Q286

National Group:	Hungary
Title:	**Collecting societies**
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Questions

I. Current law and practice

Please answer all questions in Part I on the basis of your Group's current law.

The legal regime applicable to collecting societies (CSs)

1) Are collecting societies subject to a special legal regime? Please answer YES or NO and explain.

Yes. First of all, CSs don't exist in the territory of EEA countries. Instead CMO-s (collective management organisations) may operate, that do have to meet statutory requirements set forth both in Directive 2014/26/EU of 26 February 2014 (hereafter: the CM Directive, as referred to above).

We are compelled to follow the abbreviation (term) used in the Questionnaire, but the term (collecting society) is absolutely erroneous in Europe, with regard to the complex tasks to be fulfilled by CSs, and the close administrative supervision exercised over the activity of CSs.

In Hungary a specific, voluminous statute provides for the collective management of copyright and related (it would be more appropriate to use: neighbouring) rights. This is the Act XCIII of 2016 on the collective management of authors' rights and neighbouring rights, in fact on the implementation of the CM Directive (hereafter: the CMA). Specific rules on collective management are set out in Government Decree 216/2016 (VII. 22.) on the detailed rules of operation and procedures of collective management organisations and independent management entities (hereinafter the Gov. Decree 216/2016 (VII. 22.)).

2) What can be the legal form of a CS?

a) Public administrations?

b) Private companies?

c) Other?

CSs can only be established and operate in the form of an association on a not-for-profit basis. (§ 21 of CMA). The statutes of CSs shall comply with the provisions of the Act V of 2013 on the Civil Code (hereinafter: the Civil Code) applicable to the associations and the Act CLXXV of 2011 on the Freedom of Association, on Public-Benefit Status, and on the Activities of and Support for Civil Society Organizations in relation to rules on establishment, operation, organisation and management and shall also meet specific formal and substantive criteria related to the operation and structure provided by CMA and arising from the associations' activities.

3) Are CSs for-profit or non-profit organizations?

Only not for profit organizations may carry out collective management in Hungary.

4) Who can be a partner/stakeholder in a CS?

All interested „stakeholders" are holders of copyright/related rights that do have economic rights in the field of activity of CSs. They are neither partners, nor stakeholders. CSs do have affiliated rightholders, who may be

- members of the association, that do not have to and not even allowed to provide any material contribution (let it be monetary or in kind) to the CSs,
- mandating rightholders, who enjoy the same rights from the aspect of collection and distribution of rights revenues, like formal members, but do not have any active or passive membership rights,
- those rightholders, whose affiliation (representation) is based on the statute. This group embraces all domestic or foreign affected rightholders that have economic rights identical with those of the members on the field of licensing or exercise of remuneration right, which falls within the scope of activity of the CS. (It is called extended collective management, hereafter: the ECM.) Such rightholders are represented as long as they do not object lawfully against the collective management. The ECM concerns the exercise of those economic rights, the exercise of which is under the substantive law (i.e. the Act LXXVI of 1999 on Copyright, as amended, hereafter: the CA) subject to collective management, save for the lawful exercise of the opt-out right of the affected rightholder.

5) Are CSs subject to control by public authorities?

Yes, an extremely severe administrative control with a power to take harsh measures exists in Hungary exercised by the Hungarian Intellectual Property Office (hereinafter: the Hungarian IP Office), that covers

- registration of CSs, (and accreditation= permission of operation of so called representative CSs, that exercise ECM), or mandatory collective management, hereafter: the MCM (§§ 32-35 of CMA)
- supervision with harsh measures mentioned above ranging from a warning as far as the deletion of CS from the appropriate register, mandatory participation of the supervisory agency on the general meetings, sending over of all protocols of the general board meetings and supervisory board meetings, statutes, other internal rules of operation and organisation, distribution rules, balance sheet and profit and loss statement, requesting the public prosecutor for measures that may be taken in the context of the supervision, imposing a supervisory fine, withdrawing the permission of representative CSs, or if the other measures have failed prohibiting the organization from carrying out collective management activity (§§ 74, 84-99, 101-107, 108-121 of CMA) and
- approval of tariffs of such CSs that carry out ECM/MCM. (§§ 145-156 of CMA).

In order to cover the costs incurred in connection with the supervision control exercised by the Hungarian IP Office, CSs are required to pay an annual supervision fee to the Hungarian IP Office.

The copyrights managed by CSs / relation between CSs and rightholders

6) Please indicate which types of works/copyrights (including moral and/or economic rights) are/can be managed by CSs?

Moral rights may not be exercised by CSs. Any economic right of the holders of copyright and related rights can be exercised via a CS.

Please find below in the chart the economic rights (exclusive rights and remuneration rights of the various rightholders that are exercised via collective management. Please kindly note, that we indicate, whether collective management is voluntary or not voluntary (CM= voluntary, ECM=extended, or MCM= mandatory collective management). We intentionally neglect the rental of works, sound recordings and videos, which is an obsolete mode of exploitation, and the corresponding economic right is not exercised by any of the affected rightholders.

Rightholders	*Economic rights exercised via*		
	CM	*ECM*	*MCM*
musical rightholders (composers, lyricists and music publishers)	*mechanical reproduction for purposes, other than sound recording*	*public performance communication to the public, save for terrestrial broadcasting o of non-stage musical works, that have been made public)*	*mechanical reproduction for sound recording, terrestrial broadcasting, cable retransmission of broadcast works, private copy remuneration, reprographic remuneration*

literary authors (publishers with regards to reprographic remuneration)		*public performance communication to the public, save for terrestrial broadcasting, and making available of non-stage litarary works, that have been made public*	*terrestrial broadcasting, cable retransmission of broadcast works, private copy remuneration, reprographic remuneration, public lending right*
publishers of periodicals		*so called snippet rights (making available by content sharing service providers)*	
performing artists		*repeated broadcasting of performances, making available of fixed performances*	*communication to the public of sound recordings published for commercial purposes, cable retransmission, private copy remuneration, supplementary remuneration of performers in cases of lump sum remuneration for the fixation of performances on sound recordings*
sound recording producers („labels")	*reproduction of sound recordings for purposes other than the putting into circulation thereof*		*communication to the public of sound recordings published for commercial purposes, cable retransmission, private copy remuneration*
audio-visual authors		*reproduction and distribution, public performance, broadcasting and other communication to the public of audio-visual creations*	*cable retransmission, private copy remuneration*
producers of motion picture works			*cable retransmission, private copy remuneration*

visual artists		*exhibition of visual art works, secondary uses (in fact: reproduction, and distribution or making available) of visual art works, broadcasting of visual art works*	*cable retransmission, resale right, domaine public payant, private copy remuneration, reprographic remuneration*

7) Please indicate whether certain copyrights are subject to mandatory collective management?

Please see the answer to Question No. 6.

8) Can a rightholder opt out (alternatively whether there is a default rule enabling so called Extended Collective Licensing and whether a rightholder can opt out) and if so, whether that is limited to specific categories of rightholders/sectors and/or users?

There is a general opt-out rights drafted as a right to oppose CM in the cases of ECM. The right is set forth in § 18 (1) of CMA. The provision reads as follows (with some simplification): „the rightholder may object to the authorisation of the use of his or her copyright works or related rights performances via collective rights management by means of a declaration in a private document with full probative value addressed to a representative CSs which carries out ECM. The objection may be made at any time, the objection taking effect on the fifth day following the date of receipt. In the case of license agreement already concluded which are the subject of an objection, the objection shall, unless otherwise agreed, take effect on the last day of the calendar half-year to which the objection relates, provided that the objection is lodged by the last day of the first three months of the half-year concerned. A protest lodged after the last day of the first three months of the calendar half-year may take effect at the latest on the last day of the following calendar half-year. Any provision of the statutes of a collective management organisation contrary to this paragraph shall be null and void. The representative CSs shall act in accordance with the declaration and shall not otherwise restrict the right to object."

9) Can/is there competition between several CS for the management of the same copyright? If so, is the author free to entrust the management of his/her copyright to the CS of his/her choice?

If there are more than one CSs registered to exercise the same economic rights, they are free to operate separately. In the case of representation of economic rights, subject to ECM, or MCM, only one so-called representative CS may exercise the right vis-à-vis commercial users. In the absence of a consensus to be achieved by the affected CS the competent authority, i.e. the Hungarian IP Office appoints the licensing representative CS which is obliged to distribute the collections among the other interested CSs, that do not qualify as representative CS. (§ 85 of CMA)

In addition there are so-called independent management entities (hereafter: the IME) that carry out the same activities as CSs, but may operate in any for profit legal forms. Such IMEs are to be registered with the competent authority, i.e. the Hungarian IP Office. Such IMEs exist to represent film producers in the public performance of films in public places, musical rightholders and AI producers (it is doubtful, whether the output is a work in terms of copyright)

in public performance and communication to the public. They frequently adopt rightholders who have exercised their opt out right.

10) If for each copyright prerogative, there is only one CS that can manage it, is the CS considered to be in a dominant position on the market and is competition law applicable to it? Please cite case law if available.

Please see also the answer for Question No. 9. Yes, such a representative CS is to be regarded in a dominant position, and competition law applies. There is one case, where the competent authority (Hungarian Competition Authority; hereinafter: the HCA) terminated the proceeding. (Case No. Vj-97/2004/37)[1] In Case No. HCA initiated proceedings against FilmJus Hungarian Society for the Protection of Audio-Visual Authors' and Producers' Rights (hereinafter: the FilmJus) on the basis of allegations that the CS was abusing its dominant position. HCA found that the CSs is clearly covered by the Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition (hereinafter: the Competition Act) and that the activities carried out by FilmJus constitute market conduct. HCA further indicated that the tariffs could not be considered as a state act therefore they fall within the scope of the Competition Act. According to HCA's view the fact that FilmJus set the royalty rates according to the number of subscribers and the broadcasting time can be assessed as a method proportionate to the revenue, which cannot be considered unfair. However, an abuse of a dominant position in the case of CS may not only take the form of excessive pricing, but also of restrictions on distribution, which can be detrimental to consumers. HCA did not find evidence of such conduct. On the basis of the above, HCA in its decision of 3 May 2005 terminated the proceedings against FilmJus in the absence of an infringement.

There is another case dealing with the one stop shop collection of private copy remuneration, which was closed with a commitment, however HCA could not state and prove the abuse of the dominant position. (Case No. VJ 2014/66)[2] Artisjus (the Hungarian non-profit organisation for CM of the rights of composers, lyricists, literary authors, and music publishers) was also involved in the famous CISAC case, where the General Court totally dismissed the case brought forward by the European Commission on the basis of an alleged abuse of monopoly and restrictive practices. (ECLI:EU:T:2013:172, *T-411/08*)

11) What is the legal form of entrusting the management of an author's rights to a CS?

a) A mandate?

b) A contribution to a company?

c) A contract?

d) Other?

A mandate regulated by § 13-16 of CMA, and Gov. Decree 216/2016 (VII. 22.) that give detailed provisions on the conclusion, content and termination of such a mandate.

12) Can a CS enforce the managed copyrights? And moral rights of authors?

[1] See the decision in Hungarian; see the summary in English
[2] See the order in Hungarian; see the summary in English.

Yes, a CS can enforce economic rights in its own name without the participation of the affected rightholders (§ 9 of CMA). Only the author himself/herself, or if properly authorized, the licensee can enforce moral rights.

The licenses concluded with the users

13) Please indicate the different forms of licenses that exist in collective management.

a) General performance contract?

b) Contract of use for each work?

c) Others?

Blanket licenses, individual contracts, that are based on tariff charts, which are in turn general terms and conditions of use for commercial purposes to be approved by the Ministry of Justice and announced in the Official Notice (exhibit to the Official Gazette) for representative CSs, and on tariff charts to be published by other CSs and IMEs (no government approval in the latter cases).

14) How are licensing contracts negotiated?

a) The terms of the licensing contracts are set by law (please specify which ones)

b) The CSs have standard contracts and royalty schedules

c) Each contract is/can be subject to negotiation

Please see also the answer to Question No. 13. Here answer b) applies.

15) The CS tariffs: How are licensing contract royalties set?

a) What are the general principles for setting royalty rates?

b) Are the royalties flat or proportional? In which cases?

c) If royalties are proportional, are they proportional to the user's turnover? To the extent of the exploitation of the repertoire? To another criterion?

These issues are provided for in the CMA. Under § 58 of CMA the tariff shall be established and applied in accordance with the requirement of equal treatment, without undue discrimination between users. In setting the level of royalties in the tariff, account shall be taken of the nature and extent of the use concerned and any other relevant circumstances. The tariff shall be reasonable, having regard in particular to the economic value of the use concerned and of the service provided by CS. The criteria used for setting the tariff shall be made available by CSs on request to the user concerned.

In the procedure to approve the tariff charts the representative CS have to attach a justification and documents (calculations) supporting the tariffs to the proposed tariff charts. The justification has to include reasoned statements on the nature and extent of the use and the economic value of the use. The CS frequently attaches similar tariff charts of neighbouring and other CS, that operate under comparable market conditions.

Both CS and the competent authority, the Hungarian IP Office is aware of and follow the preliminary decision of the ECJ, passed in the case ECLI:EU:C:2017:689, *C-177/16*, stating, that „For the purposes of examining whether a copyright management organisation applies unfair prices within the meaning of point (a) of the second paragraph of Article 102 TFEU, it is appropriate to **compare its rates with those applicable in neighbouring Member States** as well as **with those applicable in other Member States adjusted in accordance with the PPP index**, provided that the reference Member States have been selected in accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis.

It is permissible to compare the rates charged in one or several specific user segments if there are indications that the excessive nature of the fees affects those segments. **The difference between the rates compared must be regarded as appreciable if that difference is significant and persistent**. Such a difference is indicative of abuse of a dominant position and it is for the copyright management organisation holding a dominant position to show that its prices are fair by reference to objective factors that have an impact on management expenses or the remuneration of rightholders.(…)"

All affected users do have a right to opine on the planned tariff charts. Significant users and users' stakeholders' associations are notified and asked to opine on the tariff charts. The competent authority, Hungarian IP Office prepares the file for approval (or dismissal), and submits it to the Ministry of Justice that passes and publishes its decision as well as the tariff charts, as approved. (§§ 145-156 of CMA)

It is for the national court to determine whether the fees are excessive. In that context, it must, in particular, take account of the specific nature of copyright and strike an appropriate balance between the interest of the authors in obtaining remuneration for the use of their works and the interest of users in being able to use the works under reasonable conditions. In order to verify whether the level of remuneration imposed by CS is fair, the nature and extent of the use of the works and the economic value generated by that use should also be taken into account. In assessing this, it is necessary to examine whether other methods exist which would make it possible to determine whether a price is excessive.[3]

These methods may include benchmarks such as

- prices previously charged by the dominant undertaking for the same services on the same relevant market,
- prices charged by such an undertaking for other similar services or for different categories of customers, or even,
- prices charged by other undertakings for the same services or for similar services in other national markets,

by comparing on a uniform basis.

16) Are the CS tariffs public? If not, how do authors/artists know whether they would wish to join a CS?

Yes, tariffs are public. The tariffs of representative CSs are announced in the Official Notice, all other tariffs have to be posted on the website of the CS /IME.

[3] See C-177/16; § 36-37.

Distribution of royalties collected by the SC to authors

17) How do CSs distribute royalties among authors?

a) According to the author's reputation/nature of works/duration, etc.?

b) According to the extent of exploitation of the author's works?

c) Other?

The distribution occurs under the public distribution rules to be adopted by the general assembly of the CS, and subject to supervision and review of the Hungarian IP Office, as well as of the courts, should any rightholder dispute the distribution. Distribution shall be fair, granting equal treatment to all rightholders represented. It occurs according to the extent of exploitation of the authors' works, where appropriate data are at the disposal of the CS.Where such data are not provided, a proportionate allocation of such rights revenues takes place adding proportional amounts to the amounts distributed according to actual usage data (§§ 7 (2) c, 26 (1) b), 36 of CMA)

18) Do the CSs devote part of the collected royalties to social, cultural or other actions? If so, in what proportion?

Yes, they may make such deductions under the decision of the general assembly which is to be included in the distribution rules. (§ 36 (5) b) of CMA) The deductions may occur within the strict restrictions provided for in the CMA. The CSs may make deductions for community, mainly social or cultural purposes. The deductions shall be subject to the consent of the affected rightholders (part of the mandate, and of the representation agreement concluded with foreign CSs). Cultural deductions, if any shall be transferred to the National Cultural Fund of Hungary (hereinafter: the NKA) established by the Hungarian Parliament to support the creation, preservation and spread of national and universal values. Thus, 25% of the revenue from private copying and reprographic remunerations, reduced reasonable administrative costs, shall be used for cultural purposes in the interest of rightholders. CSs fulfil this requirement by transferring the amount to NKA. Furthermore, if the royalty is not paid within three years of the year in which it was collected, due to the rightholder or the rightholder's whereabouts not being known, the royalty is considered non-payable and 90% of it must be transferred to NKA for cultural purposes. NKA will use the amount received from CSs for the benefit of the rightholders represented by CSs that transferred the amount. CSs may use only the remaining 10% for social purposes. There is some concern about the legal provision explained above, as the right to property may be infringed by the fact that the general assembly of CS has no genuine right of disposal: it can only provide social support to its members if it pays the greater part of the amount to NKA's budget. (§§ 43-45 of CMA).

19) For the collected royalties for which the authors are not known (non-distributable royalties), are there any rules?

Yes, detailed rules are provided by §§ 41-42 of CMA. If CS is unable to pay royalties to a rightholder because the rightholder is unknown or is in an unknown location, CS must deposit such royalties in a segregated account and take such steps as would reasonably be expected of CS in the circumstances to identify and locate the rightholder. After a certain deadline (within three months calculating from the end of the third quarter of the calendar year following the calendar year of the collection) CS shall publish on its website information about copyright works and related rights in subject matter for which the identity or residence of the rightholder is not known. It is also necessary that this information is provided directly to its members or to

other CSs linked to it by representation agreements. This provision provides for an additional period of 1 year to identify the rightholders, now involving the whole public. CMA also ensures the obligation for CSs representing the same group of rightholders to cooperate in order to identify and trace the rightholder. CMA creates a rebuttable presumption if, despite a search for the rightholder, the rightholder or the rightholder's whereabouts are unknown and the royalty is not paid within 3 years of the year in which the royalty was collected. In this case, the royalty is deemed to be non-payable and 90% of it is paid to NKA.

II. Policy considerations and proposals for improvements of your Group's current law

20) Is it desirable to enforce collectively licensed copyright works using the same procedures as for non-licensed works, and if not, how should they be enforced?

If the question is to be understood whether the enforcement of copyright should be identical in cases of non-licensed uses concerning individual and collective licensing, the answer is yes.

21) Should collective licensing for particular types of works and/or sectors be mandatory?

Yes, absolutely. Cable retransmission, private copying, reprographic copying, resale of works of visual art, transfer of ownership of an original work of art by an art dealer where the term of copyright protection has expired, communication to the public of sound recording, public lending are such uses, where individual exercise of right is not only impracticable, but non effective to such an extent, that it can be regarded as impossible.

22) Should individual royalty rates be determined according to the individual circumstances of each case, or should all royalty rates be determined according to the same criteria?

According to the same criteria, without making discrimination, applying equal treatment.

23) Should there be a certain minimum threshold of use (e.g. a bar with at least 50 customers, a dance party for fewer than 500 people, or a hairdresser with 12 stylist chairs), with any use below the minimum level being royalty free?

No. This is an erroneous approach, that neglects – intentionally – the term of public as it is explained in the authentic Guide to the Berne Convention (GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO AND GLOSSARY OF COPYRIGHT AND RELATED RIGHTS TERMS, by Mihály, Ficsor, 2003, *https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf*, BC-11.4.: „The Convention does not provide a definition of the concept of "public," either as an adjective or as a noun. It is, however, quite obvious that, as regards the adjective "public," it is the opposite of the adjective "private" and, thus, what may not be characterized as "private" is supposed to be regarded "public." If "public" is used as a noun, it may similarly be regarded to be the contrary of the "private circle"; that is, those people who are beyond the private circle of the user.

(…) In any way, the dominant opinion seems to be that all uses should be regarded "public" and all acts directed "to the public" which go beyond the circle of a family and its close social acquaintances."

24) Should there be an exemption from collective licensing royalties for private, non-commercial use?

Yes, as it is provided for in the CM Directive, and in § 11 of CMA as being set out that[t]he rightholder may individually authorise the non-commercial use of his/her copyright work or related subject-matter, even if such use is otherwise authorised by a CS on the basis of a management mandate or ECM.

The detailed conditions for authorising the non-commercial use of copyright works or related subject-matter shall be laid down in the statutes of CS.

Only uses which do not directly or indirectly serve the purpose of generating or enhancing revenue and for which the rightholder does not claim royalties shall be considered to be non-commercial."

III. Proposals for harmonisation

25) Do you consider harmonisation regarding collecting societies as desirable in general? Please answer YES or NO and you may add a brief explanation.

No. This is a mission impossible. The copyright and collective management systems are too far from each other in certain parts of the world. The harmonisation should be in close connection with the very sensitive issue of the limited or unlimited transferability of economic rights, and a commercial practice of the so called buyout rights, which is the clear opposite of the collective management.

If YES, please respond to the following questions without regard to your Group's current law or practice.

Even if NO, please address the following questions to the extent your Group considers your Group's current law or practice could be improved.

Our current law provides for well-functioning, clear and applicable solutions of the complicated issues of the collective management , which mirrors the desirable balance of the various stakeholders.

~~26) Should collective licensing be mandatory any specific class of copyright works/sectors and, if so, how is that class of works defined?~~

~~If YES: Should authors/artists be allowed to opt out, if they do not agree with the licensing terms?~~

~~27) How should the licensing terms, especially the remuneration, be calculated?~~

~~28) Should authors of copyright works be allowed to choose between different licensing organisations?~~

~~29) Should licensing terms be harmonized across jurisdictions, and if so, how could different licensing terms as between jurisdictions be avoided?~~

~~30) Should the licensing terms (including remuneration) be reviewed and adjusted at specific time intervals, and if so, how should those intervals be defined?~~

~~31) Should the enforcement of a collectively licensed copyright be possible by the CS and if so:~~

~~a) should the author be joined into the action as a party?~~

~~b) if the answer to a. above is NO, how should any necessary evidence of originality be obtained for a copyright-protected work, and challenged by the defendant?~~

~~32) Please comment on any additional issues concerning any aspect of collecting societies that you consider relevant to this Study Question.~~

~~33) Please indicate which industry sector views provided by in-house counsels are included in your Group's answers to Part III. consider relevant to this Study Question.~~

A lawyer representing a CMO, and a lawyer working in an IP/IT law firm representing clients in the sector of media, publishing and entertainment.