Toward network governance of collective management organizations in Europe? The problem of institutional diversity

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1. Introduction

For anyone who has insight in the past and present realities of the creative industries, it is clear that the numerous provisions on subject matter, scope and limitations that are to be found in copyright codes and statutes, constitute only a thin layer of what actually governs relations in this multifaceted commercial sector. Beneath the surface of statutory rules, there is an intricate maze of individual contracts and collective agreements, compulsory, voluntary and extended licenses, public and private arrangements and a myriad of institutions, actors and organizations. This “underground” world of copyright law is characterized at times by Byzantine complexity. Indeed, one of Jan Rosén’s contributions as a scholar is that in his research he has systematically sought to uncover this less observed and elusive side of copyright “law in action”.¹ Jan’s work on the law of copyright contracts in Sweden has been later followed by inquiries

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into the role of different institutions in the collective management of copyright, and in particular into the governance of collective management organizations (CMOs).\(^2\)

Needless to say, the complexity has increased exponentially with the accession of Sweden to the European Union (EU) and the rising ambitions of EU institutions in the area of copyright law and policy. On the one hand, starting from the early 1990s, a process of creeping harmonization of substantive copyright law has been unfolding, with ever growing areas of copyright law being subject to Community/Union Directives, interpreted expansively by the Court of Justice of the European Union (CJEU).\(^3\) On the other hand, the exercise and the collective management of copyright and related rights are closely scrutinized for conformity with EU competition law and internal market rules.\(^4\) Since this bifurcated approach has not brought about sufficiently coherent EU copyright regime, in still a third direction, the Commission has more recently also entered the sphere of enforcement and — what is of particular interest for this contribution — of governance of collective copyright management. This new turn is probably not surprising. Given the importance of collective management of copyright and the diversity of governance arrangements across Member States, it has become increasingly evident that without some coordination and common ground in this area many of the achievements of harmonized EU copyright will remain only "on the books".

Still, probably few observers some years ago could have predicted that the EU institutions will manage to reach agreement on a Directive on the governance of collective management organisations, and even fewer that the Directive would take the bold approach now


adopted by Directive 2014/26/EU.\textsuperscript{5} The Directive was preceded by a decade-long tug-of-war between different industries and interests. The discussion on a Collective Copyright Management Directive was triggered by the European Parliament Resolution of January 2004, which for the first time outlined an EU legislative framework as a regulative option.\textsuperscript{6} In 2005 the Commission, instead of proposing binding legislation, issued a Recommendation on collective cross-border management of copyright and related rights\textsuperscript{7}, testing an alternative soft law approach. For some time it appeared that CMOs were successful in avoiding an EU-wide mandatory regulatory framework. However, following the rampant disinterest on the part of Member States and CMOs to introduce noticeable changes on the basis of this instrument, the only way forward proved to be the adoption of a binding EU legislative act.\textsuperscript{8} The initial Commission proposal for a Directive was criticized as not sufficiently respecting the special nature of CMOs and building on an unrealistic vision of competition between CMOs in Europe.\textsuperscript{9} In the course of the legislative procedure the European Parliament (EP) intro-


duced a number of amendments, which softened the initial text by ensuring better recognition for the broader societal role of CMOs and for the diversity of collective management in Europe, although much of the criticism is still lingering. The Directive was adopted in 2014 and has to be transposed in the national law of the Member States by March 2016.

As is well known, the Directive is divided into two main substantive parts. The first part takes a more holistic approach and seeks to set up minimum requirements as to the internal governance of collecting societies irrespective of cultural sector and way of operation (Title II). The second part focuses on the more specific question of multi-territorial licensing for online music (Title III). Yet another part deals with enforcement measures, including external supervision and enforcement cooperation (Title IV). The Directive is conceived as a minimum harmonization instrument. Member States are free to go beyond the minimum standards established by the Directive. Despite this fact and the relative flexibility left to the Member States in terms of choice of form and method of implementation, the Directive represents a serious attempt to influence directly the governance of collective copyright management in the EU.

The Directive has received ample scholarly attention and critical treatment, both in its part on transparency and accountability of CMOs and in the part concerning the cross-border online music licensing. This chapter has no ambition of providing comprehensive analysis of the Directive. At the centre of attention is the more limited question of the external supervision of the activities of CMOs and the envisaged framework for cooperation between competent authorities in the Member States. The contribution will pro-

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ceed in three steps. In a first step, it will provide a brief overview of the position of CMOs in EU law. Against this backdrop, the system of enforcement cooperation advanced in the Directive will be introduced and conceptualised as part of a more general trend toward network governance in the EU. Some of the reasons and implications of this trend will be addressed. In a second step, the paper will focus on the problem of institutional diversity, providing examples of largely divergent governance models of collective copyright management that are presently operating in individual EU Member States. In a third step, the initial work on transposing the Directive in a few selected Member States will be outlined, focusing on the question of supervision and enforcement. The differences between the individual national approaches will be briefly analysed as well as the impact the Directive is likely to exercise on national institutional environments. In conclusion, the prospects for achieving the purposes of the Directive and for effective functioning of the envisioned network model of governance will be critically discussed.

2. The history of CMOs in EU law and the governance model introduced by Directive 2014/26

Collective management organisations (or collecting societies) constitute a well-established element of the administration and enforcement of modern copyright. In economic theory they are largely seen as spontaneously evolved institutions of private ordering that by monitoring and cashing payments for mass "pulverized" uses of copyrighted works solve transaction cost problems and have a pivotal market facilitating task. Furthermore, they perform an important function of interest mobilisation and representation of authors in political, judicial and administrative processes, both domestic and international. While stressing the positive effects of collective management for saving transaction costs and enabling collective

action, economists also point at some more problematic aspects of collective management, namely that it is characterized by the economics of natural monopoly. In addition, members have little incentive to exercise control over the management of CMOs, giving rise to principal-agent problems.

Legally, the position of collecting societies is usually recognized in national legislation either by legislative acts entirely devoted to collective copyright management, or through special provisions forming integral part of copyright laws and IP codes (see below). At the same time, efforts are being made to minimize some of the risks associated with collective management.

In contrast to the rather prominent status enjoyed by CMOs in national legal orders, their position in EU law has been uncertain. Given the relatively slow pace of harmonisation of copyright law in the early years of European integration, on the one hand, and the principle of national institutional autonomy, on the other, there have been few attempts on the part of EU institutions to enter the field of collective copyright management. EU copyright directives have only occasionally referred to collective management, largely leaving its organisation to the Member States. However, as in other regulatory domains, EU law has entered the area of collective management “through the backdoor” in the form of CJEU jurisprudence based on the Treaty rules on free movement and competition law. This jurisprudence has come to affect the activity of CMOs with a vengeance. Already in the early 1970s the Commission initiated proceedings for infringement of Community competition law.


13 Drexel et al. (2013), supra note 11 at 948.

14 Handle and Towse (2007), supra note 11 at 948.


point out that “it is not appropriate for this Directive to restrict the choice of Member States as to competent authorities, nor as regards the ex-ante or ex-post nature of the control over CMOs.” The same recital also reassures Member States that they “should not be obliged to set up new competent authorities.” In other words, Member States are free to choose among already existing authorities and to distribute the competences and powers required by the Directive among several such authorities. This flexibility is maybe understandable, given the variety of ways in which the supervision of CMOs is organised at national level.

Nevertheless, there are a number of provisions concerning among others the functions of the authorities, their role and the arsenal of potential sanctions, indicating that the competent authority should either form part of the national public administration or at least be vested with adequate mandate and powers to initiate judicial proceedings. Thus, the Directive imposes on Member States an obligation to ensure that such authorities are “capable of addressing in an effective and timely manner any concern that may arise in the application of the Directive” (Recital 50). The envisaged cooperation and mutual assistance between the competent authorities of Member States and the Commission (Articles 37–41 Directive) likewise presupposes capacity to act independently and a minimum degree of commonality in the character, functions and powers of the participating authorities. It is difficult for instance to conceive of judicial authorities being mandated with tasks of information exchange and mutual assistance. While the Directive does not itself prescribe the sanctions and measures for ensuring compliance (see Article 35(3) Directive), Recital 50 gives some examples of measures which should be at the disposal of the authority, such as orders to dismiss directors who have acted negligently, inspections at the premises of a CMO, withdrawal of authorisation (in case such is required). All of the above examples suggest that a purely self-regulatory body, or a judicial body, would not fulfil the Directive’s requirement.

b) The scope of regulatory oversight

The Directive is not very precise as to the scope of regulatory oversight. In terms of substance Article 36 defines the scope rather broadly, imposing an obligation on the competent authorities of the Member States to monitor “compliance … with the provisions of
CMOs promoted by the Directive. Given that CMOs are expected to act freely across borders and to provide services to right holders and users in the whole of the Union, the monitoring can only be effective if it builds on a tightly-knit mesh of supervisory bodies, acting in close cooperation. For national competent authorities to be part of this intra-European supervisory network implies acting with responsibility for the effectiveness and integrity of collective copyright management in the whole Union. What deserves mentioning though is that, unlike other instruments setting up systems of enforcement coordination, the Directive does not require from Member States to designate a single liaison office for that purpose (cf. Article 3 CPC Regulation).

d) Expert group

To facilitate this cooperation, the Directive establishes a so called expert group, composed of representatives of the competent authorities of the Member States and chaired by a representative of the Commission (Article 41). The expert group has a number of tasks related to the effective transposition and ensuring compliance with the Directive. It is expected in particular: “(a) to examine the impact of the transposition of [the] Directive on the functioning of CMOs … and to highlight any difficulties; (b) to organise consultations on all questions arising from the application of [the] Directive and (c) to facilitate the exchange of information on relevant developments in legislation and case-law, as well as relevant economic, social, cultural and technological developments, especially in relation to the digital market in works and other subject-matter.” The expert group can also tackle requests for information and action referred to the group by competent national authorities upon alleged non-compliance by CMOs in other Member States (Article 38(4) Directive).

The Directive envisages even closer cooperation between the Commission and the competent authorities when it comes to the development of multi-territorial licensing of online rights in musical works (Title III of the Directive). In this domain the Commission is assigned a more active steering role. It is supposed to foster regular exchange of information between the competent authorities of the Member States, and between those authorities and the Commission, on the situation and development of multi-territorial licensing. The Commission is mandated to conduct regular consultations with rep-
representatives of rightholders, CMOs, users, consumers and other interested parties on their experience with the application of the provisions on multi-territorial licensing (Article 38). On their part, the competent authorities of Member States have a duty to report regularly to the Commission about the situation in their respective territory, also on the basis of consultations with relevant stake holders. This exercise of regular information exchange and assessment is intended ultimately to lead to proposals for new steps and new solutions, if problems with the current framework are identified (Article 38(4)).

e) **A network governance model for collective copyright management in the EU**

Obviously, the rules and regulations outlined above set up the main building blocks of a network governance model for ensuring effective enforcement and compliance with the substantive requirements of the Directive. To be sure, this governance model is hardly unique for the area of collective copyright management. Quite to the contrary, it is part of a general trend in the European Union, which has been well-observed and analysed by political scientists and legal scholars. In the literature on governance, the concept “network” is used to denote a governance arrangement that is characterized by multiple nodes of interconnected, mutually dependant institutional units operating in a non-hierarchical manner. In the EU context, networks can have different functions and tasks – from exchange of information and experience to the more formalized cooperation on enforcement and implementation of EU legislation. Usually, European networks are networks of national authorities, but they can also involve private organizations and other institutions.

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24 Börzel and Heard-Lauréot (2009), supra note 23, at 137.
The reasons for the turn to network governance in the European Union are multiple. With the deepening of European integration since the mid-1980s, the gap between expanding substantive competences of the European Communities/Union, on the one hand, and its lacking implementation and enforcement powers and capacity, on the other, was increasingly perceived as problematic and unsatisfactory. To reduce this gap, national administrations were more actively engaged in ensuring the effectiveness of EU law in various regulatory domains. At the same time, different techniques have been evolving to maintain a measure of coherence in this complex model of multi-level governance. Establishing regulatory and enforcement networks has been one such technique, linking national institutional entities into a web of mutually related nodal, with EU institutions, notably the Commission, playing the coordinating – and often steering – role.

The research focus when analysing the nature and effects of network governance in the EU has so far been primarily on European networks of regulatory agencies. Most prominent objects of study have been the various networks in the area of sectoral regulation of newly liberalized public utilities, such as energy, telecoms, but also in the area of financial markets. Following the entry into force of the Competition Enforcement Regulation 2003/1, particular interest has attracted the intensive activity of the European Competition Network. Although different in character and institutional design these networks have in common the relatively well defined ambit of regulatory competence of the entities participating in the network. There is generally common ground and understanding as to the main regulatory problems and the need for public intervention.

More recently, however, the network model of governance has been extended to areas of law and policy, which traditionally have been defined as domains of private law, or at least as hybrids between public and private law. Some examples are from the area of con-

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sumer law, labour law, the law of the regulated professions, and last but not least, intellectual property law. One distinctive feature of governance in these domains is that there is a greater diversity of institutional approaches across Member States, ranging from public to private and mixed private/public governance schemes, including co-regulation and self-regulation. The role assigned to private organisations and actors in such schemes differs across jurisdictions, as do the principles framing the relationship between private and public actors.

Indeed, collective copyright management is a good case in point with largely divergent national models of control and supervision of collective management organisations. Whereas in some countries like Germany, these organisations are subject to authorisation and relatively strict public control, in other countries like Sweden, the organisations have been largely self-governing. While in some jurisdictions supervision is exercised by Patent and Trademark Offices, in others the competent public body is the Ministry of Culture, or special public bodies set up for this purpose. This institutional diversity may constitute a serious challenge for the transposition of the Directive at the national level, but may, more fundamentally, undermine the effective implementation and functioning of the envisioned network model of governance. A major question that appears in this context is how this diversity of institutional approaches would impact on the effectiveness and the very feasibility of network governance in these domains. A related question is whether the interaction within the network would exert influence on national institutional solutions. Would one see a push towards institutional convergence or, would different adaptation and communication techniques evolve to preserve the diversity?

3. Institutional diversity in the governance of collective management organizations

At first glance, it may appear strange to speak of institutional diversity when referring to collective copyright management. The story

a) France: recognition and trust under ex post control

In their country of origin France, CMOs, known under the legal term "sociétés de perceptions et de répartitions des droits", or SPRD (in English: Royalty Collection and Distribution Societies), are usually classified in two main categories: primary management collecting societies, which are membership-based societies and have as their main objective to defend the interests of their members, and intermediary societies (or "societies of societies"), which are in turn composed of other societies and act as common gateways or platforms for collecting royalties or remuneration for particular kinds of works, or on the basis of mandatory licenses or private copy levies. The societies are defined by the French Code of Intellectual Property (CIP) as civil law companies and are consequently not-for-profit and subject to the jurisdiction of civil courts (article L321-1 CPI). They are, however, not viewed as exclusively economic entities, but are recognized as important cultural institutions, having a public interest mission, much in line with the idealistic philosophy of French droit d'auteur.

The starting premise in French law is that CMOs do not need governmental approval and can act freely as long as their activity is in compliance with the legislative framework. Prior approval is needed only for certain exploitations, mainly those based on mandatory collective management. In these cases the granting authority is the Ministry of Culture. However, in recent years there has been a trend of increasing public oversight over the activities of the CMOs, partly provoked by a number of widely publicised incidents of mismanagement and bad governance in individual CMOs. Despite the absence of formal approval procedure, all organisations are required to submit their draft statutes or articles of association to

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31 Dietz (2003), supra note 98, 897.
the Minister of Culture, who can, within two months of receiving the documents, seize the competent civil court and request that the society is closed down, if there are serious reasons that speak against its constitution. The court decides on the basis of the professional qualifications of the founders, the human and economic resources available for carrying out the functions of the society and the compliance with the relevant regulations (article L321-3(3) CPI). Since 2006 the Minister has also the mandate to seize the court and request that it annuls certain clauses in the statute, or decision of the society, provided that the latter does not comply with the Minister’s instructions within a given time-limit. So the external oversight builds on an ex post control, which is executed by the court, but upon the initiative of the responsible Minister (see article L321-3(4) CPI)\textsuperscript{34}.

A second limb in the oversight of the CMOs has been added with an amendment of the CPI in 2000, when a Permanent Commission for Control of Royalty Collection and Distribution Societies (La commission permanente de contrôle des sociétés de perception et de répartition des droits) was established under the auspices of the Court of Audit (Cour des Comptes)\textsuperscript{35}. The Commission is a five-member body composed by magistrates and other public officials of high repute. Its main task is to exercise an oversight over the accounts and financial flows of the CMOs. While the commission does not have sanctioning powers, it has far-reaching investigative powers. The Commission can demand information and access to premises upon penalty of a fine or imprisonment of one year. It has a duty to inform on an annual basis the French Parliament, the Government and affected societies, publishing reports on its audits with analysis of individual CMOs and recommendations (article L321-13 CPI). A particular subject of control is the use by the societies of the funds that are to be spent for promotion of cultural and social objectives. The sums are considerable, since 25% of the private copy levies and a percentage of the non-distributed royalties are earmarked for such purposes (article L321-9 CPI)\textsuperscript{36}.

\textsuperscript{34} See Piaskowski (2010), supra note \textsuperscript{199} ff.
\textsuperscript{35} See Piaskowski (2010), supra note \textsuperscript{202–203}.
\textsuperscript{36} See Piaskowski (2010), supra note \textsuperscript{192}.
So, while CMOs are in France trusted and recognised as institutions with important public interest mission, they are subject to double-edged *ex-post* control.

**b) Germany: benevolent regulation with *ex ante* control**

Germany features one of the most extensive regulative regimes of collecting societies. Technically, this regime forms part of German copyright law, but it is set out in a separate statutory act, the so-called Law on the Administration of Copyright and Neighbouring Rights (Urheberrechtswahrnehmungsgesetz, UrhWahrG) of 9 September 1965. This in itself already demonstrates that the law maker views the CMOs as indispensable for a workable system of copyright protection. In the words of Reinbothe, the “German legislator confirmed that CMOs were much more than just private agents; their activities were clearly considered to be in the public interest and located in the neighbourhood of State agencies or the [Trade] Unions.” At the same time, the legislator has shown impressive concern for the governance of CMOs. Detailed rules frame the activities of the societies from the moment of their establishment and set standards for the relations of the societies both internally, vis-à-vis their members, and externally, vis-à-vis their users (see §§ 6–13 UrhWahrG), with the principle of transparency permeating the regulative regime.

While societies are accorded a great degree of self-regulatory autonomy, the system also includes a considerable element of public oversight. Importantly, an approval by a competent public authority is required for any collecting society established and active in Germany (see §§ 1–2 UrhWahrG). The public authority vested with supervisory powers is the German Patent and Trademark Office (DPMA). When it comes to the grant or withdrawal of the approval the DPMA acts in agreement with the Federal Competition Authority (Bundeskartellamt, BKA). In case the views of the two authorities diverge, the matter is referred to the Ministry of Justice, which

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39 Reinbothe (2010), * supra note 18*, at 220.
acts in coordination with the Ministry of Economy and Energy (§ 18 UrhWG).

This approach to the governance of collecting society is aptly dubbed as "benevolent regulation". Dietz speaks of a comprehensive approach, noting as well the overall supportive stance of the state toward CMOs.

c) UK: from antitrust approach to co-regulation

The approach in the UK has been quite different compared to the continental approach. Collecting societies have traditionally been conceived as private licensing bodies pursuing economic objectives and there has been little acknowledgement of a public interest dimension of collective rights management. In contrast to Germany, collecting societies are set up freely and there is no procedure for government grant or approval. Until recently, the regulative regime relied in principle almost entirely on the self-governance of the societies. Although the Copyright, Designs and Patents Act (CDPA) 1988 contains express provisions on collecting societies (see Chapter VII Licensing schemes and licensing bodies, sections 137–144A), these rules are mostly concerned with the setting up of licensing schemes and tariffs and preventing the abuse by societies of their monopoly position in operating or negotiating the terms of the schemes. Licensing schemes are expected to emerge in a voluntary manner. However, in case voluntary licensing is not effectuated potential users can refer their request for licensing to a Copyright Tribunal. The same possibility exists in case of conflict between licensing bodies and users under an operating licensing scheme (Chapter VIII CDPA).

Dietz defines this approach, characteristic also for other countries of the common law family, as an antitrust approach. Even the notion "collecting societies" is by commentators seen to avow the generally suspicious attitude toward these institutions. The hostile attitude to cartels and anticompetitive practices is a famous trait of the com-

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41 Dietz (2002), supra note 14, at 897.
mon law system and well in line with the liberal pro-competitive stance of the UK political economy.43

With the advent of digital technology the need for more flexible, transparent and accountable collective copyright management has been brought to the fore. Obviously, an antitrust approach can hardly respond to these exigencies, which instead require a more prescriptive attitude, spelling out clearly the main principles for the internal governance of the societies. An influential investigation commissioned by the UK Government and chaired by Professor Ian Hargreaves published in 2011 its report ‘Digital Opportunity: A Review of Intellectual Property and Growth’ (known also as the Hargreaves review).44 The Review underlined the valuable role played by collecting societies, but also submitted evidence about dysfunctionalities in the current system. A number of stakeholders, including big users like the BBC, as well as SMEs, witnessed of protracted negotiations with collecting societies and sometimes arbitrary rejection of licensing, leading to costs and uncertainty. One of the recommendations of the Review was therefore that “collecting societies should be required by law to adopt codes of practice, approved by the IPO and the UK competition authorities, to ensure that they operate in a way that is consistent with the further development of efficient, open markets.”45

The UK government took this recommendation seriously and undertook a comprehensive regulative reform of collecting societies. Following additional consultations, it enacted the Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 (the “2014 Regulations”). This statutory instrument requires UK CMOs to adhere to codes of practice that comply with minimum standards of governance and transparency that are set out in a so called Schedule to the Regulations. If a licensing body does not have a code or if the code does not comply with the standard, the Secretary of State can direct the relevant body to adopt and publish such a code and, as a

45 Hargreaves (2011) supra note 44, at 57 & 98.
last resort, impose a code of practice on the CMO (Regulation 5). Failure to comply on the part of CMOs can also lead to imposition of financial penalties (Regulation 10). The 2014 Regulations also envisage the possibility of appointing code reviewers and a licensing code ombudsman to investigate and determine disputes on the basis of the code (Regulations 6 & 7).

The Regulations follow a model of co-regulation building on deep-rooted institutional traditions in the UK. According to this model CMOs self-regulate in the first instance, but the UK government has a reserve power to remedy any problems in self-regulation and to impose sanctions where appropriate.

d) Sweden: a self-regulatory approach

When compared to the continental and the common law model, the Swedish approach to the governance of CMOs confirms the well-established view in comparative scholarship of the Scandinavian legal family as having its particular style.46 Whereas the model shares with the continental tradition the benevolence and respect for the broader societal role of CMOs, the attitude toward the need for external control is markedly different. Common for the Nordic countries is the scarce regulation of the activities of CMOs, whereby in the case of Sweden, the hands-off approach is particularly pronounced. CMOs are certainly mentioned in the section on compulsory and extended licenses of the Swedish Copyright Law (L. URL). However, there are neither special rules on authorisation, nor any arrangements for government oversight of the activities of the organisations.47

In the recent Government Inquiry on implementation of Directive 2014/26, this lean self-regulatory approach is described in the following way:

In Swedish law there are no provisions on special supervision by an authority over the collective management organisations, for instance in the form of oversight or other public control. Instead,

the control over the organisations takes place on the basis of private law rules, i.e. company law rules or rules setting out the conditions for triggering an extended collective licences scheme and the corresponding obligations in respect to outsiders. The control of compliance with these rules is exercised by way of judicial review, whereby violations can be subject to mainly civil law sanctions, such as compensation for damages. Somewhat simplified, one can describe the present Swedish regime of collective management as self-regulatory… The absence of agency oversight or other public intervention is also characteristic of the relations between the organisations and the users.48

A number of commentators observe that the approach toward CMOs in Sweden builds in many respects on the model of Swedish industrial relations, with strong and influential labour movement and reliance on 'soft corporatist' procedures for negotiating collective agreements and for conflict settlement.49 Indeed, there are a number of parallels to be drawn. Clearly, CMOs fulfil, at least partly, the function of mediating between authors and users of their works, which places them in a position to represent the collective interests of creators in receiving reasonable remuneration for their labour, in much the same way as trade unions represent workers in their negotiations with industry.50 Therefore it is only natural that the same socio-economic conditions that have proved conducive for the high unionization in Sweden have also been advantageous for the growth of CMOs.51 In the words of Svante Bergström, allegedly one of the

51 Some of the factors that are usually brought forward are: the homogeneity of Nordic societies, "the systematic and long-standing Nordic cooperation among both authorities and organizations" (at 3), the general "policy of seeking agreement" (at 4) and the position of labour organisations as part of the "state structure" (at 4). See Riis, T. and J. Schovsbo, 'Extended Collective Licenses and the Nordic Experience — It’s a Hybrid but is It a Volvo or a Lemon?', Columbia Journal of Law and the
fathers of the Swedish extended collective licensing scheme, “few countries provide more fruitful soil for organisations – and effective organisations that is – than our country.”

The institute of extended collective license, which has attracted much attention internationally, has also visible connections to the labour law model. According to Gunnar Petri, this construction was directly inspired from the labour market, where ever since the 1920s collective agreements were allowed to have extended effects covering also unorganised workers. Similar arrangements existed also in the market for house-renting where agreements between house-owners and tenants associations were in 1974 extended to also apply to non-represented tenants. More generally, the wide-spread acceptance of collective redistributive schemes based on solidarity among the members of the collective, has also been vital for accepting pragmatic solutions infusing a high degree of collectivism in the administration of copyright.

Students of labour law and industrial relations usually underline the corporatist nature of the Swedish model. The model builds on high extent of trust between the participating parties – government, industry and trade unions. The responsible behaviour of labour organisations and the ensuing low level of labour conflict, have their counterpart in considerable delegation of regulatory powers to the unions and to collective agreements. The model is thus averse to statutory regulation and to formalised system of public control. The latter, by relying on hierarchy, may disrupt the fragile balance between the parties. It is not surprising that a similar approach can


53 See Petri (2005), supra note 48, at 438.


55 The absence of statutory provisions on such crucial elements of labour relations, such as minimum pay, is a well-known bone of contention in the attempts to level the playing field in EU labour markets. This was one of the issues at the heart of the
be observed in the area of collective rights management, where the parties are entrusted with negotiating the framework of their relations and with conflict-settlement.

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The overview above has naturally no claim of giving an exhaustive or even a sufficiently representative picture of national governance models of collective copyright management. The intention is only to demonstrate the broad variety of institutional approaches even among Member States with most developed traditions and elaborate practice of collective rights management. I am not mentioning here countries like Italy, Austria and the Czech Republic, exhibiting a system of legal monopoly granted to one single collecting society within the respective sector.\(^6\) Nor is it possible to enter the fascinating story of institution-building in the new EU Member States from Central and Eastern Europe (CEE), where collective management had to be (re)constituted after decades of state control over authors' rights and state-managed systems for remuneration.\(^7\) What is certain is that the diversity is even more striking if one spreads the investigation to all the 28 Member States of the Union.

4. The impact of the Directive on selected national governance models

Given the above, admittedly briefly sketched out, variety of national institutional models, what can the expected impact of the Directive

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\(^6\) Such a state monopoly system has been in principle found compatible with EU competition and internal market law by the CJEU in its judgment in Case C 351/12 OSA, see Drexl (2014), supra note 14.

On the other hand, in the discussion preceding the resolution, it was acknowledged that harmonisation was needed. In particular in the New Member States from CEE collecting societies were far from transparent and accountable. But even the long-existing and well established French collecting societies were not entirely trusted in respect of their transparency. On the question of public supervision the reporting Member of the Commission on Culture expressed reservations concerning the requirement of designating a special authority to exercise regulatory oversight over the activities of the CMOs and in particular over those aspects related to the multi-territorial licensing. She emphasized that under French law the control of these aspects was exclusively judicial.59

In two expert reports, commissioned by the Supreme Council on Literary and Artistic Property, a body recently established with the Ministry of Culture, the Proposal for Directive was diligently analysed after consultation with the affected stake holders (predominantly CMOs) and a number of objections and reservations were expressed.60 One recommendation was that the Directive should distinguish two different situations, namely when Member States have, or respectively do not have, a body controlling collecting societies, and accordingly establish two separate legal regimes in order to allow Member States to conduct a transposition that would achieve the Community objectives.61 This recommendation was apparently not followed in the final text of the Directive.

One aspect that may constitute a particular challenge for the French transposition of the Directive on the question of public supervision is the currently dispersed system of supervision over the activities of CMOs in France. As mentioned above, the oversight is at present divided. The Ministry of Culture has the effective powers of requiring information and compliance with the relevant statutory

61 See Rapport Martin, supra note 60, 7.
rules, including instituting judicial proceedings for the closing down of non-compliant CMOs. At the same time, the Permanent Commission for the Control of SPRD has the more specific mandate to exercise ad hoc control over the financial accounts and the economic activity of the societies. In addition, another public authority that could potentially be assigned supervisory functions is the High Authority for the Distribution of Works and the Protection of Rights on the Internet (HADOPI, Haute autorité pour la diffusion des oeuvres et la protection des droits), established in the course of previous initiatives in the field of digital copyright. Consequently, there will be several options for organising the system of supervision and control under the Directive, none of which is self-evident.

Other misgivings expressed by French stakeholders in the course of negotiations of the Directive concern the regime of control at the place of establishment of the CMO. In the expert report commissioned by the Supreme Council on Literary and Artistic Property this principle is seen to ensue from the close connection with the Services Directive. However, when applied to the control of the activities of CMOs in a highly diversified landscape of supervision of these societies, the principle is seen to carry the risk of distortions of competition, favouring CMOs in countries with light supervision of the societies.\textsuperscript{63}

b) Germany: keeping the status quo

In Germany the Federal Ministry of Justice and Consumer Protection submitted a ministerial Bill (Referentenentwurf) in June 2015 following consultation with stake-holders.\textsuperscript{64} The legislative proposal relates not only to the transposition of the Collective Copy-

\begin{footnotesize}
\begin{enumerate}
\item See Rapport Martin, supra note 47, 13.
\item Entwurf eines Gesetzes zur Umsetzung der Richtlinie 2014/26/EU über kollektive Wahrnehmung von Urheber- und verwandten Schutzrechten und die Vergabe von Mehrgebietslizenzen für Rechte an Musikwerken für die Online-Nutzung im Innenmarkt sowie zur Änderung des Verfahrens betreffend die Geräte- und Speichermediumvergütung, Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz, 09.06.2015 (hereinafter Referentenentwurf).
\end{enumerate}
\end{footnotesize}
right Management Directive, but also sets out to reform the system of private copy levies.

In the introduction to the Bill, the Ministry explains the need for the Directive partly by the fact that, unlike the situation in Germany, in some EU Member States there has been neither sufficient statutory regulation of CMOs nor effective agency supervision of their activity. Despite the general compatibility of the German national approach with the Directive, the draft submitted by the government envisages a completely new legislative act, the so called Collecting Societies Act (Verwertungsgesellschaftengesetz, VGG) that is to replace the now valid UrhWahrG. It appears that transposition of the Directive is carried out with utmost care and loyalty to the intentions of the Directive. As stated in the Bill, many of the specific requirements of the Directive, which have so far been part of non-legislative instruments, such as articles of association or statutes of the CMOs, are now transformed into statutory rules, adapted to the requirements of the Directive, and lifted into the new Law. The resulting legislative draft is characterised by considerable regulative detail, containing 139 provisions, compared to the 29 paragraphs of the current law.

Regarding the organisation of supervision and control, the Bill does not introduce any major changes. In the course of stake holder consultation preceding the Bill, the question was raised whether the system of prior authorisation for the setting up of new collecting societies should be maintained. Some of the most influential stakeholders took a clear position in favour of the existing system. In its statement the German Society for Protection of Industrial Property and Copyright (Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht, GRUR) emphasized vehemently that the system had to be preserved. The society argued moreover that the system of prior authorisation had to be extended to the setting up of CMOs granting multi-territorial licenses for online rights in musical works, in order to control that the societies comply with the criteria set up in the Directive.  

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65 Referentenentwurf, supra note 63, at 63.
66 Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht (GRUR), Stellungnahme zur Anhörung zur Umsetzung der Richtlinie 2014/26/EU, 17 September 2014.
According to the ministerial Bill the system of prior authorisation is indeed to be maintained with divided competences between the DPMA and the BKA and a supporting role for the Ministries of Justice and of the Economy. Authorisation has to be requested by any organisation seeking to be established as a CMO on the territory of the Federal Republic, as well as by organisations established in countries outside the EU and seeking to act as CMOs on the territory of Germany. In contrast, societies established in other EU Member States do not have to apply for authorisation, since they are expected to comply with the legal regime in their country of establishment (see §§ 76 VGG).

The DPMA is to keep its functions as a supervisory authority, and is also designated as competent authority under the Directive. The substantive scope of supervision is comprehensive and covers all statutory obligations of the CMOs. In particular, the explanatory part of the Bill stresses that the supervisory authority has to control the compliance on the part of CMOs with obligations that constitute legal basis for civil law claims in the interest of third parties. In the scope of supervision are also obligations in the context of the multi-territorial licensing of online rights in music works.\(^67\)

It can be noted that the Bill contains specific rules on enforcement cooperation between competent authorities in the Member States and between the authorities and the Commission, transposing the provisions of the Directive in regard to information exchange and mutual assistance (see §§ 86–87 VGG). In this way the proposed legislation provides solid legislative basis for the functioning of the network governance model advanced in the Directive.

All in all, it could be concluded that the Directive exerts minimal pressure toward institutional change, mainly because the German model was very well in line with the requirements of the Directive already before the entry into force of the latter. Irrespective of this general alignment with the Directive, the governmental Bill witnesses of a serious and congenial effort to achieve the purposes of the Directive and to enable the system of closer cooperation and monitoring in the area of collective management.

\(^67\) Referentenentwurf, § 76, supra note \(1\), 112–113.
c) UK: the strategy of anticipatory adaptation

In the UK, the domestic process of reforming collecting societies was in full swing when the Commission published its proposal for a Directive. At the time the UK Government had to decide whether to suspend all domestic legislative and regulatory efforts awaiting the outcome of the negotiations at the EU level, or to go ahead with its internal reforms. The second option prevailed because according to the Government there was no guarantee that the Directive would be agreed; and even if it was adopted, “it would be a number of years before transposition during which time rights holders and licensees would be without the protections they had been promised.” In this way, the UK government chose to work on internal reform in parallel with the reform at the EU level. Arguably, this enhanced the Government’s possibilities to influence the negotiating process, but also opened space for institutional experimentation and ongoing adaption of national solutions to the emerging EU regulative regime.

Since the 2014 Regulations were developed and implemented against the backdrop of the Directive, the governance standard set out in the Regulations was in many respects already in conformity with the requirements of the Directive. Therefore when in January 2015 the UK Government launched a consultation on the implementation of the Directive, the tenor was generally optimistic. The Government outlined two main options for meeting the requirements of the Directive, while preserving the main features of the UK model. Neither of the options seemed to put a particular strain of institutional adaptation. The first option consisted in

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70 See Consultation, supra note 69, at 3.

71 See also Collective Rights Management in the Digital Single Market: Consultation on the implementation of the EU Directive on the collective management of copyright and multi-territorial licensing of online music rights in the Internal market.
adapting the existing regulatory framework, including the 2014 Regulations, to comply with the Directive’s requirements. The second option was to replace the existing regulatory framework, including the 2014 Regulations, with new Regulations. Under this option, the 2014 Regulations would have to be repealed, while the provisions of the Directive would effectively be copied out into a new set of Regulations.

The responses to the Government consultation showed broad support for option 2. The advantage was seen to lie mainly in the normative clarity and the adherence to the regulative tradition of transposition of EU legislation into UK law through Regulations following closely the text of the original EU instrument. Indeed, in a recently published document the Government advanced draft Regulations, which basically copy out the Directive’s substantive requirements. At the same time, given that the Directive is a minimum harmonisation instrument, it is proposed to keep some of the protections for licensees included in the 2014 Regulations, which were stronger, more detailed, or absent from the Directive.

Concerning monitoring and enforcement, the Directive’s requirement of public oversight was clearly closer to the continental model of supervision, having no clear counterpart in the UK. Therefore the UK Government was exploring different options for the creation of a national competent authority (NCA): (a) creating a new regulatory body; (b) persuading an existing regulatory body to take on the role; and (c) having a dedicated team within the IPO. As admitted by the


72 Government response, supra note 71, at 10.


74 Some examples include requirements upon CMOs to act in good faith vis-à-vis licensees not only in the course of negotiations, as required by the Directive, but also in ongoing relationships, as well as an obligation for CMOs to ensure that their employees, agents and representatives are trained on conduct that complies with obligations in the minimum standards. Government response, supra note 71, at 7–9.
Government “[c]larly signals from existing regulatory bodies suggest little appetite for taking on this work, while the relatively narrow scope of the Directive would make it difficult to justify the high cost of creating a new body.”

Among these alternatives, the option favoured by the Government was for a dedicated team within the IPO to take on the role of a competent authority under the Directive. In this respect, the 2014 Regulations apparently worked as a test ground for a new governance model. Although the IPO was not a regulatory body, its responsibilities in relation to the 2014 Regulations meant that it acted in a quasi-regulatory capacity. The Government therefore found it only reasonable “to take advantage of synergies with its existing functions and expertise in collective rights management.” Alternative solutions were considered more costly. This option garnered considerable stakeholder support and is now included in the Draft Regulations.

Interestingly, the Government initially expressed its intention to use at least to some extent “existing infrastructure from the current system (e.g. the institute of code ombudsman and complaints procedure).” It thus appeared that part of the co-regulatory system established with the 2014 Regulations, with CMO obligation to adhere to codes of practices and possibility for a supervisory authority to impose a code in case of non-compliance, would be retained. However, the now published Draft Regulations reflect a more radical change in approach. CMOs and users are required to comply with clearly spelled-out statutory provisions based on the Directive. In case of non-compliance the competent authority can give compliance notice, and upon failure to comply with the notice, it can impose financial penalties of up to 50,000 GBP. The Government is careful to underline that such sanctions will be imposed only rarely and after careful consideration of alternative options. Certainly, CMOs can still continue to maintain a self-regulatory system of codes of practice and a code ombudsman. However, such a system will no longer be backed up and supervised by the Government.

75 Consultation, supra note 74, 17.
76 Government response, supra note 75, 36.
77 Consultation, supra note 76.
One can consequently speak of a shift from co-regulatory to a (light) regulatory approach.

What is clear is that the UK Government sees the Directive as a chance for the creative industries in the UK to reach a pan-European market.\textsuperscript{79} The advantage is considered as particularly significant for the music industry given the fact that the UK is one of the two net exporters of music in Europe. Likewise, the Directive is conceived as a “golden opportunity” for CMOs in the UK. The Government shows confidence in the high degree of transparency and efficiency of UK CMOs and sees therefore the Directive as imposing higher adaptation costs on collective management in other European countries. Apparently, accepting the vision of the Commission for a dynamic and competitive cross-border music licensing, the UK Government views UK CMOs as potential beneficiaries from the reform. This assessment is again based on the already well-prepared ground through the 2014 Regulations. Arguably, by working in parallel on internal reform, the Government was in a better position to promote and defend well thought-through positions in the European debate and could seek to tweak the outcome of the EU legislative process in a direction corresponding to the preferred UK solution. The effective interlocking of the domestic and the European legislative processes thus seems to have facilitated institutional adaptation.

5. **The implementation of the Directive in Sweden: resistance through creative interpretation**

Sweden is the Member State representing an institutional tradition probably least in line with the model of public supervision advanced by the Directive. Even a casual look at the comparative charts in the Impact Assessment carried out by the Commission reveals that Sweden is one of only few countries which prior to the Directive had no formal control over CMOs whatsoever, apart from the general applicability of antitrust rules.\textsuperscript{80} This is also acknowledged in the

\textsuperscript{79} Consultation, supra note 14, 1.

Inquiry, specially appointed by the Government, having the task to put forward a proposal for transposing the Directive into Swedish law.\textsuperscript{81} It could be expected that the pressure toward institutional adaptation exerted by the Directive is most strongly felt in this country. An interesting question in this context is whether the Directive would bring about a radical change in the established national governance model.

At least judging from the Government Remit of the Inquiry, so far the attitude is not particularly open to institutional change.\textsuperscript{82} The Remit contains straight-forward instructions to the specially appointed investigator to find ways of implementing the Directive that are least intrusive on the existing model of governance, which is assessed to work satisfactorily. A special concern is moreover expressed for the economic impact of the transposition on the CMOs.

To the extent that the directive leaves room for it, the investigator shall strive to adapt the proposals to Swedish law in general and to existing company law regulations, in particular. The investigator shall also strive to find solutions, which are in line with the established Swedish principles and which fit into the existing systematic.\textsuperscript{83}

As regards control over the activity of CMOs, an open preference is expressed for civil law solutions and for leaving enforcement as much as possible in the hands of the judiciary.

The investigator shall analyse the provisions on control and shall suggest which authority (or authorities) shall be designated for the purposes of the Directive. Given that the Directive does not preclude control to be exercised \textit{ex post}, the starting premise shall, as much as possible, be that the control of compliance with the provisions of the Directive shall take place by the possibility for judicial control.\textsuperscript{84}

\textsuperscript{81} See Report of the Inquiry on Collective Copyright Management (Berörande av utredningen \textit{kollektiv rättighetssförvaltning på upphovsrättsområdet)}, SOU 2015:47, 423.
\textsuperscript{82} Kommittédirektiv (Remit) 2014:30, SOU 2015:47, 597 ff., at 600.
\textsuperscript{83} Kommittédirektiv 2014:30, SOU 2015:47, 597 ff., at 599.
\textsuperscript{84} Kommittédirektiv 2014:30, SOU 2015:47, 597 ff., at 602.
Since some obligations under the Directive are clearly not within the competence of the courts and require an administrative action, the remit indicates that one or more authorities have to be designated for these purposes. Interestingly, the investigator is specifically instructed to propose how the provisions on cooperation and information exchange can be shaped in such a way that the task remains as limited as possible.\textsuperscript{85}

Proceeding from these guidelines, the Inquiry indeed makes earnest efforts to limit the impact of the Directive on the point of CMO supervision as much as possible. The Inquiry reads the Directive as being very flexible on the point of choice of competent authority, oversight and sanctions. Concerning the scope of oversight, the Inquiry admits that the concept "monitor" in Article 36 of the Directive suggests rather far-reaching supervisory functions for the competent authorities. However, the Inquiry underlines that according to Recital 50 Member States are not obliged to set up new public authorities and that they retain the choice between \textit{ex post} and \textit{ex ante} control. Additional indication for the considerable margin of discretion left to the Member States is seen to lie in the expression "designated for that purpose". This phrase is interpreted as allowing different authorities to play different functions in the oversight, whereby information exchange does not necessarily have to be coordinated by the same authority that has sanctioning powers.\textsuperscript{86}

Concerning the character of the competent authority, the Inquiry accepts the Government instructions that control shall as much as possible be exercised by the courts. In support of this position the Inquiry states that it is well in line with the established Swedish understanding that courts can also be seen as "authorities" ("myndigheter").\textsuperscript{87} Indeed, Swedish constitutional doctrine does not adhere to a strict principle of division of powers in the same way as it is familiar from other European legal orders. It is, however, doubtful whether this very Swedish interpretation would be shared by other Member States and accepted by the Commission. Still, the Inquiry acknowledges that some of the supervisory functions and sanctions clearly required by the Directive can only be exercised and

\textsuperscript{85} Kommittédirektiv 2014:30, SOU 2015:47, 597 ff., at 603.
\textsuperscript{86} SOU 2015:47, 418–419.
\textsuperscript{87} SOU 2015:47, 420.

FN Nergårdhs, J., "Domstolar och demokrati - kreditor
approach, even though employing different techniques for keeping the regulative oversight light and limited. Some mutual learning and inspiration could also be expected to take place partly under the influence of information exchange and comparing national best practices, and partly due to adaptation pressure in response to similar market realities. For instance it seems that more countries are opting to treat Intellectual Property as an integrated regulatory area important for innovation and creativity, where there may be synergies of combining competences from industrial property and copyright. As demonstrated above the model of the UK IPO might exert some attractive power. In times of major transformations in the global economy, when much hope is vested in innovation, creativity and intellectual capital, taking a holistic grip on intellectual property and overcoming antiquated distinctions between industrial property and literary and artistic property seems at least *prima facie* to be smart policy.

At the national level, the pull toward network governance at the EU level may produce a push toward more centralized administrative solutions, even if the Directive does not explicitly require such centralization. National institutional structures typically follow the internal logic of idiosyncratic division of competences and functions, something that often results in pluralist arrangements with several institutional entities performing their particular task and complementing each other. The above invoked example with the French Ministry of Culture, exercising oversight over the activities of the CMOs and the specialised Commission reviewing their accounts, is a case in point. However, from the point of view of trans-European cooperation such pluralism only comes to frustrate the interaction between the nodes in the institutional network. For the communication to be as unhindered and seamless as possible, greater equivalence between the participating entities and having single points of contact is an asset.

On a more general level, it appears that the EU is pushing Member States toward a greater degree of administrative control and oversight. Models that build on self-regulation are having considerable difficulty to survive these pressures. At first sight this appears paradoxical. Given the overall objective of open markets and fair competition, European integration could be expected to promote leaner and less bureaucratic governance arrangements. However, in a mul-