



Role of Collective Management Organisations in European IP System. Legal regulation of CMOs' Activities in CRM Directive 2014/26/EU



Lucius Klobučník

Early Stage Researcher (ESR) 15

l.klobucnik@qmul.ac.uk

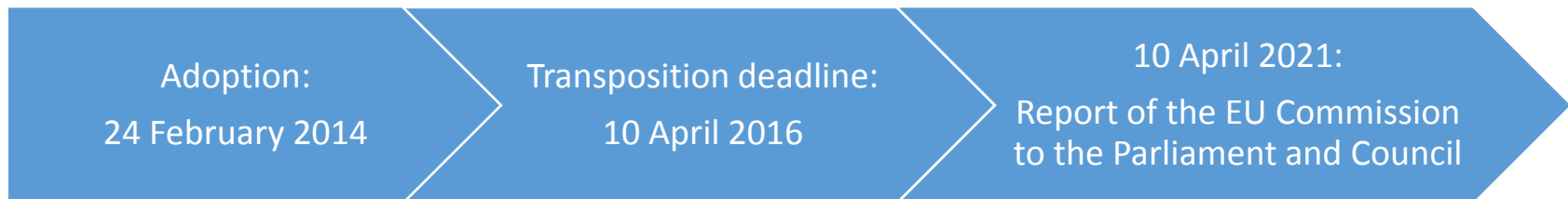
Queen Mary University of London, University of Augsburg





Collective rights management (CRM Directive)

TIMELINE



- Only 5 MSs managed to transpose on time
- Transpositions concluded by Summer 2018

- Report to assess the impact on:
- Development of cross-border services
 - Cultural diversity
 - CMO <-> users relationship
 - Need for a review

Objectives

- **Improve governance and transparency of all Collective management organisations (CMOs):**
 - Unlike other areas of copyright, collective management rules unharmonised
 - All CMOs regardless of category of rights, rightholders, remunerations
 - Level playing field
 - Access to information (public)
 - Oversight
 - Non-discriminatory treatment of foreign rightholders
 - CMO <-> CMO, CMO <-> users
- **Facilitate multi-territorial (MT) licensing of rights in musical works for online uses and the development of digital music services**
 - Narrow focus on music apparent already in Rec 737/2005
 - Only MT, only music, only online use
 - Clear rules under which CMOs can participate in MT licensing & administration

European **Online** Music Licensing Market



Reason for Collective Rights Management (CRM) Directive adopt

Difficulties for certain CMOs to grant licences to all types of rights and for all territories

Foreign members of national CMOs (EU or non-EU) discriminated → royalty collection, access to decision-making

Too limited access to annual reports by individual members

Limited information on cross-border royalty flow

Late distribution of royalties

unclear use of non-distributed income

black boxes



Transparency obligations

Rightholders (Art. 18) on management of their rights

- Not less than once a year
- Rights revenue attributed
- Amounts paid per category of rights & type of use
- Deductions (management fees and cultural services)

Other CMOs (Art. 19) on management of rights under representation agreements

- Revenue attributed - rights managed and type of use
 - Deductions
- Licences granted or refused grant
- Resolutions of the GA regarding rights managed

Transparency and financial reporting towards

Rightholders, other CMOs and users (Art. 20)

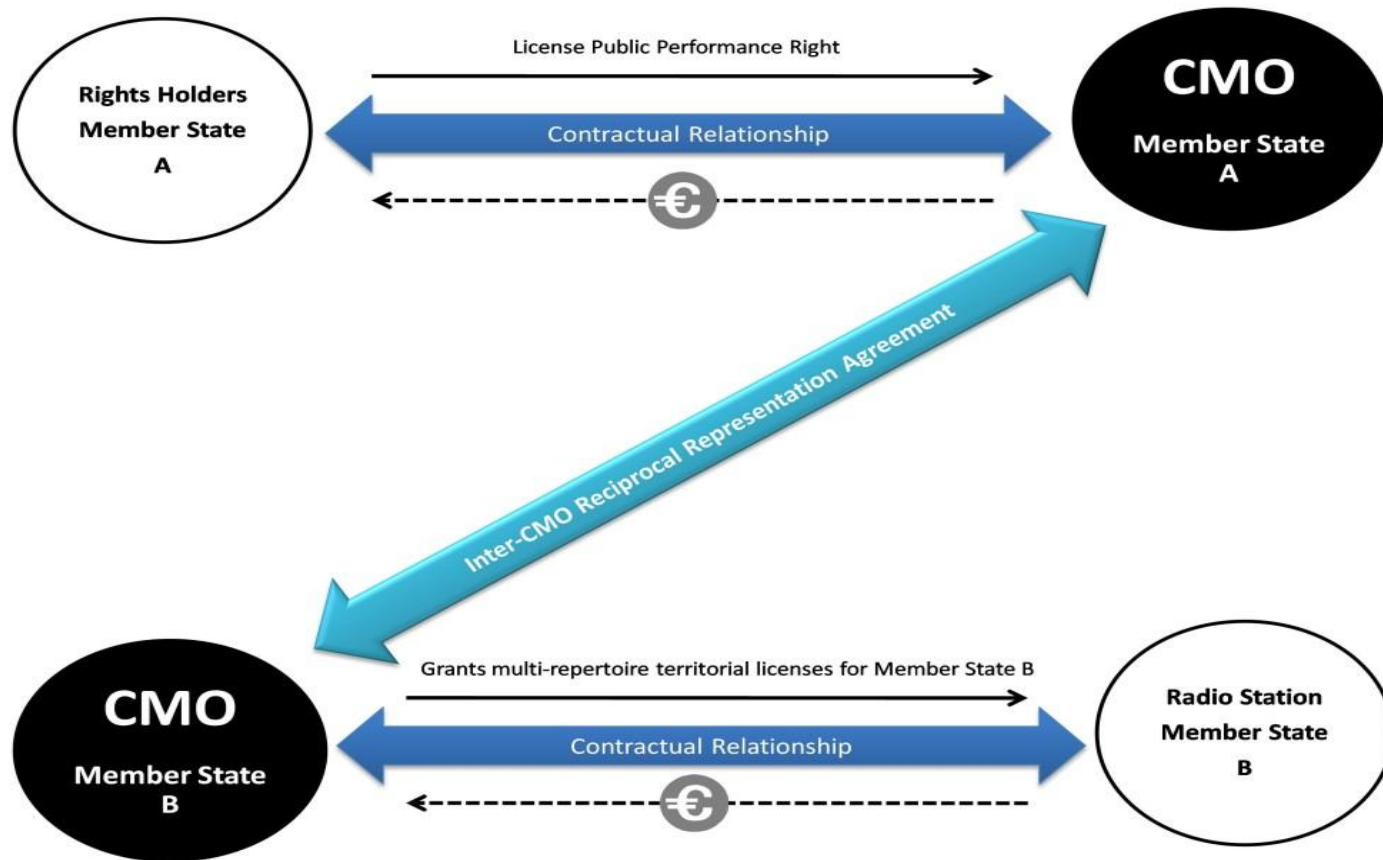
- On request
- Works it represents, rights it manages
- Territories covered
- Electronic means, undue delay

The public (Art. 21 & 22)

- Statutes
- Membership terms, terms of termination
- Standard licensing contracts, standard applicable tariffs
 - Policy on: distribution of royalties, management fees, deductions
- List of RRAs
- Dispute resolution procedure



Reciprocal representation agreements



Governance and operations

Membership rules (Art. 6)

- Membership requirements based on objective, non-discriminatory criteria
- membership criteria publicly available (statute)
- Decision making process, electronic means
- In case of refusal: clear explanation of reasons

Non-member rightholders (Art. 7)

- Communication
- Provision of information on use of rights etc

General Assembly (Art. 8)

- Convene at least yearly, all members have a right to vote
- Decide on statute and membership terms, appoints or dismisses directors
- Policy on: distribution of amounts due to rightholders, use of non-distributable amounts, deductions of rights revenue

Supervision (Art. 9)

- Continuous monitoring of managers
- Different categories of members participate in supervision
- Report of supervisory body to General Assembly at least once a year

Distribution to rightholders

- Distribution of royalties no later than 9 months from the end of financial year except if users fail to provide timely usage reports or CMO cannot identify rightholders

Distribution of royalties

- CMOs accused that undistributed royalties ended up in blackboxes
- Spanish CMOs SGAE was in 2019 expelled from CISAC (re-admitted 2021):
 - <https://www.musicbusinessworldwide.com/spanish-collection-society-sgae-plagued-by-corruption-claims-kicked-out-of-global-pro-body-cisac/>

CRM DIR requires „accurate and timely“ distribution of royalties (9 months from the end of the financial year in which revenues were collected)

- CMOs must take all necessary steps to identify and locate rightholders
- If royalties cannot be distributed after 3 years: non-distributable amounts
- General assembly decides on use of amounts, but members may limit uses



Rights of rightholders (Art. 5 + Recital 19)

Freedom of rightholders to choose:

- a CMO in Europe – no territorial restrictions as to CMO choice
- Territorial scope of mandate & scope of rights determined by a rightholder
- Categories of rights based on the **form of exploitation**, e. g. broadcasting, online on-demand distribution
- RHs have to give consent specifically to each type of right or category of rights
- CMOs have to inform rightholders of withdrawal right

Categories of rights determined by:

- the General Assembly
- the CMO's statute
- Prescribed by law

Balance between

Freedom of rightholder to dispose of their own works



Ability of a CMO to manage rights effectively

Withdrawal right (Art. 5 + Rec. 19)

- Right of a rightholder to withdraw rights or categories of rights from a CMO and a corresponding obligation of another CMO not to refuse entrustment without a justified reason
- The right to withdraw rights dates back to 1971/72, when the CJEU in *GEMA II* case confirmed the existence of withdrawal right and determined categories of rights -> reproduction right and public performance right as 2 different categories
- Later: *Daft Punk case 2002* & *Online Music Recommendation 737/2005*
- Right to terminate entrustment/ withdraw categories of rights – **6 months notice** -> however, a CMO can decide that termination will only take place at the end of the financial year
- Withdrawn rights do not have to be entrusted to another CMO, unless there is a requirement of mandatory collective management
- CMOs have to make rightholders aware of withdrawal right



Principles connected with withdrawals in EU law

High level of protection

- Principle reoccurring in EU copyright law – e. g. also in the InfoSoc Dir
- CRM Dir. Recitals 1 and 27-> finds its strongest expression in the rightholders' right to manage rights individually

Rightholders' freedom of choice <-> ability of a CMO to manage rights effectively

- Categories of rights have to be determined based on this principle
- RHs' freedom of choice prevailing – burdensome for users -> prohibitive transaction costs

Withdrawal right in CRM Dir & previous legal documents

GEMA II, Daft Punk 2002, Online Recommendation 2005

- Presumed that RHs would choose a **collective manager**
- Narrow focus – online **music rights**
- Only Rec 2005 made clear that withdrawal is effective also with regard to RRAs

CRM Directive 2014

- More emphasis on **individual/direct licensing and “other entities”**
- CMOs have to inform of the withdrawal right and have a deadline to enable withdrawal
- Broadly defined right (all forms of exploitation & all kinds of works) -> not only online music!

CMOs <-> users relationship

Licensing in general

Tariff-setting criteria:

- Licensing negotiations with users in good faith <-> users have to provide necessary information
- Tariffs based on objective and non-discriminatory criteria
- CMOs should inform users on tariff-setting criteria -> What information exactly?
- CMOs should respond without undue delay to request for licences
- Upon receipt of info -> license or give reasons why not
- Dispute resolution regarding tariffs, no codification of tariff-setting criteria
- Tariffs for exclusive rights and rights to remuneration should be reasonable in relation to:
 - **Economic value of the use of rights in trade** (taking into account the nature and scope of the use of the work)
 - econ. value interpreted in comp. law cases (*Scandlines*, *Kanal 5 v STIM*, *Premier League*), software case (*UsedSoft*)
 - **economic value of the service provided by a CMO**

CMOs <-> users relationship Licensing of innovative services

New **type** of
online services

CRM
Directive

Art

16 (2)

Active < 3
years

Licensors shall
not be required
to use licensing
terms agreed
with other users

Potential pitfalls:

- **Totally new forms of services** (Rec 32)
- Who decides if a services meet criteria?
- Brand new service or only new functions?
- Use for both online and offline exploitation
- Impact in multi-territorial lic. questionable
- GEMA example -> **all new services**



CMOs <-> users relationship

Users obligations towards CMOs

- Users should provide CMOs information on the use of rights:
 - in an agreed time frame
 - In agreed/ pre-established format – voluntary industry standards (e. g. ISWC)
 - CMOs should enable users to provide information in electronic means

NB: unlike in the Copyright in the Digital Single Market Directive, where exchange of information on usage of rights between users and rightholders/CMO is relevant for identification of works, the purpose of providing information under the CRM Directive is solely for collection of rights' revenue and distribution and payment of amounts due to rightholders



CRM Dir Definitions - organisations

Collective management organisations (CMOs)

- Any organisation authorised by law or by way of assignment, licence or any other contractual agreement to manage copyright or rights related to copyright on behalf of **more than one rightholder**
- for the collective benefit of rightholders
- Sole or main purpose is management of rights
- One of the following
 - **Owned or controlled by members**
 - **Not for profit**

CRM Dir Definitions - organisations

Independent management entities (IMEs)



- IME: the same criteria as CMO except:

- Neither owned or controlled, directly or indirectly by rightholders AND
- Organised on a for-profit basis
- Registration, oversight & transparency left to MSs
- Virtually non-existent
- Audiovisual producers, record producers, broadcasters, publishers NOT IMEs (Rec. 16)
- Membership in international organisations unclear
- Implementation problems
 - Problems with registration (in EU Member States)
 - CMOs not registering withdrawals (?)





CRM Definitions - subsidiaries

CMO subsidiaries

Art. 2 (3) -> the relevant provisions of the CRM Directive apply to entities directly or indirectly owned or controlled, wholly or in part, by a CMO, provided that such entities carry out an activity which, if carried out by a CMO, would be subject to the provisions of the CRM Directive

Recital 17 – Provisions of the Directive applicable to the activities of subsidiaries or other entities

- Clear requirement of **control** by CMOs (such as SOLAR, ARESA) -> **cooperation not enough**

MULTITERRITORIAL LICENSING OF ONLINE RIGHTS IN MUSICAL WORKS

Narrow focus:

- Online rights, musical works
- Only multi-territorial

- combat repertoire fragmentation
- facilitation of voluntary aggregation of rights and repertoire

Features & Goals

Solve problems with identification of repertoire, identification of rights, identification of territories where rights can be licensed

- Inaccurate data processing and invoicing (double invoicing or no invoicing at all)

Deal with complex and costly licensing system for users -> high transaction costs

Why is MT online music licensing challenging...



Solutions: technological adaptation (incl. Blockchain) , forming partnerships

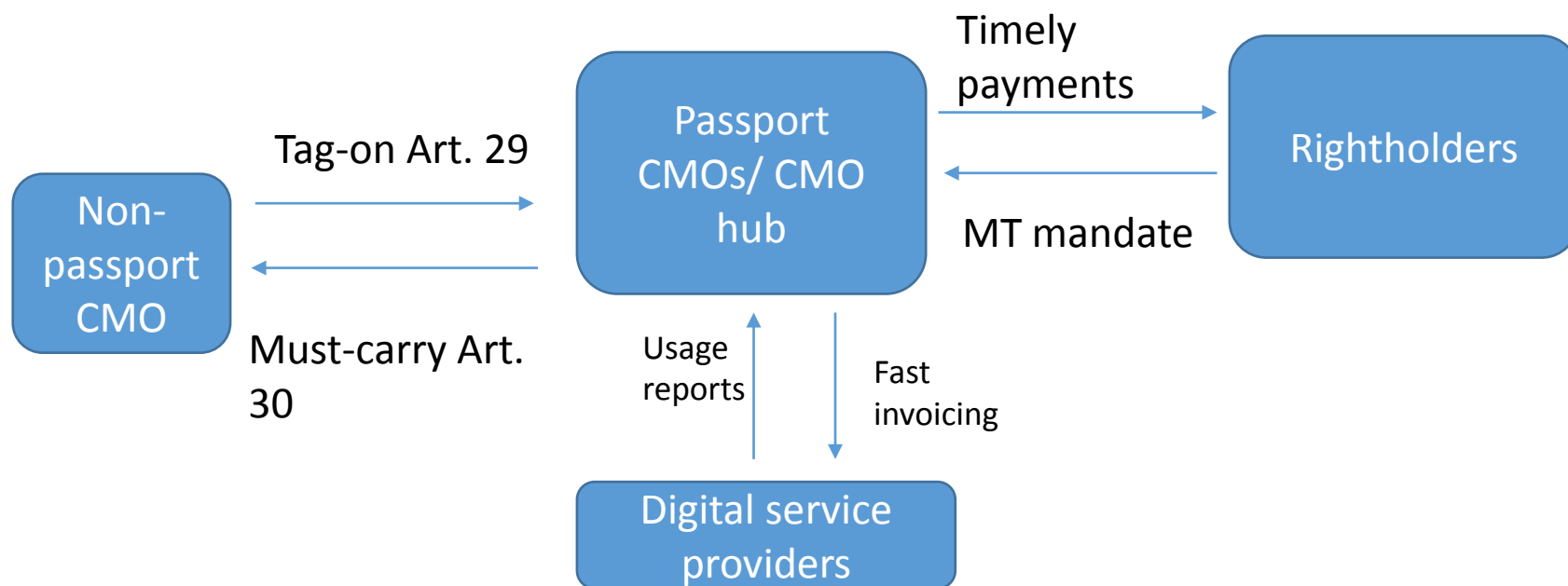


....not every CMO is able to issue & administer MT licences – PASSPORT MODEL

Passport CMOs	Non-passport CMOs	Rightholders
<p>Minimum quality standards in electronic data handling:</p> <ul style="list-style-type: none"> -> accurately identify CMO's licensed repertoire in each territory -> rapidly invoice online music providers -> use unique identifiers based on voluntary standards -> resolve inconsistencies in data, accurate MT repertoire info -> must carry obligation 	<ul style="list-style-type: none"> -> if a CMO does not meet the passport conditions, it can request a passport-CMO to license its repertoire on an MT basis -> a passport CMO has to accept if it is already granting or offering to grant MT licences for the same category of works to other CMO -> tag-on 	<ul style="list-style-type: none"> -> can benefit from MT licensing even if their CMOs is neither passport nor a tag-on CMO -> can withdraw online rights in musical works for purpose of MT licensing -> obligation of CMO to introduce this category of rights (alt: right of withdrawal even if no such category of right)



Passport model



CMO hubs - examples



- Higher level of institutionalisation – 2 LLCs
- **1 licence - ZETA Core Transactional Licence**
 - Users cannot license only parts of repertoire
- Front, back and middle office
- Centralised database
- Licensing team separate from CMOs forming ICE



- Looser cooperation platform among national CMOs
- One go-to point for licence negotiations
- Licence negotiations taken up by one of the CMOs
- Dubious whether users have to license repertoire of all CMOs

Interaction national CMO <-> passport CMO

Processing only

- CMO hub or data administrator provides only data processing services

Processing & negotiation

- CMO hub undertakes licence negotiations and data processing
- Only the licensing itself done by national CMO
- Suitable for small CMOs
- Armonia Online

Full service

- Repertoire fully included in the license
- No influence by national CMOs over licensing terms
- Revenue distributed directly from hubs to rightholders
- ICE



Direct licensors as a consequence of Recommendation 2005



aresa

BMG

- New licensing entities for Anglo-American mechanical rights
- Withdrawals extremely rare -> only big publishers
- Establishment of mechanical licensing entities -> no withdrawal *per se*



CRM Dir (non-) Definitions

Multi-territorial mono-repertoire licensors = option – 3 publishers



aresa

- Varying legal status -> subsidiaries of CMOs; run by publishers
- Publishers having control
- Mostly mechanical rights of major publishers
- German *My Video case* – not being able to provide “usable licence”
- Rules on CMOs – especially transparency & tariff setting – do not apply to them
- Recital 16 CRM Directive excludes application of CMO rules, although the draft proposal included them (with regard to CMO subsidiaries) – **only represent one rightholder**, despite controlling large amount of works



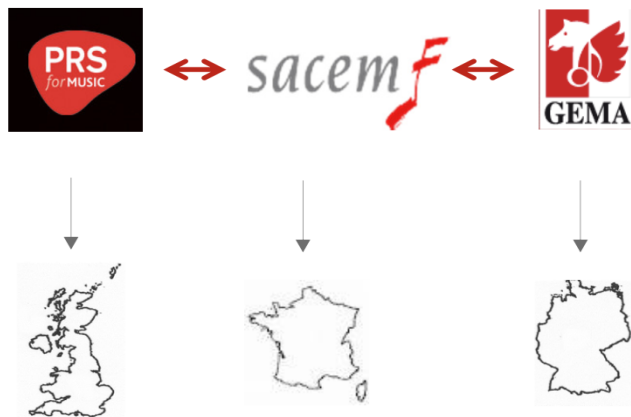
Uncertainty connected with option-3-publishers

Art. 31 of the Draft CRM Directive (2012) – Multiterritorial licensing by subsidiaries of CMOs:

- It expressly held that provisions of Title III apply to “entities owned, in whole or in part, by a CMO and which offer or grant MT licences for online use of musical works“ -> **left out from final CRM Dir., subsidiaries in Art. 2 (3) but unclear if MT rules apply to them**
- They only represent 1 rightholder \neq *CMO or IME*
- Typically perform only licensing and rely on CMOs for administration
- Calls to clarify legal status not heard
- Licence terms negotiations more transparent with CMOs -> no tariff control
- Publishers might be incentivised to form licencing entities not subject to CMO control

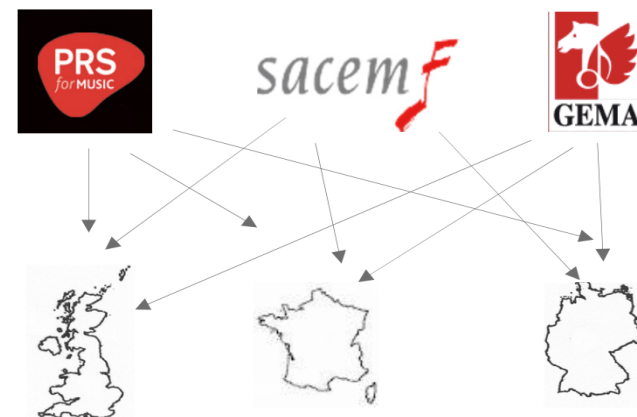
Online licensing before and now

National blanket licensing



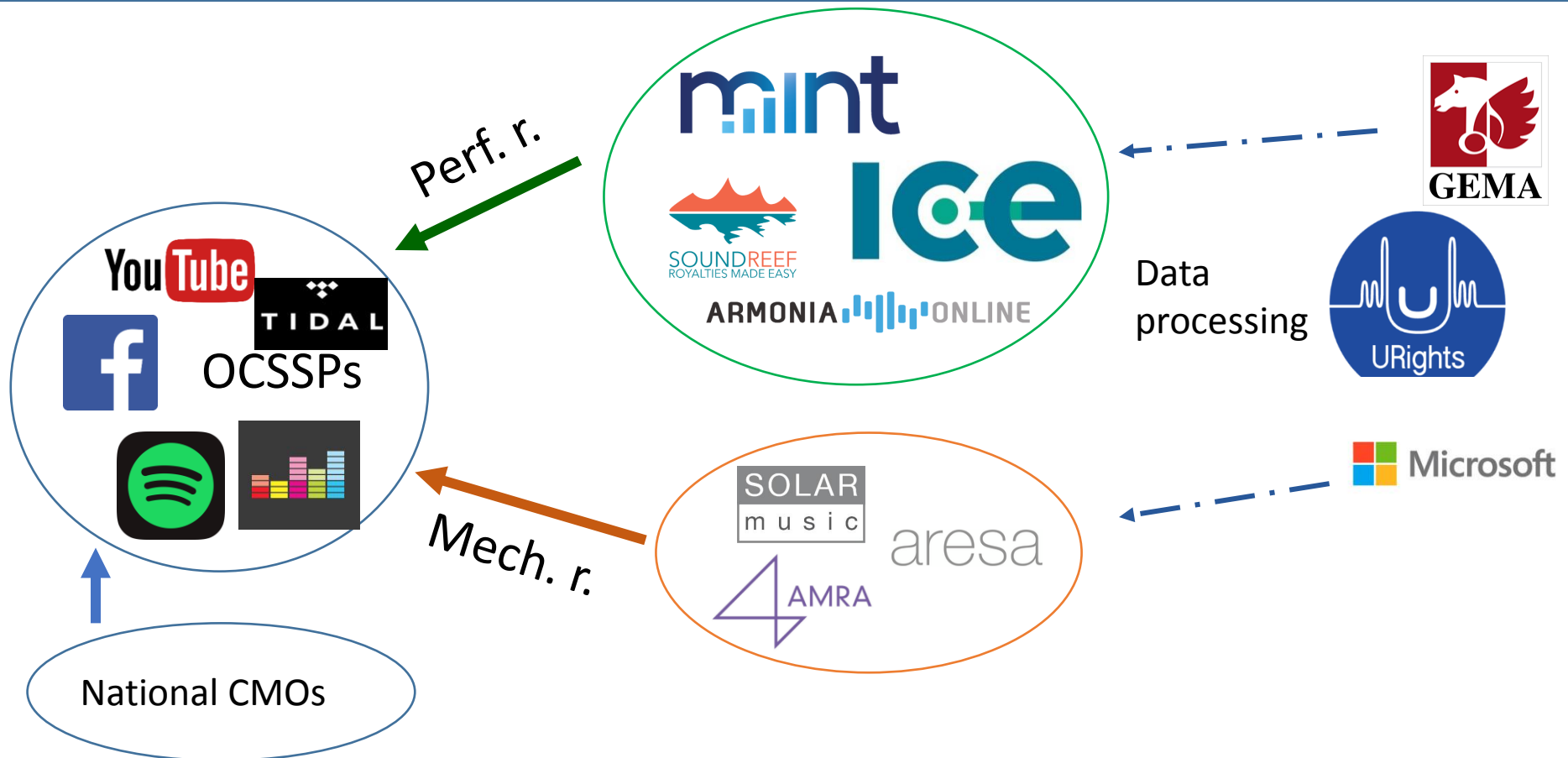
- National licensing markets
- Territorial fragmentation
- Terms & rates vary nationally
- Repertoire disputes internalised by CMOs
- Equal treatment between repertoires

Pan-European-Licensing

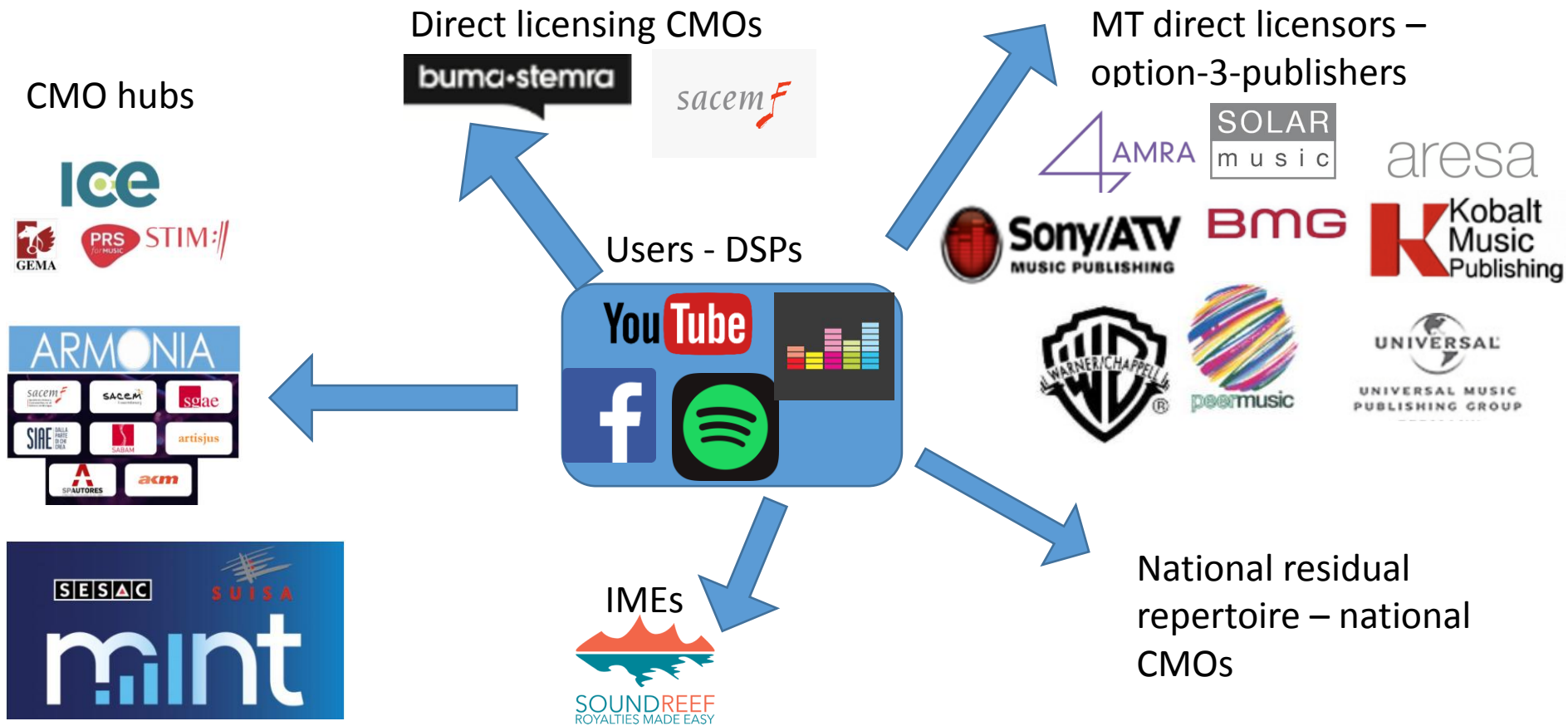


- European licensing market
- Repertoire fragmentation
- Terms & rates vary by repertoire
- Disputes to be solved on licensing level

EU-wide online licensing landscape (music)



Pan-European licensing market





CRM Directive 2014 - success and failures



- harmonisation of national level largely successful
- governance, membership rules, transparency, supervision, procedures

- rightholder-oriented, users' interests not balanced
 - Expected re-aggregation did not happen
 - Toothless measures – lic. of innovative services
 - Rise in individual licensing = increased amount of licensors
- IMEs - dubious





Databases

Global Repertoire Database:

- aimed at:
- centralised, once-only registration mechanism (registrations from both publishers and societies)
- Works, shares agreements, mandates
- Links between works and sound recordings
- Single point for identification of counterclaims and conflicts
- Dedicated online portal for users with different levels of access
- Failure in 2014

ICE Copyright Database:

- database of 16 million works and growing
- Commitment to adhere to international identification standards

URights:

- Data processing project of SACEM and IBM
- Open project, not a single database

??INTER – DATABASE CONFLICTS??

Relevance of CMOs post- CRM Dir & CDMS Directive 2019/790/EU

- > individual licensors (option-3-publishers) rely on CMOs for rights administration
- > rising number of licensees after CDMS Dir + identification of content
- > better access to standardisation initiatives (CIS-Net, ISWC)

- > dispose of less repertoire
- > rising importance of „**data processing entities**“
- > large users might find it easier to negotiate with large rightholders
- > need to improve data processing to stay relevant



Thank you!



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Early Stage Researcher (ESR) 15

l.klobucnik@qmul.ac.uk

Queen Mary University of London, University of Augsburg

