

1. General Overview of the Collective Management

1.1 Can collective management organizations be described as monopolies (natural monopolies or monopolies set by the law) in your jurisdictions?

In Portugal, CMOs are ruled according to a very detailed and comprehensive legal act, namely Law 26/2015 of 14 April, modified and republished by Decree-Law 100/2017 of 23 August (CMO Law), apart from some sparse references in the Copyright and Related Rights Code (CRRC) and complementary legislation. In this Questionnaire, all the future references to legal provisions should be understood as referring to the CMO Law, unless a different source is indicated.

The CMO Law does not establish, much less require, that each category of rightholders is to be represented by one and only CMO, so, in theory, there is a legal possibility of different CMOs representing the same category of rightholders. A minimum of 10 rightholders can set up a CMO, and each CMO may represent different categories of rightholders, or focus on one specific category.¹

However, in practice, there is only one CMO per category of rights, and previous attempts to create different CMOs for the same rights category either didn't last long or remained marginal.

Currently there are only seven CMOs² which are registered with IGAC (the Supervisory Entity) and each one, in practice, is only representative of a single category of rightholders:

- AGECOP- Associação para a Gestão da Cópia Privada- this CMO was founded by all other existing CMOs in order to collect, manage and distribute the income provided by private copy "levies". These are charged to end-use consumers in blank tapes or CDs, as well as computers, mobile-phones, USB pens and any other media or reproduction equipment;
- APEL- Associação Portuguesa de Editores e Livreiros – this CMO represents the interests of all the Book Publishers, Booksellers, second-hand Booksellers and Distributors;
- ASSOFT- Associação Portuguesa de Software – this CMO is also the representative entity for software products and defence of software makers' copyright. It also provides certification/registration services to the source-code of each new computer application;
- AUDIOGEST- Associação para a Gestão e Distribuição de Direitos- This CMO represents phonogram producers, encompassing phonograms that are recorded and published originally in Portugal by its members and beneficiaries, but also those which are originally from foreign Countries, published in Portugal under a licence from the original producers;
- GDA- Cooperativa de Gestão dos Direitos dos Artistas Intérpretes ou Executantes- this CMO takes the legal form of cooperative and it represents actors, artists, players or performers;
- GEDIPE – Associação para a Gestão Coletiva de Direitos de Autor e de Produtores Audiovisuais- this CMO represents movies' as well as video producers and publishers. It

¹ Articles 3rd nr 1 a) 5, 6nr 2 c) and d) of CMO Law

² According to IGAC Register, there is still another CMO called ANGAE - ASSOCIAÇÃO NACIONAL DE GESTÃO DE AUTORES E EXECUTANTES, aiming at representing authors, artists and producers, but it has never been active, since it was created, in January 2017, nor did it fulfil the minimum legal requirements in terms of transparency and reporting obligations. It only has one person/worker/officer, so it seems to be heading straight towards administrative extinction, thus we will not take it into consideration.

also holds representation of national television broadcasters (commercial operators) but, currently, only for the purpose of private copy income distribution as producers;

- SPA- Sociedade Portuguesa de Autores- this is the CMO representing authors as well as literary and music publishers. It has the legal form of a Cooperative, whose purpose is to defend the rights and interests of the authors represented, either as full members or as simple beneficiaries;
- VISAPRESS – Gestão de Conteúdos dos Média CRL- is a cooperative dedicated to the protection and integrated management of the copyright for publishers of newspapers, magazines and other regular editions. Nevertheless, its scope is very wide, and according to its statute, it is able to manage any Copyright and Neighbouring Rights that rightholders decide to entrust it with.

Some of this CMOs, like SPA, GEDIPE or VISAPRESS, could, in fact, represent different categories of rightholders and compete with one another, according to their By-Laws, but currently this isn't the case. So, in practice, we may conclude that there is a natural monopoly in place, even though it is not a mandatory or even legally planned situation.

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

In Portugal, collective management is not the general rule, and it is only mandatory in certain specific cases, such as:

- Private copy “levies”³: the collection, management and distribution of income is performed by AGE COP in the name of all the other CMOs which are Members of AGE COP. There is also a legal reference to rightholders who are not members but are presumably represented by existing CMOs in relation to private copy levies;
- Cable retransmission rights⁴, that are also to be made effective under mandatory collective management, except for broadcasting organisations⁵;
- Artists, players or performers’ rights are also subject to mandatory collective management in the case where they enter into contract with audiovisual or cinematographic producers and are entitled to equitable remuneration⁶;
- Phonogram and Video producers are entitled to an equitable remuneration in case of communication to the public of phonograms and videos published for commercial purposes, to be shared in equal parts with artists, players or performers, which turns it into mandatory collective management, even though the law doesn't explicitly say so.⁷

Extended collective licences are only applicable to authors rights in the case of satellite broadcasting⁸, except for cinematographic or other types of audiovisual works⁹.

³ Art 82nd CRRC and Law 62/98 of 01.09, modified by Law 50/2004 of 24.08 and Law 49/2015 of 05.06

⁴ Art 7th and 8th of Decree-Law 333/97 of 27.11.

⁵ Art 9th of Decree-Law 333/97 of 27.11.

⁶ Art 178th nr 2 CRRC.

⁷ Art 184th nr 3 CRRC.

⁸ Art. 6th nr. 2 Decree-Law 333/97 of 27.11

⁹ Art. 6th nr 3 Decree-Law 333/97 of 27.11

The CMO Law has also introduced the logics of ECL in the standard legal procedure for collective negotiation between CMOs and entities representing different types of users: the extension of agreements reached by collective bargaining is to be applied to all the users that fall under their objective requirements, regardless of their membership of those users' associations that are contractually bound by such agreements.

1.3 Is the competition between collective management organizations permitted in your jurisdiction? If so, under which circumstances, how often and in which fields (e.g. tariffs, service for users, available repertoire, service for rightholders, amount of deductions) the competition may occur.

Competition between CMOs is not forbidden by law but there is currently no legal incentive to implement it. Ultimately, the aim of CMO Law is to provide a stronger incentive for unity, freedom of services cooperation and common structures, and to prevent repeating the historical issues linked to lack of transparency. It is not strongly concerned about competition between CMOs, although it states that competition law does apply.

The new CMO Law establishes a complete set of rules and procedures which all CMOs are required to adopt in order to be able to collect copyright income and to distribute it among their members. General tariff setting is a most important part of such mission, and the procedure for setting up such tariffs is quite detailed, so each CMO is allowed to carry on its own task with a high level of autonomy, as long as it complies with legal requirements which apply to all CMOs¹⁰.

Rightholders must choose the CMO which to entrust their own rights, and they cannot mandate different CMOs for the same type of use, for the same territory and the same time-lapse¹¹.

The CMO Law clearly establishes that Competition Law is applicable to CMOs¹². Nevertheless, the same Law strongly encourages cooperation between CMOs, namely by imposing a One-Stop Shop for licensing acts of public performance¹³, which is actually a legal imposition that was meant to be implemented in one-year time counting from the entry in force of Law 26/2015. However, the current status of relationship between SPA and the other CMOs, namely GDA, AUDIOGEST and GEDIPE, predicts several difficulties in its enforcement - of which IGAC is in charge - and a most likely failure. The also predictable result is users having a one-stop shop for author's rights and, in parallel, another one-stop shop for all the other rights, namely neighbouring (*aka* related) rights.

The One-Stop Shop provision requires that autonomy between participating CMOs is to be preserved, as well as the different tariffs and distribution schemes, that are to be set autonomously. It also requires the equitable distribution of operating costs, efficiency and transparency, equality and parity, speed and easy access, and finally, autonomy between the One-Stop Shop's organisation and each participating CMO.

The Law further states that One-Stop Shop licensing does not preclude the possibility for each CMO to establish and issue its own autonomous licensing and separately exercise the rights entrusted to it, in relation to all the users which did not manage to obtain licensing via the One-Stop Shop mechanism.

¹⁰ Articles 3rd to 17th

¹¹ Art. 31st nr. 2

¹² Art. 16th

¹³ Art. 37th

There is also a provision for the joining of CMOs, that may or may not originate a new CMO, for the common pursuit of some CMOs purposes, jointly representing their respective Members¹⁴.

1.4 How is extended (if any) and mandatory collective management regulated and applied where, for the management of a given right, there are more than one organization?

There is currently no legal provision for that situation, whereas each CMO is freely allowed to pursue its own purpose even if it may coincide with the purpose of a different CMO.

As rightholders are legally prevented from entrusting the same rights to different CMOs, for the same territory and time lapse, the scope of representation will be distinct, but there is no legal provision classifying CMOs in relation to one another or stating that those which are more widely representative shall represent the whole category.

The only legal provision relating to reciprocal representation between CMOs is placed on Chapter 4 (Multi-territorial online music licensing) stating that CMOs that are not granting or offering to grant multiterritorial licences for online uses of musical works may request another CMO to represent their own repertoires. The requested CMO is required to agree to such a request if it is already granting or offering to grant multi-territorial licences for the same category of online rights in musical works in the repertoire of one or more other CMO's repertoires¹⁵.

However, in relation to users' associations, there is a clear prevalence of those which represent the highest number of users in relation to those which may represent a lower number of users¹⁶.

The CMO Law clearly states that whenever several user associations take part from the negotiations, the agreement reached may only be deposited (thus, legally binding) if it is accepted by the highest number of users from the same field of activity¹⁷. Even after the agreement is deposited, there may be a challenge of such deal and a hold of its effects by an entity that is more representative, in regard of purpose, territory and number of users that it represents. This type of prevalence in relation to the number of members represented does not have a match on the side of rightholders', so it is not legitimate to interpret it analogically.

1.5 Is the collective licensing of rights conducted by non-profit CMOs or a different type of agency or entity (profitable entities such as business corporations), or by the state agency (such as the IP Office)?

Under the CMO law, CMOs are only allowed to adopt the form of non-profit associations or private cooperatives¹⁸. Collecting licensing of rights is never undertaken by the State or any Public Administration Office.

The Law distinguishes between CMOs and Independent Managing Entities, which correspond to any organisations which may be authorised by law or by way of assignment, licence or any other contractual arrangement, to manage copyright or related rights on behalf of more than one rightholder, for the collective benefit of those rightholders and that are neither owned nor controlled, directly or indirectly, wholly or in part, by such rightholders and/or organised on a for profit basis.

¹⁴ Art 14th

¹⁵ Art 48th-G

¹⁶ Art 40th nrs. 8 b) and 10

¹⁷ Art. 41st nr 2.

¹⁸ Art 5th nr 2

1.6 Are the collective management organizations obliged to contribute to cultural development of the society? If so, in which areas and how is the cultural support implemented (e.g. management of social or cultural funds)? Is the creation of such funds and their allocation limited by law?

The CMO Law¹⁹ imperatively commands that a portion not lower than 5% of all the income collected must be allocated to social and cultural funds, which may encompass the following objectives:

- a) Social welfare for members or associates;
- b) Education in the matter of Copyright and Related Rights as well as in other areas that may be necessary within the pursuit of its members' scope;
- c) Promoting of works, performances and products;
- d) Incentives to intellectual and artistic creation, privileging the investment in brand new talents;
- e) Prevention, identification and termination of copyright infringement activities, with the express exclusion of financing the CMO licensing in itself;
- f) Research, communication and promoting of copyright and related rights as study subject;
- g) Market internationalisation for works and performances of national conception and international cooperation, aiming at developing collective management of copyright at supranational level.

Law 62/98 of 01.09 modified by Law 49/2015 of 05.06 also requires that for private copy, 20% of all the income collected should be earmarked for cultural activities' incentive and to the research and communication of copyright and related rights²⁰.

2. Collective Management Organizations and Authors (Right-holders)

2.1 Do the authors/rightholders have a legal right to become represented? To become members? If they are rejected, what kind of remedy do they have at their disposal?

According to the CMO Law, every CMO is required to accept the management of the rights that it represents according to its statutory purpose, as expressed by its By-Laws, in line with mandates entrusted to it, based in objective, transparent and non-discriminatory criteria²¹.

If they reject an application, they must give a justification in writing for such rejection²².

Rightholders who have been rejected by a CMO are entitled to file a complaint under the CMO internal complaints procedure²³. Should such complaint be rejected, the grounds therefore must also be provided in writing. In the case of AGECOP, there is an express reference in the Law to

¹⁹ Art. 29th nr 1

²⁰ Art 7th of Law 62/98 modified by Law 49/2015 (Private Copying Law)

²¹ Art. 27th nr 1 b)

²² Art 27th nr 2

²³ Art 37th-A

ADR mechanism for rejection litigation²⁴. Even though the CMO Law doesn't say it, there is always the constitutional right to appeal to the Courts of Law to claim there was discrimination.

2.2 How does the CMO resolve a conflict between rightholders in case of a "double claim"? Are the rightholders referred to court or is there an ADR at hand?

The CMO Law requires CMOs to make available for their members complaint mechanisms. The CMOs must make information concerning those procedures, as well as dispute resolution mechanisms, accessible to rightholders²⁵.

The CMO Law doesn't specifically require the existence of ADR mechanisms, but they usually exist and do apply in case of "double claims".

2.3 How can the authors (rightholders) participate in the activities of the collective management organization? Under which circumstances can they be elected into the management or controlling boards? Are there pre-conditions, such as a minimal amount of remuneration from CMO, to become elected?

The CMO Law allows a large autonomy to CMOs in terms of self-organisation, if certain minimum conditions are respected:

- a) The By-Laws must define the purpose of the CMO, as well as the categories of rightholders which can be comprehended within their scope; the terms of membership; the rights that members may exercise and how the votes are expressed; the composition and form of appointment of members of social bodies²⁶.
- b) The CMO activities must be subject to the following principles and management criteria, namely: a) transparency; b) organisation and democratic management; c) members' participation; d) non-discrimination between national and foreign members;²⁷
- c) Only members of a CMO are allowed to participate in the composition of social bodies, except for the Statutory Auditor and the General Manager, in the case there is one²⁸. The same person cannot be a member of more than one social body, under penalty, except the General Manager, which may cumulate as member of the Board²⁹. When there are several different categories of members, the composition of social bodies must reflect such plurality of categories, representing the different types and members in a fair, balanced and, if necessary, rotative manner³⁰.
- d) The amount of rights previously attributed is very often the decisive criterion for the distribution of voting rights, but it is not a pre-condition for members to become elected. The members of the managing board of a CMO must annually declare if they own 5% or more of any entity which is subject to licensing, permission or payment to that CMO, except if that entity's activity is only of an accessory nature and not economically relevant. They are also legally prevented from participating in any decision which may damage, benefit or in any way affect their own personal or any relative's interests, or the interests of any entity of which

²⁴ Art 6th nr 5 of Law 62/98 modified by Law 49/2015 (Private Copying Law)

²⁵ Art 28th nr 4 e)

²⁶ Articles 6th nr 2 and 11th nr 2a)

²⁷ Art. 10th

²⁸ Art. 19th nr. 1

²⁹ Art. 19th nr. 2

³⁰ Art. 19th nr. 3

they may be members of social bodies. In such cases, they must invoke this impediment at once and their votes will not be accounted for the purpose of *quorum*³¹.

2.4 How is the remuneration distributed amongst authors? How can the authors intervene in the process of the formulation of distribution schemes? In which phases of the collecting process are the fees taxed and by whom?

The standard way of influencing the process of distribution is through the participation in the General Assembly (G.A.), which is legally attributed the competence for defining the general criteria for distribution of amounts due to rightholders and deduction of any management fees, as well as the general criteria for using the amounts which are to be reserved for cultural and social funds³².

Such criteria must be objective, transparent and non-discriminatory³³ and made public on the CMO website³⁴. Deduction of management fees and other deductions must also be transparent, reasonable in relation to the services provided, and based on objective criteria³⁵.

There is always the need to approve one or several Internal Regulations for the Distribution of Rights, and these are usually necessary to allow rightholders to clearly understand what they will receive, and how it is calculated. This is done at G.A. level. For the sake of transparency, such Regulations are to be published on the webpage, under the so-called duty of information³⁶.

CMOs are also legally required to grant their members access, through electronic means, to information concerning any right collected on their behalf, or, in case of collective licensing or equitable remuneration not allowing such singularization in the collection stage, to the amount that they will be entitled to after the distribution stage, including any income pending from collection³⁷. Rightholders shall be granted access to amounts disaggregated by rights' category³⁸.

The same applies to any management fees or deductions made for any other purpose, including social and cultural funds³⁹. This information is to be provided preferably during distribution, or annually to each rightholder who is entitled to receive income⁴⁰.

CMOs must inform the rightholders about management fees and any other deductions on income resulting from rights, before obtaining their consent for the management of their rights⁴¹.

CMOs must distribute the income obtained by their collection activities regularly, quickly, diligently and accurately, according to By-Laws and the distribution policy approved by the G.A.⁴²

³¹ Art. 20th

³² Art. 21st nr2 c) and d)

³³ Art 27th nr 1 b)

³⁴ Art 28th nr 2 f), g) and h)

³⁵ Art 30th

³⁶ Art. 28th nr 2 f) g), h), k) and p)

³⁷ Art.28th nr 4 b)

³⁸ Art 28th nr 4 c)

³⁹ Art. 28th nr 4 d)

⁴⁰ Art. 24th nr 5

⁴¹ Art. 30th nr 1

⁴² Art 33rd nr 2

The By-Laws and the distribution policy must be based on objective criteria, that are adequate to the type of rights managed, exclude arbitrariness and grant rightholders a participation in distribution which must be proportional to the use of such works⁴³.

In the case of private copy “levies”, the law requires that the By-Laws include distribution criteria among the members of the associate CMOs, including the form of distribution and payment to those beneficiaries which are not members but are presumably represented by members⁴⁴.

Furthermore, the same provision requires the following factors to be weighed in:

- a) Representativeness of rightholders;
- b) The result of studies carried on by the CMO (AGECOP) namely about the nature of the works that are copied and the copying habits of the Portuguese population;
- c) The use, by rightholders, of effective technological measures, namely digital protection mechanisms;
- d) Access by the Portuguese population, to copies that are authorised by rightholders.

Both, the CMO responsible for collecting and distributing the private copy levies and those CMOs which are members of the latter, must disclose, on a yearly basis, by publicizing on their respective websites, the total amounts distributed to the beneficiaries of equitable compensation, as well as the criteria that are applicable to such distribution.

2.5 How does the law or legal practice reflect the will of the author (“autonomy of will”) to grant licences individually? Is it allowed for the user to obtain the licence directly from the represented author? Are such direct licences null and void or are they valid, while the user still pays remuneration to the CMO? Please elaborate for each regime of the collective management.

Rightholders can choose between directly licensing or entrusting a CMO with the representation of their rights and interests, through a management and representation contract, up to five years, automatically renewable for the same terms, in the absence of voluntary termination⁴⁵. If they do so, they must choose what rights or categories of rights, types of work and performances are to be delegated to CMOs. They cannot be required to mandate CMOs to manage all possible modalities of exploitation or all their repertoire⁴⁶. The conditions to prevent renewal must be clear and expressly written in the contract⁴⁷. They cannot mandate more than one CMO for the same type of uses, artistic performances, phonograms, videos and broadcastings for the same period and territory⁴⁸.

By entrusting their representation to CMOs, rightholders preserve their own capacity to grant licenses directly, but only in relation to non-commercial uses, requiring a previous notice to the CMO⁴⁹. However, in case of commercial uses, sometimes rightholders also license users directly.

⁴³ Art 33rd nr 3

⁴⁴ Art 6th nr 2 e) of Law 62/98 modified by Law 49/2015 (Private Copying Law)

⁴⁵ Art 31st

nr 1 a), and 2 and Art 32nd

⁴⁶ Art 31st nr 1 a)

⁴⁷ Art 32nd nr 2

⁴⁸ Art. 31st nr 2

⁴⁹ Art. 31st nr 6

This latter case is normally a breach of the mandate but is sometimes difficult to prevent from happening, despite the many claims made by CMOs to their members and beneficiaries.

Rightholders are also allowed to terminate the mandate granted to a CMO, totally or in part, in relation to some or all categories of rights they own, for any or all the territories, works or performances which make part of their repertoire⁵⁰.

They must be informed of all the rights they own, the By-Laws and criteria to be applied before giving their consent regarding the management of any right or category of rights⁵¹. In case of termination, they must do it in writing, to become effective in 90 days after such notice⁵². In relation to rights pending from collection, termination will only be effective after the end of the year of notification⁵³. The presence and participation of rightholders in shows or public performances does not imply that the latter are licensed or duly authorised, by the CMO representing the former, in case such license is required⁵⁴.

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

Although the CMO Law doesn't qualify these as public licenses, rightholders are allowed to license directly for non-commercial uses⁵⁵ as indicated above. There are many examples, in relation to private performances of plays, for instance, which must be licensed by the rightholders, regardless of their commercial or non-commercial purpose, except in the case where the performance takes place in a family environment⁵⁶.

There are no cases where the CMO may distribute the work for non-commercial purposes, unless it does it for promotional reasons, which occurs often, but always in accordance with the creators of such work. As noted above, the promotion of works, performances and products is one of the aims of the so-called cultural fund, for which a minimum 5% of collections is reserved.

In terms of public uses of works, which do not require rightholders' consent, they are as follows: aside from the private copy exception, which entails the payment of an equitable remuneration (levy) charged from blank media and reproduction equipment⁵⁷, there is also the possibility of reproduction and distribution of public speeches, conferences and interventions in short summaries⁵⁸; reproduction and distribution of short fragments of literary or artistic works when included in current reports, for the purpose of information⁵⁹; reproduction and distribution by and within public libraries or other public institutions, such as archives, museums, scientific or education establishments, restricted to the non-commercial needs of such institutions, including for preservation and archive⁶⁰; reproduction, distribution and making available to the public of material samples of works which are exclusively destined for teaching and other non-

⁵⁰ Art 31st nr 1 b)

⁵¹ Art 31st nr 1 c)

⁵² Art 31st nr 3

⁵³ Art 31st nr 4

⁵⁴ Art 31st nr 7

⁵⁵ Art 31st nr 6

⁵⁶ Art 108th nr. 1 CRRC

⁵⁷ Art 75th nr. 2, 81 b) and 82 CRRC and Private Copy Law (Law 62/98 of 01.09, modified by Law 50/2004 of 24.08 and Law 49/2015 of 05.06)

⁵⁸ Art. 75th nr 2 b) and 3 CRRC

⁵⁹ Art 75th nr 2 d) and 3 CRRC

⁶⁰ Art 75th nr. 2 e) and 3 CRRC

commercial purposes⁶¹; reproduction and distribution of works for physically impaired people, in straight connection with such impairment, for non-commercial purposes⁶²; the reproduction and distribution of articles on current affairs, of economic, political or religious nature, if not expressly reserved⁶³. All these forms of reproduction/distribution are subject to the three-step test, that is, they are exceptional or special cases, cannot conflict with a normal exploitation of the work or other subject-matter nor cause unreasonably prejudice the legitimate interests of the rightholder⁶⁴. Some of these forms of use, such as private copying and reproduction by teaching institutions, are subject to the payment of an equitable remuneration to rightholders⁶⁵. Currently, however, there is no implementation of such compensation by teaching institutions.

3. Collective Management Organizations and Users

3.1 How does your jurisdiction prescribe private copying remuneration (“levies”)? Is the general principle of freedom of a contract respected in this area (i.e. is the remuneration a subject of the negotiations between users and collecting societies) or is the size of the private copying levy stipulated by any legislative act (such as governmental decree)?

Private Copy Law (Law 62/98 of 01.09, modified by Law 50/2004 of 24.08 and Law 49/2015 of 05.06) includes a detailed table where all the blank media and equipment which are subject to the private copy “levy” are determined, together with the amount to be applied to each item. This table includes digital media and equipment and has been last reviewed by Decree-Law 100/2017 of 23.08. Levies were always defined by legislative act, and never subject to market negotiations between users and CMOs.

3.2 Nowadays, the major use occurs on the Internet. Has there been any attempts in your country to set a private copying levies collected by CMOs or by different entities or state for the use of protected subject matters on the Internet (e.g. in the form of a so-called “flat fee” or a special tax)?

There was an attempt, back in 03. 02.2016, to introduce, by legislative intervention, some sort of special contribution by ISPs, namely a fixed rate of 0,75€ per subscription/contract, that would be reflected on the price to be paid by final users. This contribution would then be “pooled” into a special Fund, that would be managed by the Ministry of Culture. This was an initiative by the Portuguese Communist Party and included liberalization of non-commercial Peer-to-Peer file sharing, which would become assimilated to private copying.

It was allegedly based on the need to foster widespread access to Culture and Knowledge and would reverse the current principles of Copyright and Related Rights, by requiring rightholders to *opt-in* only in case they wanted their works, performances and other subject matters to become legally protected. Otherwise, there would be a legal presumption of permission to share, as long as it was for a non-commercial use. “Piracy” and “Counterfeiting” would only apply to commercially oriented practices, where the access to other protected materials, in return, would not count as a benefit for members of a content sharing community. The content was required to have been previously published for commercial purposes, made available to the

⁶¹ Art 75th nr 2 f) and 3 CRRC

⁶² Art 75th nr 2 i) and 3 CRRC

⁶³ Art. 75th nr. 2 m) and 3 CRRC

⁶⁴ Art 75th nr 4 CRRC

⁶⁵ Art 76th nr 1 b) CRRC

public with rightholders' consent and not subject to any express sharing restrictions. Software and periodic press publications were expressly excluded from the scope.

The Fund was to be distributed according to the following: a) 70% would be delivered to CMOs; b) 30% would incorporate the budget of the Ministry of Culture General Art Directorate and the National Film Institute, in order to be used to finance art and the future production of films.

As regards the CMOs, the distribution would be akin to the one already existing in Private Copying Levies, in the case of audiovisual content, that is 40% for author's CMO, 30% for artists' CMO and 30% to be divided between audiovisual and phonogram producers' association.

Nevertheless, the proposal suffered a heavy attack on behalf of CMO's and the Portuguese ISP association, and it found no political ground for approval. In fact, some of the opinions received by the Parliament pointed out to creating a major risk of default regarding Portugal's international obligations, in terms of Copyright and Related Rights. Portugal would become a Free Zone for Audiovisual Piracy. In fact, quite the opposite occurred: thanks to cooperation between rightholders organisations, the Ministry of Culture's Copyright Supervision Authority (IGAC) and ISP Association (APRITEL), together with other players such as the Company that runs DNS for .PT domain name, Portugal is currently internationally championing in terms of website blocking and illicit content removal since entry in force of the "Memorandum of Understanding" in 2015.

3.3 How are the tariffs set (by decision of the CMO, by negotiation with users, consumers or others)? What are the statutory criteria for the tariffs (e.g. assessing the value of the rights by experts, proportionality etc.)? Do they require approval of a regulatory authority (such as an IP Office, Ministry of Culture etc.)? How can they be contested by the users? By general courts, by special ADR procedure or specialized tribunals?

1. Tariff setting:

The CMO Law went well beyond the rules established by Directive 2014/26 of 26.02 and it regulated in detail the so-called *procedure for setting general tariffs*, distinguishing between *collective procedure* and *individual procedure*, based on the criterion of representativeness of users involved in the negotiation. This factor conditions the obligation of the CMO to engage into negotiations. Once these tariffs have been agreed, following such negotiating procedure, the contracts must be concluded in writing and deposited with IGAC, the supervisory authority.

Pursuant to the provisions of the CMO Law, these entities are obliged to contractually engage with the interested parties for the granting of non-exclusive authorizations of rights whose management has been entrusted to them in a non-discriminatory, fair and reasonable manner and upon payment of the remuneration or tariff established⁶⁶;

Such obligation to negotiate the appropriate monetary compensations corresponding to the authorizations requested by interested third parties (tariffs), as well as the remuneration due for uses not subject to authorization or licensing (equitable remuneration) only apply where the interested third parties are representative entities of a significant number of users of their sector. If this is the case, CMOs may not refuse to engage into negotiations.

The CMO Law only recognizes CMOs the prerogative of unilaterally setting the applicable tariffs in the following circumstances: (a) if the representative body of users *refuses to negotiate*, in accordance with Article 40 (9), and there is no collective agreement or previous decision of the

⁶⁶ Art 27th nr 1 g)

committee of experts in force; b) If the parties involved in the negotiation *do not refer the matter to the committee of experts* after 30 days from the lack of agreement in the negotiation.

Once the agreement is reached in the collective negotiating procedure, the general tariffs must be integrated into those that were unilaterally established by the CMO, thus binding the latter, but also any and all users who fulfil the objective assumptions of their application, whether or not they were members or associates of the representative entities which subscribe it.

Any users' representative entity may "associate" other entities that represent the same category of users to the procedure, thus extending the subjective validity of the contract reached in the negotiation procedure. This is inspired by ECL mechanisms but applied, in this case, to users.

However, even if it does not do so, the general tariff to be reached by negotiation, after being deposited with IGAC, becomes binding on all users who meet the objective requirements of their application, *regardless of their will and affiliation in these entities*, which clearly approximates the model of the so-called "extension administrative orders" that we can find, for example, in Collective Labour Law.

The CMO Law *does not foresee any opting out mechanisms*, which would be more in accordance with the nature and purpose of Copyright. But this provision works in favour of rightholders.

The CMO Law also provides for a mechanism akin to an institutionalized arbitration, which is referred to as a "committee of experts". This committee shall be composed of three experts, each one appointed by one of the parties and a third one agreed by the other two, who shall chair the committee. However, under the law, if the parties do not appoint their respective expert or if the parties appointed do not meet the choice of the expert chairman, one of the following solutions will be applied as long as such lack of designation or choice is maintained:

- (a) Tariffs which have been determined by agreement with user representative associations or with individual users will remain in application, on an interim basis (even after its term by natural expiry or denunciation);
- (b) The collection of general tariffs which have been fixed unilaterally by the CMO is suspended.

In cases where a license or permission is legally required for a use of the repertoire of one or more CMOs, these will be obliged to issue provisional licenses, valid up to 15 days after the end of the negotiations, if a shorter term is not required by the user. In order to suspend application of unilaterally set up tariffs, the user must assume: a) that it will apply the tariffs that end up being determined by agreement for the provisionally permitted or licensed uses; b) in the absence of agreement, and in case of default of committee of experts procedure, that it will comply with the tariffs set up by the CMO, retroactively to when the negotiations began.

While the "committee of experts" procedure is ongoing, the user will still be required to obtain a permit or a license for such use of works, performances, phonograms, videos, or broadcastings. Rightholders or CMO representing them can also appeal to the Courts as a form of reaction against any unauthorised use of the repertoire.

2. Criteria for setting up the tariffs

According to the CMO Law, CMO's activity must respect the following principles and criteria, only to name those that may apply to the setting up of tariffs⁶⁷:

- a) Transparency;
- b) Democratic organization and management;
- c) Participation by the members;
- d) Fairness in the sharing and distribution of income collected as a CMO;
- e) Non-discrimination, equity, reasonableness and proportionality in the setting of tariffs and fees;
- f) Efficient and economic management of the resources available;
- g) Moderation of administrative fees;
- h) Non-discrimination between national and foreign members;
- i) Management control, by the adoption of adequate internal procedures;

In addition, tariffs must reflect the economical value of the rights and be the result of a real market negotiation⁶⁸. They must consider, namely, the economic value of the use of the repertoire for different categories of beneficiaries, correspond to the fair remuneration of rightsholders for the use of their works, phonograms, videos, performances or broadcastings and, whenever possible, the measure of real use⁶⁹.

In the relationship with users, negotiations are subject to the principles of *bona fide* and transparency⁷⁰, included the need to provide complete information to allow the collection of applicable tariffs⁷¹. General licensing terms must reflect objective and non-discriminatory criteria namely concerning applicable tariffs.

4. Administrative approval of tariffs

Tariffs only need to be deposited with IGAC and publicized on IGAC's website, as well as on the CMO's website in order to become effective⁷².

5. Tariff litigation

Users may complain to IGAC, as the supervisory authority for Copyright and Related Rights⁷³.

In addition, following a recent legal amendment, the Intellectual Property Court of Lisbon is now prepared to decide on matters related with licensing and any other contracts executed by and between rightholders or CMOs representing them and users or user associations. It has widened its competence to encompass any claims related to the performance, lack of performance, validity, effectiveness, interpretation of contracts and acts having for purpose the creation,

⁶⁷ Art 10th nr 1

⁶⁸ Art 38th nr. 3

⁶⁹ Art 38th nr 4

⁷⁰ Art 36th nr 1

⁷¹ Art 36th nr 1

⁷² Art 38th, nr 1-2

⁷³ Art. 49th nr 4

transmission, burdening , disposal, licensing and permission of use of copyright, related right and intellectual property rights in any modality available within the law.

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

CMOs are subject to competition laws and principles⁷⁴. A recent Decision where the possibility of an abuse of dominant position has been argued - but not acknowledged as existing - was ECJ Decision in Case C- 525/16, held on 19.04.2018 (MEO *versus* Competition Authority, with the intervention of GDA – Cooperative for the Management of Artists, Players or Performers).

The ECJ found that there was no abuse of dominant position on behalf of GDA, because there was no distortion of competition between trade partners which compete against each other.

In this case, the alleged differences in applicable tariffs, are not likely to distort competition between users, namely MEO and the other Electronic Communications operator (NOS) since the alleged difference in the applicable tariff was very narrow and did not affect the profits of MEO, nor its capacity as a competitor⁷⁵.

The Court concluded also that GDA did not mean to exclude MEO from the market, even though the tariff applied to MEO was higher than the one applied to NOS⁷⁶.

In order to qualify as a competitive disadvantage for the purposes of subparagraph (c) of the second paragraph of Article 102 TFEU, a situation where a dominant undertaking applies discriminatory prices to trade partners must be a situation in which that behaviour is capable of distorting competition between those trade partners⁷⁷.

A finding of such a ‘competitive disadvantage’ does not require proof of actual quantifiable deterioration in the competitive situation, but must be based on an analysis of all the relevant circumstances of the case leading to the conclusion that that behaviour has an effect on the costs, profits or any other relevant interest of one or more of those partners, so that that conduct is such as to affect that situation⁷⁶.

3.5 In some jurisdictions the problem may be the non-transparency of tariffs. Are there any rules on the statutory level or as the outcome of the self-regulatory activities which concern the transparency of the tariffs? Has there been any development in this area in recent years?

As explained, there are several provisions requiring CMOs to publicize tariffs and criteria for their application, some of them resulting from the implementation of Directive 2014/26 of 26.02. The most important are those referring to the Transparency Report⁷⁸, the duty of information⁷⁹ and the duty to publicize on the CMO’s website⁸⁰ and the chapter on the negotiation of general tariffs and equitable remuneration⁸¹.

⁷⁴ Art 16th

⁷⁵ EUCJ, Case C-525/16 of 19.04.2018,[34] ,

⁷⁶ Idem [35]

⁷⁷ Ibidem [37]

⁷⁸ Art 26th-A and Annex I

⁷⁹ Art 27th nr 1 e)

⁸⁰ Art 28th nr 2 d) and e)

⁸¹ Art 38th nr 1 and 2 and 41st.