno kolektivno upravljanje pravic, je izbira imetnikov pravic omejena na druge organizacije za kolektivno upravljanje pravic.«*

As established above – contrary to the Directive – in all cases of mandatory collective management of rights, the Act does not give the rightholders the right to authorize a collective management organization of their choice to manage their rights as there shall be only one collective management organization to choose from. In other words: there are no “other” collective management organizations.

Kot že navedeno – v nasprotju z Direktivo – v vseh primerih obveznega kolektivnega upravljanja pravic, ZKUASP avtorjem ne daje pravice, da sami pooblastijo organizacijo za kolektivno upravljanje pravic po svoji lastni izbiri, ker namreč v takšnih primerih obstoji zgolj ena organizacija za kolektivno upravljanje pravic. Z drugimi besedami: ni nobenih “drugih” organizacij za kolektivno upravljanje pravic.

In Paragraph 3 of Article 18, the Act also provides that such (an exclusive) collective management organization for mandatory collective management of rights may manage the rights of authors even if not authorized by the authors. Thus, the authors are not only denied the option to authorize a collective management organization of their choice to manage their rights, but worse so – the collective management organization for mandatory collective management of rights may even manage the authors' rights against their own will. This is in direct conflict with said Paragraph 2 of Recital 19 of the Directive (“[...] rightholders should be able easily to withdraw such rights or categories of rights from a collective management organisation [...]”) and Paragraph 1 of Article 5 of the

V 3. odstavku 18. člena ZKUASP dalje določa, da lahko takšna (ekskluzivna) organizacija za kolektivno upravljanje pravic upravlja avtorske pravice brez pooblastila imetnika pravic. Avtorjem tako ni le odvzeta možnost, da za upravljanje pravic pooblastijo organizacijo za kolektivno upravljanje pravic po svoji lastni izbiri, pač pa še več – organizacija za obvezno kolektivno upravljanje pravic sme celo upravljati z avtorjevimi pravicami proti njihovi lastni volji. Slednje je v neposrednem nasprotju z navedenim 2. odstavkom 19. uvodne izjave Direktive (“[...] imetnikom pravic bi moralo biti ob ustrezном upoštevanju tega ravnovesja omogočeno, da enostavno umaknejo takšne pravice ali kategorije pravic iz organizacije za kolektivno upravljanje pravic [...]”) in 1. odstavkom 5. člena Direktive – ki

Directive – establishing that a collective management organization must be authorized to manage the authors' rights – as well as Paragraph 4 of Article 5 of the Directive, stipulating that "*the rightholders shall have the right to terminate the authorization to manage rights, categories of rights or types of works and other subject-matter granted by them to a collective management organisation or to withdraw from a collective management organisation any of the rights, categories of rights or types of works and other subject-matter of their choice [...]*". The Act clearly contradicts all of the aforementioned provisions of the Directive.

določa, da mora biti organizacija za kolektivno upravljanje pravic pooblaščena za upravljanje s pravicami avtorjev – kot tudi s 4. odstavkom 5. člena Direktive, ki določa, da imajo imetniki pravic pravico, "*da prekinejo pooblastilo za upravljanje pravic, kategorij pravic ali vrst del in druge vsebine, ki so ga podelili organizaciji za kolektivno upravljanje pravic ali da iz organizacije za kolektivno upravljanje pravic umaknejo katere koli pravice, kategorije pravic ali vrste del in druge vsebine po lastni izbiri [...]*". ZKUASP je v očitnem nasprotju z vsemi navedenimi določbami.

#### **4. The Act interferes with the Union's internal market**

As briefly set out under (1), the Act unacceptably restricts the conditions for authorizations and excessively regulates the authorization procedure (Article 14 of the Act). While this is a particular issue in itself (elaborated on under (1)), it also has certain distinctive implications with respect to the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter referred to as the "Directive 2001/29/EC").

In Article 2, the Directive 2001/29/EC sets forth the obligation of the Members States to provide

#### **4. ZKSUAP posega v notranji trg**

Kot na kratko že izpostavljeno v 1. razdelku, ZKUASP nedopustno omejuje izdajo dovoljenj in pretirano regulira postopek izdaje dovoljenj (14. člen ZKUASP). Slednje je sicer problematično že samo po sebi (kot je to podrobnejše pojasnjeno v 1. razdelku), ima pa tudi določene posebne implikacije v kontekstu Direktive 2001/29/ES Evropskega parlamenta in Sveta z dne 22. maja 2001 o usklajevanju določenih vidikov avtorske in sorodnih pravic v informacijski družbi (v nadaljevanju: "Direktiva 2001/29/ES").

V 2. členu Direktiva 2001/29/ES določa obveznost držav članic, da predvidijo izključno pravico dovolitve ali prepovedi, neposrednega

for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, but further allows for an exception 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 (Article 5(2)). However, this exception may be only applied on the condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in the Directive 2001/29/EC ((Article 5(2)). The Republic of Slovenia has opted for such an exception, but at the same time failed to provide for any measures with respect to enforcement of the right to fair compensation.

Instead of appropriately and accurately implementing said Directive 2001/29/EC, the Act further restricts the conditions for authorizations, and puts in place numerous administrative burdens. The legal framework envisioned in the Act *de facto* prevents the collective management organisations from obtaining authorizations. The Act even omits a provision contained in the Copyright and Related Rights Act, which allowed the competent authority to grant temporary authorizations (although – it should be noted – the competent authority refused to grant such authorizations anyway). With this in mind, the Act does not aid in the improvement of the “fair compensation” system, but effectively prevents it from even developing. As a consequence, the authors’ are simply not compensated from the

ali posrednega, začasnega ali stalnega, reproduciranja na vsak način in v vsaki obliki, v celoti ali deloma, pri čemer dalje priznava izjemo v zvezi z reproducijami v katerem koli mediju, ki jih izdela fizična oseba za privatno uporabo in v namene, ki niso niti posredno niti neposredno komercialni (5. člen (2)), vendar le ob pogoju, da imetniki pravic prejmejo pravično nadomestilo, pri katerem se upošteva uporaba ali neuporaba tehničnih ukrepov, na katere se Direktiva sklicuje (5. člen (2)). Republika Slovenija je uveljavila takšno izjemno, vendar ni določila nobenih ukrepov, ki bi imetnikom pravic zagotavljeni pravično nadomestilo.

Namesto da bi ZKUASP ustrezno in pravilno implementiral navedeno Direktivo 2001/29/ES, je še nadalje zaostril pogoje za pridobitev dovoljenja in določil številna administrativna bremena. Pravni okvir, ki ga predvideva ZKUASP, organizacijam za kolektivno upravljanje avtorskih pravic *de facto* preprečuje, da bi pridobile dovoljenje. ZKUASP celo opusti določbo iz Zakona o avtorski in sorodnih pravicah, ki je pristojnemu organu omogočala, da izda začasna dovoljenja (pa četudi – kot velja poudariti – pristojni organ predmetnih začasnih dovoljenj tako ali tako ni izdajal). V tej luči ZKUASP nikakor ne vzpostavlja sistema “pravičnega nadomestila”, pač pa dejansko preprečuje, da bi se le-ta sploh razvil. Posledično avtorji ne prejmejo nikakršnega nadomestila za, denimo, prazne nosilce zvoka in

sales of, for example, blank carriers of sound and picture (for example USB flash drives, CDs), which finally enables the Slovenian market actors to set a lower price thereof. Without a doubt, such strategies (allowed and legitimized by the state!) may have negative effects on the internal market of the Union.

slike (npr. USB ključke, CD-je), kar omogoča slovenskim trgovcem, da le-tem določijo nižjo ceno. Nedvomno imajo lahko takšne strategije (ki jih dopušča in legitimizira država!) negativne vplive na notranji trg Unije.

##### **5. Other non-compliant provisions**

There is a plethora of other non-compliant provisions of note in the Act, including the following:

- the Directive defines a collective management organization as "*any organization which is authorized by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright*" (Article 3(b) of the Directive), yet the Act only provides for the authorization system, i.e. the authors may not autonomously establish a collective management organization without the competent authority's approval, or authorize a collective management organization that does not have such an approval (Article 4 of the Act), although one cannot find any rational reason for that in the context of the existing system;
- the Directive provides that collective management organisations are authorized to manage copyright or rights related to

##### **5. Druga neustrezna določila**

ZKUASP vsebuje še številna druga neustrezna določila, denimo:

- Direktiva definira organizacijo za kolektivno upravljanje pravic kot "*vsako organizacijo, ki je z zakonom ali z dodelitvijo, licenco ali katerim koli drugim pogodbenim dogovorom pooblaščena za upravljanje avtorske ali sorodnih pravil*" (člen 3(b) Direktive), medtem kot ZKUASP predvideva zgolj sistem dovoljenj, tj. avtorji organizacije za kolektivno upravljanje pravic ne morejo ustanoviti avtonomno, brez odobritve pristojnega organa, ali pooblastiti organizacije za kolektivno upravljanje pravic, ki nima takšne odobritve (4. člen ZKUASP), za kar v kontekstu obstoječega sistema ni najti razumnega razloga;
- Direktiva določa, da so organizacije za kolektivno upravljanje pravic pooblaščene

- copyright to as its sole **or main purpose** (Article 3(a) of the Directive), while the Act provides that collective management organisations may manage such rights only as their sole purpose (Article 4 of the Act), and thus preventing the authors and rightholders from undertaking any other or additional pursuits within a respective collective management organization;
- the Directive sets forth that collective management organisations should be free to have certain of their **activities**, such as the invoicing of users or the distribution of amounts due to rightholders, carried out by subsidiaries or by other entities that they control (Protocol 17 of the Directive). The Act, on the other hand, provides that **administrative-technical related to a very limited domain of the collective management organization's activities may be delegated**, and exclusively to one external entity (Paragraph 3 of Article 16 of the Act). Hence, the Act prohibits delegation of activities of the collective management organization, and only allows delegation of certain administrative-technical tasks. The Directive anticipates no such limitations. It also sets out no limitation for delegation to only one external entity nor to only three out of nine activities. As set out above, the Act also prohibits the external entity to authorize a third person to perform any of its delegated tasks (Paragraph 3 of Article 16 of the Act), again without any grounds set forth by the za upravljanje avtorske ali sorodnih pravic, pri čemer je to njen edini ali **glavni namen** (člen 3(a) Direktive), ZKUASP pa določa, da organizacije za kolektivno upravljanje pravic upravljajo s takšnimi pravicami kot s svojo edino dejavnostjo (4. člen ZKUASP), kar avtorjem in imetnikom pravic preprečuje, da bi v okviru določene organizacije za kolektivno upravljanje pravic opravljali katerokoli drugo aktivnost oz. dejavnost;
  - Direktiva predvideva, da bi moralo biti organizacijam za kolektivno upravljanje pravic na voljo, da za opravljanje določenih **dejavnosti**, kot sta izdajanje računov uporabnikom ali razdelitev pripadajočih zneskov imetnikom pravic, določijo podružnice ali druge subjekte pod njihovim nadzorom (17. uvodna izjava Direktive). Po drugi strani pa **ZKUASP določa**, da se lahko prenese zgolj izvajanje **administrativno-tehničnih nalog v zvezi z zelo ozko določenimi dejavnostmi** organizacije za kolektivno upravljanje pravic, pa še to zgolj enemu zunanjemu izvajalcu (3. odstavek 16. člena ZKUASP). ZKUASP tako prepoveduje prenos izvajanja dejavnosti organizacije za kolektivno upravljanje pravic in dovoljuje zgolj delegacijo določenih administrativno-tehničnih nalog. Direktiva takšnih omejitev ne predvideva, kaj šele omejitev zgolj na enega zunanjega izvajalca in še to zgolj za tri od devetih dejavnosti. Kot že navedeno, ZKUASP tudi določa, da zunanji izvajalec

Directive. In addition, pursuant to Paragraph 1 of Article 17 of the Act, such external entities – if they are not collective management organizations, but companies – have to be controlled by the collective management organization. The Directive stipulates that subsidiaries or other entities performing activities of a collective management organization must be controlled, but – again – sets out no limitations with respect to administrative-technical tasks, such as, for example, accounting or IT services;

- the Act prohibits or at least *de facto* prevents the authors to manage the business of a collective management organization. Namely, in Paragraph 6 of Article 26, the Act provides that a member of the management board of a collective management organization may undertake other profitable activities or transactions on its or third person's behalf only upon obtaining an approval by the supervisory board of a collective management organization. No such limitation is set forth by the Directive. On the contrary, the **Directive allows rightholders to hold a management position in a collective management organization.** This (amongst other) logically derives from Paragraph 1 and 2(b) of Article 10 of the Directive, stipulating that persons who manage the business of a collective management organization shall provide an individual

prenesenih nalog ne sme prenesti na drugo osebo (3. odstavek 16. člena ZKUASP), ponovno brez kakršnih koli razlogov, ki bi izhajali iz Direktive. Obenem morajo biti na podlagi 1. odstavka 17. člena ZKUASP zunanj izvajalci – če sami niso organizacije za kolektivno upravljanje pravic, pač pa pravne osebe – pod nadzorom kolektivne organizacije. Direktiva sicer določa, da morajo biti podružnice ali drugi subjekti pod njihovih nadzorom, vendar se to nanaša na izvajanje dejavnosti, Direktiva pa – ponovno – ne določa nikakršnih omejitev, kar zadeva administrativno-tehnične naloge, denimo računovodstvo ali računalniške storitve;

ZKUASP prepoveduje ali vsaj *de facto* preprečuje, da bi avtorji lahko upravljali posle organizacije za kolektivno upravljanje pravic. Namreč, v 6. odstavku 26. člena ZKUASP je določeno, da član poslovodstva ne sme brez soglasja nadzornega odbora opravljati druge pridobitne dejavnosti, pa tudi ne sklepati poslov za svoj ali tuj račun. Direktiva ne predvideva nobene takšne omejitve. Prav nasprotno, **Direktiva imetnikom pravic dovoljuje, da v organizaciji za kolektivno upravljanje pravic zasedajo poslovne položaje.** Slednje (med drugim) logično izhaja iz 1. in 2(b). odstavka 10. člena Direktive, ki določa, da morajo osebe, ki upravljajo posle organizacije za kolektivno upravljanje pravic, skupščini predložiti individualno izjavo, ki vsebuje informacijo "o vseh

statement to the general assembly of members containing information "any amounts received in the preceding financial year from the collective management organisation as a rightholder". Hence, if the rightholders (authors) were prevented from managing the business of the collective management organization, such a provision would have been completely redundant. *Argumentum a contrario*, rightholders may hold managing positions, as long as they provide said statement to the general assembly of the collective management organization. The proposed amendments, set out in the last two paragraphs, also conflict with the existing practice.

As aforementioned, the non-compliant provisions of the Act set out above are not comprehensive, but merely exemplificatory. The fatal flaws of the Act, however, are not only **non-compliant provisions**, but also **gold-plating, conceptual fallacies, and violations of the authors' rights**.

The undersigned respectfully requests that the above considerations be addressed in accordance with your capacities.

*zneskih, ki so jih v preteklem finančnem letu kot imetniki pravic prejeli od organizacije za kolektivno upravljanje pravic*". Če imetniki pravic (avtorji) ne bi smeli upravljati poslov organizacije za kolektivno upravljanje pravic, bi bila takšna določba povsem nesmiselna oz. nepotrebna. *Argumentum a contrario*, imetniki pravic lahko zasedajo poslovodne funkcije, če skupščini organizacije za kolektivno upravljanje pravic predložijo zadevno izjavo. Predlagane spremembe, opisane v zadnjih dveh alinejah, tudi nasprotujejo obstoječi praksi.

Kot že navedeno, navedeni seznam neustreznih določb ZKUASP ni izčrpen, pač pa zgolj eksemplifikativen. Usodne pomanjkljivosti ZKUASP pa niso zgolj **neustrezne določbe**, pač pa tudi t.i. **gold-plating, konceptualne napake, in kršitve pravic avtorjev**.

Spodaj podpisani Vas s spoštovanjem prosi, da zgoraj navedene pomisleke naslovite skladno s svojimi pristojnostmi.

Združenje SAZAS,

on their behalf Law firm Rojs, Peljhan,  
Prelesnik & partners o.p., d.o.o.

Združenje SAZAS,

zanje Odvetniška družba Rojs, Peljhan,  
Prelesnik & partnerji o.p., d.o.o

cc:

v vednost:

[REDACTED] [REDACTED] Director-General of  
Directorate General for Communications  
Networks, Content & Technology

[REDACTED] [REDACTED], generalni direktor  
Generalnega direktorata za komunikacijska  
omrežja, vsebine in tehnologijo

## **Document 18**

Email from GENNA Cabinet SPRL, 21/06/2016, (Ref.Ares  
(2016)2882350)

Non disclosure

## **Document 19**

Letter from ZAPIS regarding the transposition of the CRM directive  
in Slovenia, 28/07/2016, (Ref. Ares(2016)3973336)

**(CNECT)**

**From:** [REDACTED]  
**Sent:** 28 July 2016 10:23  
**To:** CAB GUENTHER OETTINGER CONTACT  
**Cc:** [REDACTED] (CNECT); [REDACTED] (CNECT); [REDACTED] (COMM-LJUBLJANA)  
**Subject:** Slovenia / Directive 2014/26/EU  
**Attachments:** Letter\_ZAPIS\_July 2016.pdf

Dear Mr. Oettinger and Ms. Herold,

Združenje ZAPIS (*in English translation: the ZAPIS Society*) is a Slovenian society of authors, producers and performers (hereinafter referred to as: "ZAPIS"). ZAPIS operates as a collective organisation for collective management of rights in the sense of 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 (hereinafter referred to as: "Directive 2014/26/EU") formed on the initiative of authors, producers and performers, with the purpose of system regulation in the field of private and other own reproduction. For many years ZAPIS has been endeavouring to obtain a permit for collective enforcement of rights of authors, performers and producers on the basis of blank carriers of sound and picture. The reason why ZAPIS has not been issued the permit does not in any way lay in the society itself (for example, because the society would not meet the conditions stipulated by the law), but rather in the fact that the competent Slovenian regulatory authority (Intellectual Property Office) systematically creates/maintains a situation, whereby it refuses to issue the permit for collective management of rights on the basis of blank carriers of sound and picture to any collective organisation.

We hereby attach a letter concerning the transposition of the Directive 2014/26/EU into the legal order of the Republic of Slovenia. As elaborated in more detail in the letter, the anticipated reform of the Slovenian legal framework related to collective management of rights either thoroughly contradicts the Directive or stretches its scope to an unlawful and unacceptable degree. We respectfully ask you to review the letter and address our considerations in accordance with your capacities.

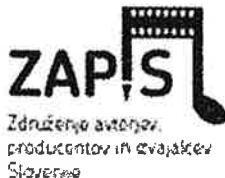
We trust you may have some additional queries or questions concerning the issues raised in the letter. If you do, please do not hesitate to reach out. We would gladly provide you with any additional information you may find useful.

Thank you for your time.

Sincerely Yours,

~ Združenje ZAPIS

[REDACTED]



Evropska komisija  
Rue de la Loi 200  
B-1049 Bruselj  
BELGIJA

European Commission  
Rue de la Loi 200  
B-1049 Brussels  
BELGIUM

**Za:**

Evropski Komisar za digitalno gospodarstvo  
in družbo

Günther Hermann Oettinger

Anna Herold

**To the attention of:**

European Commissioner for Digital Economy  
and Society

Günther Hermann Oettinger

Anna Herold

16. 7. 2016

16 July 2016

Spodaj podpisano Združenje ZAPIS je slovensko združenje avtorjev, producentov in izvajalcev (v nadaljevanju: »ZAPIS«). Deluje kot kolektivna organizacija za kolektivno upravljanje pravic v pomenu Direktive 2014/26/EU Evropskega parlamenta in Sveta z dne 26. Februarja 2014 o kolektivnem upravljanju avtorske in sorodnih pravic ter izdajanju več ozemeljskih licenc za pravice za glasbena dela za spletno uporabo na notranjem trgu (v nadaljevanju: »Direktiva 2014/26/EU«), nastala pa je na pobudo avtorjev, producentov in izvajalcev, z namenom regulacije sistema na področju privatnega in drugega lastnega reproduciranja.

The undersigned Združenje ZAPIS (*in English translation: the ZAPIS Society*) is a Slovenian society of authors, producers and performers (hereinafter referred to as: "ZAPIS"). ZAPIS operates as a collective organisation for collective management of rights in the sense of *Directive 2014/26EU 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* (hereinafter referred to as: "Directive 2014/26 EU") formed on the initiative of authors, producers and performers, with the purpose of system regulation in the field of private and other own reproduction.

ZAPIS si že več let prizadeva za pridobitev dovoljenje za kolektivno uveljavljanje pravic avtorjev, izvajalcev in producentov iz naslova praznih nosilcev zvoka in slike. Dovoljenja ZAPIS do danes še ni uspel pridobiti, pa četudi so v njem združeni prav upravičenci do nadomestila iz naslova privatnega in drugega lastnega reproduciranja, torej nadomestila, ki je vezano na produkcijo praznih nosilcev zvoka in slike (denimo: praznih CDjev, USB ključkov...). Razlog za dejstvo, da ZAPIS dovoljenja ne pridobi, pa nikakor ni v samem združenju (denimo: da združenje ne bi izpolnjevalo zakonsko določenih pogojev), pač pa v tem, da **pristojni slovenski regulatorni organ (Urad za intelektualno lastnino)** sistematično vzpostavlja/ohranja stanje, v katerem nobeni kolektivni organizaciji ne podeli dovoljenja za kolektivno uveljavljanje pravic iz naslova praznih nosilcev zvoka in slike. Namreč: do dne 31.12.2009 je tovrstno pravico upravljal drug zavod (Zavod IPF), od tedaj pa prav nobena kolektivna organizacija, ker slovenski Urad za intelektualno lastnino nobeni kolektivni organizaciji ni podelil ustreznega dovoljenja.

Pravice reproduciranja na evropski ravni ureja *Direktiva 2001/29/ES Evropskega parlamenta in Sveta* z dne 22. maja 2001 o

For many years ZAPIS has been endeavouring to obtain a permit for collective enforcement of rights of authors, performers and producers on the basis of blank carriers of sound and picture. Up to this day ZAPIS has not yet managed to obtain the permit, despite the fact that it is precisely the persons entitled to compensation for private and other own reproduction in relation to the production of blank carriers of sound and picture (for example USB flash drives, CDs) who are associated in ZAPIS. The reason why ZAPIS has not been issued the permit does not in any way lay in the society itself (for example, because the society would not meet the conditions stipulated by the law), but rather in the fact that the competent Slovenian regulatory authority (Intellectual Property Office) systematically creates/maintains a situation, whereby it refuses to issue the permit for collective management of rights on the basis of blank carriers of sound and picture to any collective organisation. Namely, until 31 December 2009, the management of such right was entrusted to another institute (Institute IPF), and since then, to no other organisation, because Slovenian Intellectual Property Office refused to issue the adequate permit to any collective organisation.

At the European level, reproduction rights are regulated by the *Directive 2001/29/EC of the European Parliament and of the Council of 22*

*usklajevanju določenih vidikov avtorske in sorodnih pravic v informacijski družbi (v nadaljevanju: »Direktiva 2001/29/ES«). Leta v 5. členu predvideva izjeme od splošnega pravila v zvezi s pravico reproduciranja, ki je zajeto v 2. členu. Med drugim določa, da lahko države članice predvidijo izjeme in omejitve pravice reproduciranja iz 2. člena v zvezi z reproducijami v katerem koli mediju, ki jih izdela fizična oseba za privatno uporabo in v namene, ki niso niti posredno niti neposredno komercialni, ob pogoju, da imetniki pravic prejmejo pravično nadomestilo, pri katerem se upošteva uporaba ali neuporaba tehničnih ukrepov na zadevnem delu ali predmetu (pri čemer pa so zadevni tehnični ukrepi nato nadalje opredeljeni v členu 6). Na podlagi Direktive 2001/29/ES je tako povsem jasno, da imajo upravičenci pravico do pravičnega nadomestila v zvezi z reproducijo za privatno rabo, pri čemer pa mora vsaka država članica uveljaviti sistem, ki upravičencem upravljanje takšne pravice tudi omogoča.*

*May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter: "Directive 2001/29/ES"). Article 5 of the Directive 2001/29/ES anticipates exceptions to the general rule in relation to the reproduction right, embedded in the Article 2. Among other it stipulates, that member states may introduce exceptions and limitations to the reproduction right determined in Article 2 in relation to reproductions on any kind of media, which are produced by a natural person for private use and for the purpose which is not indirectly nor directly commercial, under the condition that rightholders receive just compensation, which takes into account the use or non-use of technical measures on the relevant work or subject (whereas the relevant technical measures are referred to in Article 6). Therefore, on the basis of Directive 2001/29/EC it is made abundantly clear that the entitled persons have the right to just compensation in relation to reproduction for private use, whereas it is up to each member state to enforce a system, which enables such rightholders the management of such right.*

Evropska zakonodaja sicer izrecno ne določa, na kakšen način naj bi se zadevna pravica upravljala, vendar pa teorija opozarja, da si ni mogoče predstavljati upravljanja zadevne pravice brez kolektivnih organizacij (denimo,

European legislation does not expressly provide in what manner should the relevant right be managed, but the theory cautioned that one cannot imagine the management of the subject right without collective

tako navajajo avtorji v delu *Max Planck Institute for Intellectual Property and Competition Law, Comments of the Max Planck Institute for Intellectual Property and Competition Law on the proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market COM (2012)372*). Teorija tako izpostavlja, da upravljanje pravic v določenih primerih »že po naravi stvari« pridržana kolektivnim organizacijam, ker si individualnega upravljanja zaradi narave same pravice ni mogoče zamisliti. Dejstvo je torej, da je moč pravice oz. nadomestilo iz naslova praznih nosilcev zvoka in slike uveljavljati le preko kolektivne organizacije, ne pa individualno. Ker pa – kot navedeno zgoraj – slovenski Urad za intelektualno lastnino prav nobeni kolektivni organizacije ne podeli dovoljenja, ki bi omogočalo uveljavljanje zadevnega nadomestila, s tem avtorjem *de facto* preprečuje oz. onemogoča, da bi svoje pravice (ki jim nedvomno gredo) sploh mogli uveljaviti. Upravičencem tako (vsakodnevno) nastaja velika premoženska škoda, ki letno znaša približno 1 milijon EUR – ker pa takšno nevzdržno stanje traja že od konca leta 2009 (dotlej je, kot navedeno zgoraj, s pravico do nadomestila upravljal Zavod IPF), nastala škoda znaša že skorajda 6 milijonov EUR. Pri tem gre torej za očitno

organisations (as for example pointed out by authors in the work *Max Planck Institute for Intellectual Property and Competition Law, Comments of the Max Planck Institute for Intellectual Property and Competition Law on the proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market COM (2012)372*). Therefore, theory emphasizes that the enforcement of rights is on certain instances already "by the nature of things" reserved for collective organisations, since due to the nature of the right itself, individual management of such right is incomprehensible. Thus, the right or compensation on the basis of blank carriers of sound or pictures may only be enforced through a collective organisation and not individually. However – as mentioned above – since the Slovenian Intellectual Property Office refuses to issue a permit to any collective organisation, which would enable the enforcement of subject compensation, and with that *de facto* prevents and precludes the authors to even be able to enforce their rights (the rights to which they are undoubtedly entitled). Rightholders are thus (on a daily basis) incurred significant pecuniary damage, which annually amounts to 1 million EUR – and since such untenable situation has been continuous ever since the end of 2009 (as

oškodovanje slovenskih avtorjev, ki pa ga dopušča (in legitimira) prav država. O nedopustnosti takšnega stanja priča tudi dejstvo, da je Republika Slovenija edina država v Evropi, v kateri se zadevnih nadomestil ne pobira.

mentioned above, until then, the right to compensation was managed by the Institute IPF), the damage incurred already amounts to almost 6 million EUR. This means that damage is manifestly caused to Slovenian authors, and this is being permitted (and legitimized) by the state itself. Inadmissibility of such situation is further confirmed by the fact that the Republic of Slovenia is the only European state, where the subject compensation is not being collected.

Iz navedenega izhaja, da: (1) regulatorni organ v Republiki Sloveniji dovoljenj kolektivnim organizacijam za kolektivno upravljanje pravic iz naslova praznih nosilcev zvoka in slike ne podeljuje, ter (2) Direktiva 2001/29/ES v nacionalni pravni red Republike Slovenije ni ustrezno implementirana (navedeno pomanjkljivost bi sicer Urad Republike Slovenije vsaj začasno in dejansko saniral tako, da bi podelil začasno dovoljenje, vendar - kot rečeno - temu nikakor ni tako).

It follows from the above-mentioned that: (1) the regulatory authority in the Republic of Slovenia does not issue permits for collective management of rights on the basis of blank carriers of sound and picture to collective organisations, and (2) Directive 2001/29/EC has not been adequately implemented into the national legal order of the Republic of Slovenia (Intellectual Property Office of the Republic of Slovenia could at least temporarily and factually remedy this deficiency by issuing temporary permits, however - as mentioned - this has not been done).

V zadnjih mesecih smo v Republiki Sloveniji sicer priča zakonodajni aktivnosti v zvezi s prenosom Direktiva 2014/26/EU v nacionalni pravni red. Rok za implementacijo le-te se je namreč iztekel dne 10. 4. 2016 (naj omenimo, da tudi te direktive Republika Slovenija ni implementirala pravočasno, za kar je tudi

Through the recent months, legislative activity has been undertaken in the Republic of Slovenia in relation to the transposition of the Directive 2014/26/EU into the national legal order, since the period for implementation ran out on 10 April 2016 (it should be noted that this Directive has also

dobila uradni opomin s strani Evropske Unije). Slovensko Ministrstvo za gospodarski razvoj in tehnologijo (v nadaljevanju: »MGT«) je v lanskem letu v javno razpravo predložilo predlog Zakona o kolektivnem upravljanju avtorske in sorodnih pravic (v nadaljevanju: »ZKUASP«), ki je po besedah MGT implementacijski akt Direktive 2014/26/EU. Opozarjamo, da je ZKUASP povsem neprimeren poskus prenosa Direktive 2014/26/EU, saj ji neposredno nasprotuje, pod pretvezo implementacije uvaja rešitve, ki jih Direktiva 2014/26/EU sploh ne predvideva (denimo večji nadzor države nad kolektivnimi organizacijami), poleg tega pa ne rešuje ključnih težav, ki so nastale zaradi neimplementacije Direktive 2001/29/ES v slovenski pravni red (oz. bolje: še poglablja težave, ki so nastale zaradi tega).

not been implemented in a timely manner, for which Slovenia received an official warning from the European Union). Last year, Slovenian Ministry of Economic Development and Technology (hereinafter referred to as: "MGT") sent a draft of the Collective Management of Copyright and Related Rights Act (hereinafter referred to as: "ZKUASP") into public discussion, which is according to the MGT an act for implementation of the Directive 2014/26/EU. We would caution that ZKUASP represents a completely inadequate attempt of transposition of the Directive 2014/26/EU, since it directly contradicts the Directive 2014/26/EU, and introduces solutions which are not even included in the Directive 2014/26/EU, under the pretence of implementation (for example, stronger state control over collective organisations), whereas it fails to present a solution to the key problems which arose due to non-implementation of the Directive 2001/29/EC into the Slovenian legal order (or better: even widens the problems which were incurred by non-implementation).

Še posebej opozarjamo na sledeče:

We especially caution of the following:

1. ZKUASP je zaostril pogoje za pridobitev dovoljenja za kolektivno upravljanje pravic. Med drugim je denimo opustil določbo iz sedaj veljavnega Zakona o avtorski in sorodnih pravicah, ki je 1. ZKUASP has exacerbated the conditions for obtaining the permit for collective management of rights. Among other, it has dropped the provision from the currently valid Copyright and Related Rights Act, which

pristojnemu organu (Uradu za intelektualno lastnino) omogočala izdajo začasnih dovoljenj (pa četudi le-teh, kot navedeno zgoraj, Urad za intelektualno lastnino tudi sicer nikoli ni izdajal). Kar zadeva uveljavljanje nadomestila iz naslova praznih nosilcev zvoka in slike, tako ZKUASP ne prinaša nobenih rešitev, pač pa nasprotno – še nadalje preprečuje, da bi se sistem učinkovitega uveljavljanja pravice do pravičnega nadomestila sploh vzpostavil.

enabled to the competent authority (Intellectual Property Office) to issue temporary permits (even though, as mentioned-above, the Office nevertheless never issued such permits). Inasmuch as enforcing compensation on the basis of blank carriers of sound and picture is concerned, ZKUASP fails to introduce any solution. On the contrary, it continues to further prevent even the establishment of the system of effective enforcement of the right to just compensation.

2. ZKUASP po drugi strani še nadalje ohranja obvezno kolektivno upravljanje avtorskih in sorodnih pravic tudi na tistih področjih, na katerih za takšno omejitev pravic avtorjev ni najti nobenega razumnega razloga. Torej: namesto da bi ZKUASP rešil pereče vprašanje manjka kolektivne organizacije za uveljavljanje pravičnega nadomestila iz naslova praznih nosilcev zvoka in slike, raje regulira druga področja, ki jim sicer pritiče bistveno večja avtonomnost samih avtorjev oz. možnost individualnega upravljanja pravic.

2. On the other hand, ZKUASP continues to enforce mandatory collective management of copyright and related rights even for those areas, where such limitation of authors' rights is not supported by any reasonable grounds. Thus: rather than solving the pressing problems of deficit of collective organisation for enforcement of just compensation on the basis of blank carriers of sound and picture, ZKUASP regulates other areas, which should rather be accorded with substantially greater autonomy of authors or the possibility of individual management of rights.

3. ZKUASP nadalje določa, da v primerih obveznega kolektivnega upravljanja pravic ne izda dovoljenja za kolektivno upravljanje avtorske pravice pravni osebi, če je za isto vrsto avtorskih del in za iste pravice že izdano dovoljenje za kolektivno upravljanje avtorske pravice drugi kolektivni organizaciji. S tem je

3. ZKUASP further stipulates that in cases of mandatory collective management of rights, the permit for collective management of copyright shall not be issued to a legal person, if another collective organisation has already been issued a permit for collective management of copyright for the same type of

ZKUASP v neposrednem nasprotju z Direktivo 2014/26/EU, saj onemogoča vstop bolj učinkovite organizacije na trg.

copyrighted work and the same rights. This puts ZKUASP to direct contradiction to the Directive 2014/26/EU, since it prevents a more efficient organisation to enter the market.

4. ZKUASP tudi določa, da mora imeti kolektivna organizacija zaposlene najmanj tri osebe, kar je ponovno absurden poskus omejevanja pravic avtorjev do kolektivnega upravljanja avtorskih pravic. Denimo, ZAPIS ne more pridobiti dovoljenja za kolektivno upravljanje pravic iz naslova pravičnih nadomestil, kar pomeni, da tudi ne more imeti treh zaposlenih, saj bi bilo to z kolektivno organizacijo – ki ji regulatorni organ onemogoča vstop na trg – finančno popolnoma nevzdržno. Gre dejansko za začaran krog: dovoljenja ni moč pridobiti brez določenega števila zaposlenih, po drugi strani pa kolektivne organizacije skorajda nimajo zaposlovalne moči, dokler dovoljenja ne pridobi.

4. ZKUASP also stipulates that a collective organisation shall employ at least three persons, which again represents an absurd attempt to limit the rights of authors to collective management of rights. For instance, ZAPIS may not obtain a permit for collective management of rights on the basis of just compensation, which means that it also cannot employ three employees, since this would be completely financially untenable for a collective organisation, which is being prevented to enter the market by the authority. Effectively, this constitutes the situation of Catch 22: the permit may not be obtained without a certain number of employees, while on the other hand collective organisations barely have any employing possibilities, until the permit is obtained.

5. ZKUASP Uradu za intelektualno lastnino obenem omogoča popolno diskrecijo oz. arbitrarnost pri podeljevanju dovoljenj, kar gotovo ni v skladu z Direktivo 2014/26/EU. Eden ključnih ciljev le-te je namreč prav vzpostavitev sistema, ki bi deloval v največjo korist avtorjev/upravičencem, in s tem namenom

5. At the same time ZKUASP grants the Intellectual Property Office complete discretion or arbitrariness when it comes to issuing permits, which is almost certainly against the Directive 2014/26/EU. One of the key goals of the latter is precisely the establishment of the system which would work in the best interest of

uokvirja notranjo organizacijo kolektivnih organizacij, ki nadzorstveno funkcijo prvenstveno prepušča samim avtorjem. Pretiran nadzor države, ki se v ZKUASP kaže tako pri podeljevanju dovoljenj kot pri možnostih sankcioniranja, je v popolnem nasprotju z Direktivo 2014/26/EU.

authors/rightholders, and for this purpose establishes the internal organisation of collective organisations, which entrusts the supervisory function primarily to authors themselves. Excessive state supervision, which is reflected in ZKUASP in the provisions regulating the issuing of permits as well as in sanctioning options, is in complete contradiction to the Directive 2014/26/EU.

6. ZKUASP – dodatno, kar zadeva možnosti sankcioniranja – Uradu za intelektualno lastnino ne prepušča le pretirane diskrecije (denimo, organ sploh ni več vezan na načelo sorazmernosti pri izrekanju ukrepov, tako kot je bilo določno v dosedanjem zakonu), pač pa predvideva tudi povsem nesorazmerne in pretirano visoke kazni. Sorazmernost sankcij pa je izrecno predvidena z Direktivo 2014/26/EU, kar pomeni, da ji predlog ZKUASP neposredno nasprotuje tudi v tem delu. Zgolj za primer: če kolektivna organizacija za en dan zamudi rok objave zapisnika skupščine na svoji strani, jo lahko doleti globa v višini od 3.500 EUR do 6.000 EUR. ZAPIS je majhna organizacija, kar pomeni, da se iz povsem praktičnih razlogov zlahka zgodi, da ZAPIS zaradi pretiranih administrativnih bremen, ki jih tudi uveljavlja ZKUASP, vsakokrat ne bo mogel izpolniti vseh obveznosti, naloženih z ZKUASP. Tudi iz tega razloga bo naposled upravičencem, ki se zaradi uveljavljanja pravičnega nadomestila iz

6. ZKUASP – additionally, in relation to the sanctioning options – not only gives the Intellectual Property Office excessive discretion (for example, when imposing measures, the authority is no longer even bound by the principle of proportionality, as has been stipulated in the currently valid act), but also stipulates completely unproportioned and excessively high penalties. Yet, the proportionality of sanctions is explicitly prescribed with the Directive 2014/26/EU, which means that also in this part, the draft of the ZKUASP directly contradicts the said Directive. For exemplary purposes: if the collective organisation misses the deadline for publication of the minutes of the general meeting on its website by one day, it may be incurred a fine in the amount between EUR 3,500 and EUR 6,000. ZAPIS is a small organisation, which means that due to completely practical reasons, it could easily occur that ZAPIS may not be able to always fulfil all of its obligations imposed by ZKUASP

naslova praznih nosilcev zvoka in slike, due to excessive administrative burdens imposed by ZKUASP. Thus, for this reason also the enforcement of rights will eventually be prevented to rightholders who are associated in ZAPIS for the purpose of enforcement of just compensation on the basis of blank carriers of sound and picture.

7. ZKUASP ne določa prenosa dejavnosti (kar bi – če naj bi bil skladen z Direktivo – sicer moral), pač pa omogoča zgolj prenos treh segmentov administrativno tehničnih nalog. Poleg tega pa ZKUASP še zahteva, da je subjekt, na katerega so administrativno tehnični posli preneseni, v upravljanju ali pod nadzorom kolektivne organizacije. V tem okviru gre očitno za napačno razumevanje Direktive s strani predlagatelja/sestavljalca zakona. Namreč, Direktiva prenos subjektom pod nadzorom kolektivnih organizacij omenja zgolj pri prenosu dejavnosti (kar pomeni, da gre pri tem za eno izmed dejavnosti, kot jih opredeljuje Direktiva, denimo razdelitev zneskov upravičencem), ne pa pri prenosu administrativno tehničnih poslov. Glede slednjih Direktiva ne določa nobenih omejitev, tudi sicer pa je neizvedljivo, da bi imele organizacije za kolektivno upravljanje pravic pod nazorom poslovne subjekte, ki bi zanjo opravljale administrativne naloge. Kot navedeno, ZKUASP tudi ne dopušča prenosa dejavnosti. Naj izpostavimo, da majhna organizacija, kot je ZAPIS, določene dejavnosti

7. ZKUASP does not provide for the transfer of activity (which it would have to- if it was in accordance with the Directive), but only enables for the transfer of three segments of administrative technical tasks. Additionally, ZKUASP demands that the entity to whom the administrative technical tasks are transferred, must be under the management or supervision of a collective organisation. In this regard, the drafter/proposer of the law clearly misunderstood the Directive, since the Directive provides for the transfer to entities under supervision of collective organisations only in regard to the transfer of activity (which means that this concerns one of the activities determined by the Directive, for example, the distribution of amounts to rightholders), and not for the transfer of administrative technical tasks. In regard to the latter, the Directive does not determine any limitations and it is in anyway untenable for organisations for collective management of rights to have supervision over business entities, who would perform administrative tasks on their behalf. As mentioned, ZKUASP



mora prenesti, če naj bo stroškovno učinkovita, kar pomeni, da ji ZKUASP preprečuje stroškovno učinkovito delovanje, če ne že sam obstoj.

does not permit for the transfer of activity. We should emphasize that a small organisation, such as ZAPIS, must transfer certain activities, if it was to be cost effective, which means that ZKUASP prevents ZAPIS to operate cost-effectively, if not even its existence itself.

Končno še opozarjamo, da smo navedli zgolj nekaj nesprejemljivih določil ZKUASP, ki pa jih je na žalost še kopico. V prihodnosti pomanjkljivosti ZKUASP ter problematika neimplementacije Direktive 2001/29/ES zahtevajo resno diskusijo vseh vpletenih. Ker gre za pravni okvir, ki se prvenstveno določa na ravni Evropske Unije, pri izpostavljenih točkah pa gre potemtakem za očitne kršitve evropskega prava, vas prosimo, da ukrepate skladno s svojimi pristojnostmi.

Finally, we emphasize that we have only listed certain unacceptable provisions of ZKUASP, yet there are, sadly, many more. In times to come, ZKUASP deficiencies and the problem of non-implementation of Directive 2001/29/EC demand serious discussion of everyone involved. Since the situation concerns the legal framework which is primarily being determined on the level of the European Union and thus the above-outlined points concern manifest breaches of European law, we kindly ask you to act in accordance with your competences.



Predstavništvo Evropske komisije v Sloveniji      Representation of the European Commission in the Republic of Slovenia