

The European Union's Neighbourhood Programme for the Republic of Moldova

Support to Enforcement of the Intellectual Property Rights

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**Performance assessment
of the activity of Moldova collective management organisations
according to requirements of Directive 2014/26/EU and practice of
implementation of the Directive in the EU member-states**

December 2018



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of the activity of Moldova collective management organisations
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LIST OF ANALYSED DOCUMENTS:

A. Normative acts and related rights

- ✓ Law no. 139/2010 on copyright and related rights;
- ✓ Draft amending Law no. 139/2010;
- ✓ Information note (substantiation);
- ✓ Government Decision no. 641/2001 on the minimum rates of authors' remuneration;
- ✓ Government Decision no. 987 / 21.11.2017 on the organization and functioning of the Intellectual Property Specialized Arbitration and the Arbitration Procedure.

B. Documents of the State Agency on Intellectual Property (AGEPI)

- ✓ Instructions on the control of the activity of the collective management organizations related to patrimonial rights of the authors and / or to related rights, approved by the Order of AGEPI General Director no. 169/2016, modified by the Order of AGEPI General Director no. 204/2017;

C. Documents of the collective management organisations

Republican Copyright Office (ORDA)

- ✓ Revised Statute, registered at the Ministry of Justice on 17.01.2014;
- ✓ Internal Regulation;
- ✓ Annual Transparency Report for 2016;
- ✓ Control Act no. 6/2014 for 11.12.2012-31.12.2013;
- ✓ Control Act no. 12/3/2016 for 01.01.2014-31.12.2015;
- ✓ Directive no. 1 (Decision) no. 1/22.05.2012 of the Advisory Council;
- ✓ Directive no. 1/17.12.2013 of the General Assembly;
- ✓ Contract for the transfer of related-patrimonial Internet rights to the management by collective principles;
- ✓ Contract on the transmission of patrimonial copyright for collective management;
- ✓ Memorandum of understanding on co-operation in the field of collective management related to patrimony rights of the copyright holders and / or to related rights between AGEPI, ANCO, AsDAC and ORDA.

Centre for Rights Licensing and Management (CLAD)

- ✓ Status registered at the Ministry of Justice on 22.05.2014;
- ✓ Additional agreement on the non-exclusive license agreement;
- ✓ Agreement on the termination of the license agreement regarding the public interpretation of copyright and related rights;
- ✓ Calculation of the remuneration for the use of copyright protected objects and related rights;
- ✓ Preliminary request;
- ✓ Application for the renegotiation of the fee and of the period of validity of the license;
- ✓ Suspension request;
- ✓ Interdiction to use works protected by copyright and related rights;
- ✓ Non-exclusive license agreement for public interpretation;
- ✓ Non-exclusive license agreement for public communication of copyright and related works;
- ✓ Non-exclusive license agreement on public communication of works by retransmission;



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- ✓ Non-exclusive license agreement for the use of works by public audio-visual communication;
- ✓ Letter of intent on obtaining the license.

I. INTRODUCTION

The need to improve the functioning of the collective management organisations has been identified, at the level of the European Union by *Commission Recommendation 2005/737 / EC on collective cross-border management of copyright and related rights for legitimate online music services*. A number of principles have been established, such as the freedom of the right holders to choose their collective management body, equal treatment between different categories of right holders, fair distribution of remuneration, and the representation of right holders at the level of the decision-making structures of the collective management organisations and dispute settlement.

Following the Report in 2006¹, the European Parliament invited the Commission to point out that the 2005 Recommendation applies only to online sales of musical recordings and to present, as soon as possible - after a consultation with the interested parties - a proposal for a directive to be adopted by the Parliament and by the Council through the co-decision procedure, with a view to regulating the collective management of copyright and related rights².

Taking into account the specificity of the digital era, the European cultural diversity and the three key principles for the functioning of the collective management organisations: efficiency, equity and transparency, the Commission announced, in the Communications: "A Single Market for Intellectual Property Rights" and the "European Consumer Agenda", the launching of a legislative proposal related to this field. The proposal is put forward in the context of the Digital Agenda for Europe and the Europe 2020 Strategy for smart, sustainable and inclusive growth.

On 26.02.2014 it was published in the Official Journal of the European Union no. L 84/72, *Directive 2014/26 of the European Union on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market* was published on 26.02.2014 in the Official Journal of the European Union no. L84/ 72.

According to its provisions, the deadline transposing the provisions into the national legislation of the EU Member States is two years from its entry into force, namely 10 April 2016.

The aim of this Directive is to provide for coordination of national rules concerning access to the activity of managing copyright and related rights by collective management organisations, the modalities for their governance, and their supervisory framework.

Rationale 9 provides that Member States may have more stringent regulations than the ones imposed by Directive 2014/26 EU, aiming at ensuring a minimum level of harmonization in the reference area. The Member States are allowed to choose the transposition procedure applied to the provisions of this Directive, either by elaborating a new law on copyright and related rights, either by a draft law amending the regulations in the field, in force at the moment when the harmonization occurs.

¹ 2006/2008(INI);

² A soft law without prior consultation and without the formal involvement of Parliament and the Council is unacceptable, thus bypassing the democratic process.



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The following meetings have been organized during the mission carried out in the period 27 November – 1 December 2017:

- management of AGEPI and experts within the Directorate General of Copyright within AGEPI (27, 29 and 30 November);
- representatives of the collective management organisations National Copyright Association -ANCO (27 November) and of the Republican Copyright Office - ORDA (28 November);
- representatives of the Centre for Rights Licensing and Management (CLAD), with the role of collection structure (28 November).

These work meetings aimed at identifying issues that are not in line with the provisions of Directive 2014/26 / EU. At the same time, during the meeting organised on 30 November, I delivered a presentation on the challenges and innovative elements brought by Directive 2014/26 / EU.

Taking into account the documents provided, highlighted in the list, as well as those discussed with the representatives of AGEPI and the collective management organisations, the main identified problems concern:

1. Set-up of the collective management organisations:

- a.) The two collective management organisations, which are currently operating in the Republic of Moldova, are responsible for both copyright and related rights. Only musical works and their performances are subject to collective management (only authors of musical works, performers and phonogram producers are represented);
- b) There are no collective management organisations that manage the rights of the holders in relation to written works, graphic or plastic works of art, photographic works, cinematographic works, visual art works, storage media.

2. Organisation and functioning of the collective management body:

- a) Rights holders have no control over the activity carried out by the collective management organisations, which is mainly demonstrated by the organization of the General Assemblies once every four years. Both in the Law no. 139/2010 on copyright and related rights, as well as in the statutes of the collective management organisations, there are no rules regarding the summoning and re-summoning of the General Assembly. The rules on participation and voting in the General Assembly are restrictive in the case of a collective management body;
- b) The statutes provided by the collective management organisations do not include the conditions related to membership, the cases of termination and suspension of membership, the rights and obligations of the members, the information on the managed inventory, the rules of distribution, the administration fees for each of the managed rights;
- c) AGEPI has no attributions regarding the approval of the statutory changes of the collective management organisations;
- d) Both in the Law no. 139/2010 on copyright and related rights and in the statutes of the collective management organisations, there are no rules applicable to the remunerations due to deceased authors or artists, whether or not there are heirs;
- e) There is no procedure established in Law no. 139/2010 on how to distribute the remuneration and establish a management fee in the case of the rights collectively managed on a mandatory basis (single collector);



f) The distribution of the remuneration paid to rights holders is based solely on the monitoring reports and not on the play lists provided by radio and television broadcasters.

3. Transparency of the collective management organisations:

a) create and update the websites of the collective management organisations.

4. Relation between the collective management organisations and the users:

- a) The remuneration payable by the users is established by *Government Decision no. 641/2001 on the minimum rates of the remuneration of authors*, without having a legal procedure in place (negotiation, mediation or arbitration, court) for their calculation;
- b) Radio and TV bodies do not communicate the necessary information (Play-list) to the collective management organisations;
- c) Law no. 139/2010 on copyright and related rights does not provide for the rights and obligations of the users or for the sanctions applicable in case of failure to observe the legal provisions.

II. CHALLENGES AND INNOVATION ELEMENTS INTRODUCED BY DIRECTIVE 2014/26/UE.

1. Relation between the collective management body and the right holders.

For the purposes of this Directive:

- “*collective management organisation*” means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one right holder, for the collective benefit of those right holders, as its sole or main purpose, and which fulfils one or both of the following criteria:
 - (i) it is owned or controlled by its members;
 - (ii) it is organised on a not-for-profit basis;
- “*right holder*” means any person or entity, other than a collective management organisation, that holds a copyright or related right or, under an agreement for the exploitation of rights or by law, is entitled to a share of the rights revenue (art. 3 letter c). The definition refers to the rights holders who have a direct legal connection with the collective management organisations, by law or by transfer, license or other type of contractual arrangement, without being its members.

In order to protect those right holders whose rights are directly represented by the collective management organisation but who do not fulfil its membership requirements, it is appropriate to require that certain provisions of this Directive relating to members be also applied to such right holders. Member States should be able also to provide such right holders with rights to participate in the decision-making process of the collective management organisation (Rationale 21).

A collective management organisation should not, when providing its management services, discriminate directly or indirectly between right holders on the basis of their nationality, place of residence or place of establishment (Rationale 18).

✓ *The right to authorise a collective management organization of their choice (Art. 5).*

The agreement of the holder shall be written in a written form, specific for each right, category of rights or type of works and for other protected objects. Further modifications,



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subject to management authorization may be accepted by tacit consent in accordance with the conditions laid down in national law.

Collective management organisations are required to manage only those rights, categories of rights or types of works and other protected objects that fall within their field of activity. Where, for example, a collective body managing rights deriving from cable retransmission is required to manage broadcasting rights, it is not under an obligation to accept the other rights.

The rights, categories of rights, types of works and other elements managed by the collective management organisations shall be determined within the general meeting of the members if these are not already set out in its statute or provided by law in a way that maintains the balance between the freedom of the owners to dispose of their creations and the ability of the body to effectively manage the rights of a creative sector.

Rights holders have the freedom to choose a collective management body that already manages such:

- **types of works and other protected objects**, such as literary, musical or photographic works;
 - **rights**, e.g. rights of communication to the public or reproduction;
 - **categories of rights** related to forms of exploitation, such as broadcasting, theatrical representation or reproduction for online broadcasting.
- ✓ ***The right to grant licenses for non-commercial uses (Article 5).***
Non-commercial use mainly refers to the notion of creative commons.
In order for the holders to exercise this right, the collective management organisations shall take the necessary measures, namely:
- decision on the conditions related to the exercise of this right;
 - decision to inform the right-holders about this option before obtaining their consent for managing the rights;
 - facilitate the exercise of this right.

Directive 2014/26 / EU brings no prejudice to the possibility of the right-holders to manage their individual rights, including non-commercial uses.

- ✓ ***The right to revoke the authorization or to withdraw any rights, categories of rights, types of works and other protected objects of its own choice from the collective management body, on the basis of a reasonable notice not that should not exceed 6 months.***

Rights holders have the following rights:

- to easily withdraw the rights or categories of rights entrusted to a collective management body and manage them individually;
 - to entrust or transfer the full or partial management to another collective management body, irrespective of the Member State of residence, the nationality, domicile or headquarters of the collective management body or the right holder
- ✓ ***Information provided by the collective management organisations (Art. 18)***

A collective management organisation makes available, not less than once a year, to each right holder to whom it has attributed rights revenue or made payments in the period to which the information relates, at least the following information:



- Any contact details which the right holder has authorised the collective management organisation to use in order to identify and locate the right holder;
- The rights revenue attributed to the right holder;
- The amounts paid per category of rights managed and per type of use;
- The period during which the use took place for which amounts were attributed and paid to the right holder, unless objective reasons relating to reporting by users prevent the collective management organisation from providing this information;
- Deductions made in respect of management fees;
- any rights revenue attributed to the right holder which is outstanding.

2. Relation between the collective management body and its members.

According to this Directive:

- „*member*” means a right holder or an entity representing right holders, including other collective management organisations and associations of right holders, fulfilling the membership requirements of the collective management organisation and admitted by it (art. 3 letter d);
- „*statute*” means the memorandum and articles of association, the statute, the rules or documents of constitution of a collective management organisation (art. 3 letter e).

✓ ***Membership requirements (Art. 6 paragraph (2))***

A collective management organisation shall accept new members only if they fulfil the membership requirements made available and included in the statute, which shall be based on objective, transparent and non-discriminatory criteria

The rejection of the adhesion request shall be motivated.

✓ ***Revoke the authorization or withdraw any rights, categories of rights, types of works and other protected objects of its own choice from the collective management body, on the basis of a reasonable notice not that should not exceed 6 months.***

The collective management body may decide for the revocation/ withdrawal to become effective at the end of the financial year.

✓ ***Communication by electronic means (Art. 6 paragraph (4))***

A collective management organisation shall allow its members to communicate with it by electronic means, including for the purposes of exercising members' rights.

The streaming/ webcasting of the General Assembly is ensured (the teleconference does not meet the requirement).

✓ ***Complaints procedure (Art. 33)***

Collective management organization shall:

- make available to their members, and to collective management organisations on whose behalf they manage rights under a representation agreement, effective and timely procedures for dealing with complaints, particularly in relation to authorisation to manage rights and termination or withdrawal of rights, membership terms, the collection of amounts due to right holders, deductions and distributions;



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- respond in writing to complaints by members or by collective management organisations on whose behalf they manage rights under a representation agreement. Where the collective management organisation rejects a complaint, it shall give reasons.

✓ *Participation to the decision-making process (art. 6 paragraph (4) and art. 8 paragraphs (9) and (10))*

All members of the collective management organisation shall have the right to participate in, and the right to vote at, the general assembly of members.

The exercise of these two rights:

- may allow for equitable and proportional restrictions, presented in the statute, made available for the public, such as the duration of membership or the amounts received or due to a member;
- facilitated both for the participating members, and for those who are not attending the general assembly;
- by electronic means;
- by a representative. The appointment shall not result in a conflict of interest (for example, where the appointing member and the proxy holder belong to different categories of right holders). Restrictions concerning the appointment of proxy holders and the exercise of the voting rights of the members they represent if such restrictions do not prejudice the appropriate and effective participation of members in the decision-making process may be applied. Each proxy shall be valid for a single general assembly of members. The proxy holder shall cast votes in accordance with the instructions issued by the appointing member and shall enjoy the same rights.

✓ *Alternative dispute resolution procedures (Art.34) and initiation of an action in court (Art. 35).*

Disputes (commercial or civil) between the members of the collective management organisations may be subject to extrajudicial, rapid, easily accessible, effective, independent and impartial trials, such as mediation or arbitration.

This Directive does not provide for a specific way in which alternative dispute resolution should be organized, nor does it determine which body should be in charge with this action, the only condition being that the resolution body is independent, impartial and has expertise in the intellectual property area.

The implementation of the extrajudicial procedure brings no prejudice to the right of the parties to invoke and defend their rights by initiating an action in court.

3. Relation between the collective management organisations and the users.

For the purposes of this Directive, „user” means any person or entity that is carrying out acts subject to the authorisation of right holders, remuneration of right holders or payment of compensation to right holders and is not acting in the capacity of a consumer (art. 3 letter k).

✓ *Licensing conditions (Art. 16)*

Collective management organisations and users conduct negotiations for the licensing of rights in good faith and by mutually providing all the necessary information.



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Licensing terms shall be based on objective and non-discriminatory criteria. When licensing rights, collective management organisations shall not be required to use, as a precedent for other online services, licensing terms agreed with a user where the user is providing a new type of online service which has been available to the public in the Union for less than three years.

Collective management organisations shall reply without undue delay to requests from users, indicating, the information needed to offer a licence.

Upon receipt of all relevant information, the collective management organisation shall, without undue delay, either offer a licence or provide the user with a reasoned statement explaining why it does not intend to license a particular service.

✓ *Reasonable tariffs (Art. 16)*

Tariffs for exclusive rights and rights to remuneration shall be reasonable in relation to 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, as well as in relation to the economic value of the service provided by the collective management organisation.

Collective management organisations shall inform the user concerned of the criteria used for the setting of those tariffs.

✓ *Communication by electronic means (art. 20)*

Collective management organizations communicate with users by electronic means, including for the purpose of using the license.

Collective management organizations shall make available to any user, by electronic means and without undue delay, at least the following information:

- (a) the works or other subject-matter it represents;
- (b) the rights it manages directly or under representation agreements;
- (c) the territories covered.

✓ *Users' obligations (Art. 16 and Art. 17)*

Users provide the collective management organisations with accurate reports (relevant information) required for the collection and distribution of remuneration, within the agreed and pre-defined timeframe and format in line with optional sectoral standards.

Collective management organizations should not be obliged to accept use reports in formats protected by exclusive rights if wide spread sector standards are available.

Sector-specific standards on music usage, reporting and billing are essential for the sharing of data between the collective management organizations and users.

Monitoring the use of licenses should observe fundamental rights, including the right to respect for private and family life and the right to the protection of personal data.

✓ *Alternative dispute resolution procedures (Art.34) and initiation of an action in court (Art. 35).*

Disputes (commercial or civil) between the members of the collective management organisations may be subject to extrajudicial, rapid, easily accessible, effective, independent and impartial trials, such as mediation or arbitration.

This Directive does not provide for a specific way in which alternative dispute resolution should be organized, nor does it determine which body should be in charge with this action, the only condition being that the resolution body is independent, impartial and has expertise in the intellectual property area.



The implementation of the extrajudicial procedure brings no prejudice to the right of the parties to invoke and defend their rights by initiating an action in court.

4. Relation between the collective management organisations (Art. 14, 15, 19, 20, 33)

✓ *Representation agreements (Art. 14)*

For the purpose of this Directive, „*representation agreement*” means any agreement between collective management organisations whereby one collective management organisation mandates another collective management organisation to manage the rights it represents, including an agreement concluded under Articles 29 and 30 (art. 3 letter j).

A collective management organisation does not discriminate against any right holder whose rights it manages under a representation agreement, in particular with respect to applicable tariffs, management fees, and the conditions for the collection of the rights revenue and distribution of amounts due to right holders;

✓ *Distribution and payment of the amounts*

- collective management organisation regularly, diligently and accurately distributes and pays amounts due to other collective management organisations;
- collective management organisations or their members who are entities representing right holders distribute and pay those amounts to right holders as soon as possible but no later than nine months from the end of the financial year in which the rights revenue was collected, unless objective reasons relating in particular to reporting by users, identification of rights, right holders or matching of information on works and other subject-matter with right holders prevent the collective management organisation or, where applicable, its members from meeting that deadline.

✓ *Deductions*

- a collective management organisation does not make deductions, other than in respect of management fees unless the other collective management organisation expressly consents to such deductions;

✓ *Communication by electronic means (Art. 19)*

A collective management organisation makes at least the following information available, not less than once a year and by electronic means, to collective management organisations on whose behalf it manages rights under a representation agreement, for the period to which the information relates:

(a) the rights revenue attributed, the amounts paid by the collective management organisation per category of rights managed, and per type of use, for the rights it manages under the representation agreement, and any rights revenue attributed which is outstanding for any period;

(b) deductions made in respect of management fees;

(c) deductions made for any purpose other than in respect of management fees as referred to in Article 15;

d) information on any licences granted or refused with regard to works and other subject-matter covered by the representation agreement;

(e) resolutions adopted by the general assembly of members in so far as those resolutions are relevant to the management of the rights under the representation agreement.

✓ *Information provided upon request (Art. 20)*



In response to a duly justified request, a collective management organisation shall make available by electronic means and without undue delay to any collective management organisation on whose behalf it manages rights under a representation agreement, at least the following information: the works or other subject-matter it represents, the rights it manages, directly or under representation agreements, and the territories covered.

✓ ***Complaints (Art. 33)***

Collective management organisations:

- make available to their members, and to collective management organisations on whose behalf they manage rights under a representation agreement, effective and timely procedures for dealing with complaints, particularly in relation to authorisation to manage rights and termination or withdrawal of rights, membership terms, the collection of amounts due to right holders, deductions and distributions;
- respond in writing to complaints by members or by collective management organisations on whose behalf they manage rights under a representation agreement. Where the collective management organisation rejects a complaint, it shall give reasons. The "written" answer also refers to the electronic answers, sent by e-mail.

5. Relation between the national control authority and the collective management organisations

The compliance 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

There are procedures enabling members of a collective management organisation, right holders, users, collective management organisations and other interested parties to notify the competent authorities of activities or circumstances which, in their opinion, constitute a breach of the legal provisions.

✓ ***Competency of the national authorities (Art. 36)***

The authorities have the competency to take appropriate measures and to impose effective, proportionate and dissuasive sanctions.

Rationale 50 provides that "This Directive does not provide for specific types of sanctions or measures, provided that they are effective, proportionate and dissuasive. "Such sanctions or measures may include orders to dismiss directors who have acted negligently, inspections at the premises of a collective management organisation or, in cases where an authorisation is issued for an organisation to operate, the withdrawal of such authorisation."

✓ ***Exchange of information between competent authorities (Art. 37)***

A request for information with regard to the activities of collective management organisations established in the territory of the requested Member State, is responded to without undue delay by the competent authority designated for that purpose, provided that the request is duly justified.

Where the provisions of this Directive are not observed by a collective management organisation established in another Member State but acting within the territory of other Member State, the competent authority on the territory of the state where the activity is carried out:

- may transmit all relevant information to the competent authority of the Member State in which the collective management organisation is established, accompanied where appropriate by a request to that authority that it take appropriate action within its



competence at national level. The requested competent authority shall provide a reasoned reply within three months.

- may be referred to the expert group established in accordance with Article 41 41.

✓ **Expert group (Art. 41)**

The expert group:

- shall be chaired by a representative of the Commission;
- shall be composed of representatives of the competent authorities of the Member States;
- shall meet either on the initiative of the chairman or at the request of the delegation of a Member State;
- has the following tasks:

(a) to examine the impact of the transposition of this Directive on the functioning of collective management organisations and independent management entities in the internal market, and to highlight any difficulties;

(b) to organise consultations on all questions arising from the application of this Directive;

(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.

6. Functioning of the collective management organisations

(General assembly, Supervisory function, Director, Collection of the remunerations, Deductions, Distribution of the remunerations, Annual transparency report)

✓ **General Assembly**

According to this Directive, „*the general assembly of the members*” means the body in the collective management organization wherein members participate and exercise their voting rights, regardless of the legal form of the organization (art. 3 letter f).

The General Assembly of the members of the collective management organisation shall be summoned at least once a year.

The General Assembly decides:

- on any amendments to the statute - Art. 8 paragraph. (3)
- on any amendments to the membership terms- Art. 8 paragraph (3);
- on the general policy on the distribution of amounts;
- on the general policy on deductions (fee/ social fund) and on any incomes deriving from the investment of the fee;
- on the risk management policy
- on the general policy on the non-distributable amounts and their use - Art. 8 paragraph (5) and art. 13 paragraph (5);
- on the appointment or dismissal of the directors and review of their general performance

The general assembly approves:

- the remuneration of the directors (monetary and non-monetary benefits, pension awards and entitlements, rights to other awards and rights to severance pay – Art. 8(4);
- the annual transparency report – Art.8 paragraph (8);
- any acquisition, sale or hypothecation of immovable property;



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- mergers and alliances, the setting-up of subsidiaries, and the acquisition of other entities or shares or rights in other entities;
- taking out loans, granting loans or providing security for loans (art. 8 paragraph 5);
- the appointment and removal of the censor/ auditor;

Member States may decide that the powers of the general assembly of members may be exercised by an assembly of delegates elected at least every four years by the members of the collective management organisation, provided that:

- appropriate and effective participation of members in the collective management organisation's decision-making process is ensured;
- the representation of the different categories of members in the assembly of delegates is fair and balanced.

✓ *Supervisory function (Art. 9)*

The supervisory function may be exercised by a separate body, such as a supervisory board, or by some or all of the directors in the administrative board who do not manage the business of the collective management organisation (Rationale 24).

The requirement of fair and balanced representation of members should not prevent the collective management organisation from appointing third parties to exercise the supervisory function, including persons with relevant professional expertise and right holders who do not fulfil the membership requirements or who are represented by the organisation not directly but via an entity which is a member of the collective management organisation.

The persons acting as supervisors are required to complete, before taking up office, and subsequently every year, a statement to be submitted to the General Assembly and containing information on:

- a) any interests in the collective management organisation;
- b) any remuneration received in the preceding financial year from the collective management organisation, including in the form of pension schemes, benefits in kind and other types of benefits;
- c) any amounts received in the preceding financial year as a right holder from the collective management organisation;
- d) any actual or potential conflict between any personal interests and those of the collective management organisation or between any obligations owed to the collective management organisation and any duty owed to any other natural or legal person.

✓ *Obligations of the persons who manage the business of the collective management organisation (art. 10)*

For the purpose of this Directive, „director” means:

- (i) where national law or the statute of the collective management organisation provides for a unitary board, any member of the administrative board;
- (ii) where national law or the statute of the collective management organisation provides for a dual board, any member of the management board or the supervisory board;

In order to ensure a proper administration, the management of the collective management organization shall:

- act in a sound, prudent and appropriate manner,
- use sound administrative and accounting procedures and internal control mechanisms;
- be independent.



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Managers / directors, whether elected or contracted, are required to fill in, prior to taking up office, and subsequently each year, a statement that is transmitted to the General Assembly and which must contain information related to:

- a) any interests in the collective management organisation;
- b) any remuneration received in the preceding financial year from the collective management organisation, including in the form of pension schemes, benefits in kind and other types of benefits;
- c) any amounts received in the preceding financial year as a right holder from the collective management organisation;
- d) any actual or potential conflict between any personal interests and those of the collective management organisation or between any obligations owed to the collective management organisation and any duty owed to any other natural or legal person.

When it cannot be avoided, they identify, manage, monitor and reveal real and potential conflicts of interest so as to avoid collective interests being affected.

✓ *Collection, distribution and payment of the remunerations, (Art. 13)*

Collective management includes the granting of licenses, the monitoring of the use of rights or types of managed works, the enforcement of these rights, the collection, distribution and payment of the amounts due to the holders arising from the remuneration paid for the use of the rights managed or the investiture of revenue.

In accordance with the general distribution policy provided for in the Statute, the management bodies shall carry out such distribution and payments to the other collective management organisation as soon as possible but **no later than nine months from the end of the financial year in which the rights revenue was collected.**

- Exception: objective reasons, in particular relating in particular to reporting by users, identification of rights, right holders or matching of information on works and other subject-matter, on the one hand, and with rights holders, on the other.

At the latest three months after the expiry of the general deadline set for the distribution and payment, the collective management body shall:

- Make available to the right holders it represents and to all collective management organisations with which it has concluded representation agreements, information on works and other subject-matter for which one or more right holders have not been identified or located to;
- verify the record of the members, which will be regularly updated, as well as other records that can be easily read.

If the abovementioned measures fail to produce results, the collective management organisation shall make that information available to the public **at the latest one year after the expiry of the three-month period.**

The general assembly decides on the use of the amounts that cannot be distributed **after three years from the end of the financial year** in provided that the collective management organisation has taken all necessary measures to identify and locate the right holders.



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This provision shall not prejudice to the right of right holders to claim such amounts from the collective management organisation in accordance with the laws of the Member States on the statute of limitations of claims.

The purpose for which the use of the non-distributed amounts is authorized may be limited by ensuring that such amounts are used in a separate and independent way in order to fund social, cultural and educational activities for the benefit of right holders.

✓ *Deductions (Art. 12)*

- Deductions shall be reasonable in relation to the services provided by the collective management organisation to right holders, being established on the basis of objective criteria;
- Management fees shall not exceed the justified and documented costs incurred by the collective management organisation and are decided by the General Assembly;
- Deductions for social, cultural or educational purposes, including scholarships, must comply with the same requirements, as decided by the General Assembly. Rights holders must have non-discriminatory access to any social, cultural or educational service funded by such deductions.

Where a collective management organisation provides social, cultural or educational services funded through deductions from rights revenue or from any income arising from the investment of rights revenue, such services shall be provided on the basis of fair criteria, in particular as regards access to, and the extent of those services.

✓ *Annual transparency report (Art. 22 and the Annex)*

The collective management organisation shall publish on its website the annual transparency report, which shall remain available to the public on that website for at least five years and shall be elaborated within eight months after the finalization of the financial year under question.

The annual transparency report shall contain at least the information set out in the Annex. The financial information shall be broken down on categories of managed rights and types of use, according to Rationale no. 19 of the Directive.

A special report shall address the use of the amounts deducted for the purposes of social, cultural and educational services and shall contain at least the information set out in point 3 of the Annex.

The accounting information included in the annual transparency report shall be audited by one or more persons empowered by law to audit accounts in accordance with Directive 2006/43/EC of the European Parliament and of the Council.

The audit report, including any qualifications thereto, shall be reproduced in full in the annual transparency report.

III. Recommendations

1. Recommendations for the State Agency on Intellectual Property of the Republic of Moldova (AGEPI):



- **The transposition of Directive 2014/26/EU, especially of the provisions in Title I (General Provisions), Title II (Collective management organisations) and Title IV (Enforcement measures) into the national legislation;**
- **The following issues should be taken into account for the modification of Law no. 139/2010 on copyright and related rights:**
 - **separation between copyright and related rights management** (collective management organisations set up to manage distinct categories of rights, corresponding to different creation fields, and for the management of rights belonging to distinct categories of holders);
 - **creation of a legal framework introducing competition on the basis of the efficiency and quality of the services provided by the collective management organisations and not on the basis of the level of remuneration offered to right holders;**
 - **a fast, easily accessible, efficient, independent and impartial procedure for calculating remuneration and management fees, where there are several management bodies acting within the same creation area;**
 - **collective management for the authors and performers who died, with an indication of the cases in which they have nominated heirs or not**
 - **mentioning the attribution of the AGEPI regarding the approval of the statutory changes of the collective management organisations;**
 - **establishment of a legal procedure (negotiation, mediation or arbitration, court) for determining the remuneration due to the users of the collective management organisations;**
 - **the rights, obligations and sanctions applicable to users.**
- **Regulating the control activity carried out by AGEPI experts on the activity of the collective management organisations according to Quality Management System ISO 9001: 2008, provided that the AGEPI services are provided according to this standard.** At present, the control of the activity carried out by the collective management organizations is regulated by the Instructions approved by the Order of the General Director AGEPI no. 169/2016, modified by the Order of AGEPI General Director no. 204/2017.

This recommendation guarantees the quality, impartiality and objectivity of the control activity in line with international standards;
- **Approval, by order of AGEPI Director General, of the format on the inventory of collective management organisations.** The inventory is submitted to AGEPI and contains at least the name of the author, the name of the right holder, the title and duration of the work, the identification of performers, phonograms or storage media;
- **Approval, by order of the AGEPI Director General, of the format of the annual transparency report containing the information provided in the Annex to Directive 2014/26 / EU.** After approval by the General Assembly, the annual report of the Transparency shall be submitted to AGEPI and posted on the website of the Collective



Management Organizations and AGEPI for a period of at least 5 years, according to the provisions of article 22 of Directive 2014/26 / EU;

- **Encourage and facilitate dialogue between the users and the collective management organisations** by organizing meetings aimed at clarifying how the two sides should work together (negotiate in good faith, provide each other with all the necessary information).

Users provide the collective management organisations with accurate reports (relevant information) required for the collection and distribution of remuneration, within the agreed and pre-defined timeframe and format in line with optional sectoral standards.

Collective management organisations respond to user requests without delay, indicating the information required to provide a license.

2. Recommendations for the collective management organisations active on the territory of the Republic of Moldova.

A. Compliance with the national provisions adopted in accordance with the requirements of Directive 2014/26 / EU will require the **statutory provisions** of the collective management organisations **to be amended**.

It is necessary for **the status** of each collective management body operating in the Republic of Moldova **to be approved by the General Assembly of Members and to include at least the following information:**

- **Accession conditions established on the basis of objective, transparent and non-discriminatory criteria.** These conditions may be proof of the fact that the person is an author, interpreter, right holder, or that the inventory was declared and the membership fee was paid, etc.;
- **Cases when membership is refused/ considered incompatible, especially in circumstances where refusal to grant membership is motivated in writing.** For example, a collective management body may refuse to grant membership if the holder:
 - a) does not prove the claimed rights;
 - b) does not submit an inventory of the works, performances and artistic interpretation, phonograms, video grams and other protected objects;
 - c) does not indicate which property rights, types of works or other protected objects is transferring under the management if the collective management body;
 - d) is a member of another collective management body for the same rights over the same works, performances and artistic interpretation, phonograms, storage media and other protected objects for which they require the management;
 - e) formerly lost membership of the collective management body through exclusion;
 - f) has been convicted, by a final decision, of a fine or imprisonment for offenses under intellectual property law;
 - g) is a paying user;
- **Termination of membership.** Termination may occur lawfully (e.g. death, prohibition, or expiry of a final and irrevocable court decision), by exclusion (e.g. violation of law provisions, image damage to the collective management body), or upon request;
- **Suspension of membership.** For example:



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- a) legal entities undergoing insolvency proceedings or who have suspended their activity. Suspension ceases with the submission of a certificate of resumption of activity;
- b) failure to pay the membership fee in the amount set out in the statute;
- c) a dispute between that member and the collective management body, in which case the suspension shall cease. This does not affect the rights of the owner.

- **Rights of the members** (e.g. the right to participate and the right to vote in the General Assembly, the right to be elected in the management bodies of the collective management body, the right to receive information on the activity of collecting and distributing the remuneration, the right to access the documents of the collective management body)
- **Obligations of the members.** For example:
- a) communicate the modification of the identification data within 10 days of their registration, the member being able to bear the additional costs generated by his / her own omission;
 - b) quarterly updating of the inventory, under the sanction of not taking into account the works, phonograms, storage media not declared during the distribution;
 - c) submission of the assignment contracts, within 10 days after the termination, which affect the managed rights, subject to the sanction of not taking them into account;
 - d) keeping confidentiality on the documents and activity of the collective management body;
 - e) payment of the membership fee / contribution, within the period stipulated in the statute.
- **Information on the managed inventory** (for example, its content, the update procedure and deadlines, the way in which it can be accessed by the users);
- **Composition, rules on convocation and re-summoning of the General Assembly of the Members, duties of the General Assembly, as well as the quorum necessary for the adoption of the decisions.**
- The General Assembly must be convened at least once a year.**
- Ordinary general meetings as well as extraordinary general meetings can be organized. The General Assembly decides on any change of the statute, membership conditions, general remuneration policy, general policy on deductions (social, cultural, educational), and any revenue derived from the investment of the commission, risk management policy, the general policy on the non-distributable amounts and their use, the appointment / dismissal of the directors and the analysis of their activity.
- The General Assembly approves directors' remuneration (pecuniary / non-pecuniary benefits, pensions, other rights, compensatory payments), the annual transparency report, any acquisition, sale, mortgage of real estate; mergers, alliances, establishment of subsidiaries, acquisitions, shares; contracting or granting loans or providing guarantees for loans; appointment and dismissal of the auditor / censor;

The exercise by members of the right to participate and to vote may be subject to fair and proportional restrictions presented in the Statute, made available to the public, such as the age of membership or the amounts received or due to a member.



The streaming / webcasting of the General Assembly is ensured (the teleconference does not meet the requirement).

The right to participate and the right to vote can be exercised through a representative. Designation should not lead to a conflict of interest (the member and the representative belong to different categories of holders). Restrictions on the appointment of representatives and on the exercise of the voting rights may be imposed if they do not prejudice the proper and effective participation of members in the decision-making process.

The mandate of each representative is valid for a single general meeting. The representative shall vote in accordance with the instructions of the member who has appointed him and benefits of the same rights as the member.

- **Composition, summoning and attributions of the Board of Directors;**
- **Appointment procedure, attributions and cases of incompatibility of the directors / persons managing the activity of the collective management body;**
- **General policy for allocating the amounts due to the right holders**
 - distribution rules for each of the managed assets, for example, the actual use based on play-lists in the case of broadcasting, the reports provided by cable operators in the case of cable retransmission, the market study in the case of private copies, etc.
 - the deadlines for distribution and payment - as soon as possible but not later than nine months after the end of the financial year in which those remunerations were collected.
- **General policy on management fees** (management fee for each of the managed rights/ collection source, deductions for social, cultural or educational purposes).
- **General policy on the use of non-distributable amounts.**

B. Increasing the transparency of the collective management organisations through:

- **Proper design and update of the websites**, according to the provisions of art. 21 of Directive 2014/26/UE, websites where the collective management organisations shall present the following information:
 - (a) statute;
 - (b) membership terms and the terms of termination of authorisation to manage rights, if these are not included in the statute;
 - (c) standard licensing contracts and standard applicable tariffs, including discounts;
 - (d) list of the directors./ persons managing the activity of the body;
 - (e) general policy on distribution of amounts due to right holders;;
 - (f) general policy on management fees;
 - (g) general policy on deductions, other than in respect of management fees, including deductions for the purposes of social, cultural and educational services;
 - (h) a list of the representation agreements it has entered into, and the names of the collective management organisations with which those representation agreements have been concluded;
 - (i) general policy on the use of non-distributable amounts;



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(j) complaint handling (Art. 33) and dispute resolution (Art. 34) procedures

➤ **Communication by electronic means with:**

- **members**, including for the exercise of their rights;
- **users**, to whom they communicate without delay the works or other protected objects they represent, the rights they manage directly or through representation agreements and the covered territories;
- **rights holders** to whom they communicate without delay the works or other protected objects they represent, the rights they manage directly or through representation agreements and the covered territories;
- **any collective management body on behalf of which it manages rights under a representation agreement**

➤ **Establish effective and expeditious procedures for dealing with complaints formulated by members or collective management organisations in relation to the representative agreements.** For example, a Standing Committee on Access to Information may be set up and designated by the General Assembly, consisting of an odd number of members, in charge with responding within a short term to the notifications related to the authorisation for the management of the rights, to the revocation or withdrawal of the rights, to the membership conditions, to the collection of amounts, their retention and their distribution;

➤ **Informing the right holders, before obtaining their agreement on the management of the rights, on the management fees and other deductions applied**

C. Make the activity of the collective management organisations more efficient by:

- **Involving all the members in the decision-making process, by organizing the General Assembly on an annual basis, under the conditions provided by Directive 2014/26/UE;**
- **making the distributions, based on the information provided by the users (playlists) and not only on the basis of the monitoring reports;**
- **purchase operational distribution software.**



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