TRANSPARENCY OF COLLECTIVE MANAGEMENT ORGANIZATIONS (COLLECTING SOCIETIES)

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Abstract

According to art. 133, paragraph (7) of Law no. 8/1996 on Copyright and Related Rights: „the collective management organization (collecting society), which is the sole collector, is required to issue the authorization through a non-exclusive license, in writing, on behalf of all recipient collective management organizations and to ensure both transparency of collection activities and the related costs in relations to the recipient collective management organizations. They have an obligation to support the collection activity." This special rule applies only to sole collectors and it cannot be transposed to the collectors appointed in various collection fields by ORDA, even if they are subject to mandatory collective management.
Otherwise, in accordance with art. 130, paragraph (1), letter (i) of Law no. 8/1996, the obligation to ensure transparency in the collection activity operates also regarding the collectors from areas other than „private copying", according to which „the collective management organizations are required as follows: i) to ensure transparency of collective management activities in their relations with the public authorities which have the right to control and, through them, with the users;". Under these circumstances, such obligation to ensure transparency exists and it is also applied by CREDIDAM, and the latter has entirely complied with it over time by submitting to ORDA on annual basis all the documents as required by law, as well as any other document required by it during inspections. We shall further show that CREDIDAM has also provided all the information, as enlisted in art. 2 point A of the draft decision, including to the recipient organizations.

Keywords: *related right, collective management, transparency, circumstances, right.*

1. Introduction

ORDA[1] has requested the collective management organizations to communicate their opinion on the transparency obligations of collective management organizations designated as collectors. The collective management organization which manages performers' rights, i.e. CREDIDAM, introduced the distinction between the concept of sole collector and the one of collector on source/collection field, as well as the transparency obligation contents incumbent on the collective management organizations from both categories.

After receiving the opinions from all the colective management organizations, ORDA communicated them a draft decision on transparency.

We emphasize that the original draft text drawn for discussion by the collective management organizations is distinct from the one in ORDA's Decision no. 114/2016[2], regarding the burdens imposed on the collective management organizations which are appointed as collectors by ORDA, based on the principle of representativeness criteria. In our opinion, there is no legal basis for regulating the transaprency requirement beyond the provisions of the Law no. 8/1996 on Copyright and Related Rights *(hereinafter referred to as „**Law no. 8/1996**"),* as well as the fact that collective management organizations already are bound to transparency according to current legal provisions. Moreover, most of the information provided through the administrative document issued by ORDA was communicated by the collecting body to the recipient collective management organizations, and the not provided one, i.e. the information communicated by the users showing the actual use of the repertoire managed by the recipient collective management organizations, namely that set out *in paragraph B of the initial draft*, due to its confidential nature, is the prerogative of recipient organizations to arrange to get it by their own.

ORDA has communicated the opinion of collective management organizations regarding the advisability of issuing the decision on transparency obligation of the organisations designated as collectors. Following such correspondence, ORDA announced the collective management organizations that **a decision on the transparency obligations shall not be issued** regarding the rights subject to mandatory collective management. As grounds for its conclusion, ORDA considered that this decision, as it would be drawn up in accordance with the current legal framework, cannot be applied.

Surprisingly, without having a prior dialog with the collective management organizations on the amendment of the original draft decision text and without us being communicated the reasons for the reconsideration of ORDA's initial position, the latter issued the *Decision no. 114/2016 on transparency obligations of the collective management organizations designated as collector /sole collector for the rights subject to mandatory collective management*, published

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[1] The Romanian Office for Copyright.
[2] Published in the Official Gazette, Part I, no. 889 dated November 7th, 2016.

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In our opinion, the text of ORDA's Decision no. 114/2016 is unclear and we requested clarifications from ORDA for the provisions considered unclear, in order for it to be understood correctly and consequently implemented by the collecting collective management organizations. Except for the material error correction contained in art. 2 point A letter e) of the administrative document, **ORDA's clarifications were added to the text of the decision regarding its key provisions,** by comparison to the version published in the Official Gazette, a fact which lead to a different construing, conclusion supported even by the recipient collective management organizations.

2. Content

In order to analyze which are the transparency obligations of the collective management organizations designated as collector/sole collector we previously have to check if there is any difference between the collective management organization designated as collector for a certain category of right-holders and the collective management organization designated as collector for all the categories of right-holders, the so-called sole collector.

2.1. ON THE CONCEPT OF SOLE COLLECTOR

About the concept of sole collector, ORDA's opinion is that art. 133 should be correlated with art 107^1 of the Law no 8/1996, so that both concepts exercise the same basic rights and obligations for the collective management organizations which fulfill these functions.

As far as we are concerned, we believe that the procedure for appointing the sole collector for the „private copy" field is different from the procedure by which ORDA appoints the collector of remuneration payable to the same category of holders, so that neither of the two concepts overlap, because they do not give rise to the same rights and obligations as tasks of the organizations which fulfill this function.

More specifically, as ORDA states, according to art. 107^1 of Law no. 8/1996, „*The compensatory remuneration for private copy will be collected by a collective management organization as sole collector for the works reproduced after sound and audiovisual recordings and by another collective management organization as sole collector for works reproduced from paper, in the conditions of art. 133 paragraphs 6) - 8). The two collective management organizations, with tasks of sole collector, are appointed in order to obtain the vote of the majority of beneficiary collective management organizations, upon the first summons, or by obtaining the highest number of votes upon the second summons, irrespective of the number of persons present. The collective management organizations appointed by vote will submit to the Romanian Copyright Office, the minutes based on which they were appointed. Within 5 working days since the date of submission, the Romanian Copyright Office shall appoint the sole collector based on the decision of the General Manager, which will be published in the Official Gazette of Romania, Part I.*"

As such, according to art. 107^1 of Law no. 8/1996:

1. For the private copy field, there shall be a sole collector for works reproduced from paper and a sole collector for the works reproduced after sound and audiovisual recordings;
2. The sole collector for the works reproduced after sound and audiovisual recordings shall collect for several categories of copyright and related rights holders, respectively for: authors (of music, film directors, visual arts, etc.), performers and producers (of music, of audiovisual and cinema works);
3. The sole collector shall be appointed by the recipient collective management organizations, and ORDA shall issue a decision to be published in the Official Gazette and by which it appoints the collector, as agreed by the organizations involved;
4. ORDA's powers and obligations in appointing the collector are limited; it can only take note of the agreement between the organizations and issue the decision, without examining the criteria and conditions contemplated by the parties;

However, according to art. 133 of Law no. 8/1996, „*(1) Collection of the amounts payable by users or by other payers shall be made by the collective management organization which repertoire is used*.

(2) If there are several collective management organizations for the same creative field, and the rights managed are from the category of these referred to in art. 123^2, the recipient organizations establish through a Protocol to be submitted to the Romanian Copyright Office in order for the following to be published in the Official Gazette of Romania, Part I, at their expense:

a) the criteria for distribution of remuneration between organizations;
b) the collective management organization which is to be appointed among them as collector in the fild of said right-holders, by the decision of the General Manager of the Romanian Copyright Office;
c) the manner of recording and justifying the expenditure on actual coverage of the collection costs of the collecting society (collective management organization).

(3) As referred to in paragraph (2), if the recipient collective management organizations fail to submit the above mentioned Protocol to the Romanian Copyright Office within 30 days from the date of entry into force of the Methodologies, the Romanian Copyright Office appoints among them a collector in the field of said right-holders, based on representativeness, by decision of the General Manager.

(4) For the circumstance provided in paragraph (3), the sole collector appointed by the Romanian Copyright Office cannot allocate the collected amounts either between the recipient organization, or to their own members, unless after submitting a Protocol to the Romanian Copyright Office concluded between the recipient organizations and by which they set up the criteria regarding the distribution of collected amounts. Collection costs, in this case, shall be separately registered and must be justified by documents concerning the actual cover of the collection costs of the collective management organization that is collecting in the field of said right-holders.

(5) Upon the expiry of the 30 day period as provided in paragraph (3), any of the collective management organizations may request the Romanian Copyright Office to initiate the arbitration proceedings conducted by arbitrators, in order to set up the criteria regarding the distribution of collected amounts between the categories of recipients. The arbitration proceedings, as well as the subsequent stages are referred to in art. 131[2] paragraphs (3)-(9).”

As such, according to art. 133 of Law no. 8/1996:

1. For the rights that are subject to mandatory collective management, the criterion required by law in order to determine the remuneration payable to right-holders is *the actual use of the repertoire*;
2. ORDA practice was to appoint a collector among the collective management organizations operating for a certain category of right-holders, this collector subsequently collecting from users the amounts payable to right-holders and to distribute between them such amounts;
3. For the rights which are subject to optional collective management, if there are several collective management organizations that represent the same category of right-holders, according to art. 133, paragraph (2) of Law no. 8/1996, they should conclude a Protocol in order to establish the criteria, the collecting organization and ways to recognize the amounts;
4. In the absence of a Protocol, ORDA shall appoint by decision, based on the criterion of representativeness of the collecting organization, and will subsequently establish the criteria based on protocol or by arbitration within ORDA, whether the conclusion of the protocol is not possible;
5. Thus, if the organizations fail to agree upon the conditions for concluding a Protocol, ORDA shall intervene with extensive powers over the proceedings referred to in art. 107[1] of Law no. 8/1996 and appoints the representative organization.

2.2. REGARDING THE LEGAL STATUS OF COLLECTIVE MANAGEMENT ORGANIZATIONS

Based on the fact that ORDA places the sign of equivalence between the **sole collector** in the field of “private copy” and **the collector appointed** for the other fields of collection, it rules that the provisions of art. 133, paragraphs (6-8) of Law no. 8/1996 also applies upon the collectors appointed for the other collection fields.

However, we cannot ignore the provisions of art. 107[1] according to which „*The compensatory remuneration for private copy will be collected by a collective management organization as sole collector for the works reproduced after sound and audiovisual recordings and by another collective management organization as sole collector for works reproduced from paper, **in the conditions of art. 133 paragraphs (6) – (8)***”.

As such, the provisions of art. 133, paragraphs (6) – (8) which refer to the sole collector are applied to the equitable remuneration on the “private copy”, and their application cannot be extended to other field, by analogy, when Law no. 8/1996 sought to create an exceptional procedure for the field of private copy. Or, in hour opinion, contrary to the facts shown by ORDA, the sole collector applicable rules may not apply also for the other fields.

In this respect, the provisions of art. 133, paragraph (7) according to which „*the collective management organization, **which is the sole collector**, **is required** to issue the authorization through a non-exclusive license, in writing, on behalf of all recipient collective management organizations, and to **ensure both transparency of collection activities,** and the related costs in relations to the recipient collective management organizations. They have an obligation to support the collection activity.*”

Or, this special rule applies only to sole collectors and it cannot be transposed to the collectors appointed in various collection fields by ORDA.

The collector assigned on various collection fields fits with the collection costs within the percentage set by the Arbitration Awards or by Civil Judgments of the Courts, and for the sole collector, the costs are determined by the Protocol signed by the recipient parties.

Otherwise, in accordance with art. 130, paragraph (1), letter (i) of Law no. 8/1996, the obligation to ensure transparency in the collection activity operates also regarding the collectors from areas other than „private copying”, according to which „*the collective management organizations are required as follows: i) to ensure transparency of collective management activities in their relations with the public authorities which have the right to control and, through them, with the users;”*

Under these circumstances, such obligation to ensure transparency (before ORDA, the sole control authority, before the members and to the general

public) exists and it is expressly provided by law and also applied by CREDIDAM, and the latter has entirely complied with it over time by submitting to ORDA on annual basis all the documents as required by law.

The Law no. 8/1996 concerns the obligation of all collective management organizations (so not only of the collective management organizations designated as collectors/sole collectors) to have transparency before:

1. public;
2. members;
3. ORDA.

Consequently, the law does not require the collecting collective management organizations to report, for the sources of mandatory collective management, their entire activity to the collective management for which they collect, organizations which are competing in the market, in the opinion of the Competition Council, and also of Bucharest Court of Appeal – Administrative and Fiscal Disputes Section.

Thus, these transparency obligations are:

1) Transparency obligations towards the public

CREDIDAM communicated to the public through its website www.credidam.ro, the mass-media and its magazine, "Info CREDIDAM", the following data, according to **art. 125[1]** of Law no. 8/1996:"

a) the categories of right-holders it represents;

b) the economic rights they manage;

c) the category of users and the categories of natural and legal persons who/which have payment liabilities for compensatory remuneration for private copy to the right-holders;

d) the laws under which the operate and collect the remunerations payable to right-holders;

e) the collection methods and the persons responsible for this activity, both locally and centrally;

f) the working schedule".

2) Transparency obligations towards members:

Likewise, every year, all the updated information has been posted on CREDIDAM website, according to **art. 134[1] paragraph 1** of Law nr. 8/1996, with subsequent amendments and supplements:

"a) the Statute;

b) the list with the members of central and local governing bodies, the members of the internal commissions and the list of local liable persons;

c) the annual statement on the balance of undistributed amounts, the collected amounts on categories of users and other payers, amounts withheld, the management costs and the amounts distributed on categories of right-holders;

d) the annual report;

e) the information regarding the General Assembly, such as: the date and place of convening the agenda, the draft resolutions and decisions adopted;

f) other information necessary to inform the members".

3) Transparency obligations towards ORDA

The Law no 8/1996 on Copyright and Related Rights, with subsequent amendments and supplements, clearly states the documents that collective management organizations must submit to ORDA in order to comply with transparency principles. Thus, according to **art. 135 paragraphs 1 and 2** of Law no. 8/1996, CREDIDAM submitted to ORDA the following documents, in the first quarter of each year, after its General Assembly:

"a) the annual report, approved by the General Assembly;

b) the annual report of the Audit Committee, presented to the General Assembly;

c) the Decisions of the Courts regarding the registration of changes to the Statute, approved by the Romanian Copyright Office;

d) the updated repertoire;

e) the representation contracts with similar foreign organizations.

(2) the documents referred to in paragraph 1 letters a) and d) shall be submitted to the Romanian Copyright Office, in a form established by the decision of the General Manager of this Office."

In conclusion, transparency obligations incumbent on the collective management organizations are expressly and exhaustively provided by law.

On the other hand, there is no legal basis for the undersigned to be required to submit to the other collective management organizations the same documents which the law requires to be disclosed to ORDA, and art. 133 paragraph (7) cannot be applied by analogy, as there is no basis in this regard, the more that this rule expressly states that it applies to the single collector.

Although we share the opinion expressed by ORDA regarding competitive activities in the field, we have shown that, on several occasions, the collective management organizations have been treated (by the courts, the Competition Council) as undertakings who are subject to the Competition Law no. 21/1996, so in this case we are in a situation of competing undertakings, given that both CREDIDAM and two other collective management organizations are operating in the field of performers. Or, under these circumstances, until clear regulations in this regard, ORDA cannot require collective management organizations to offer information and violate the confidential nature of business secrets.

2.3. ON THE ISSUES POINTED OUT BY ORDA AND POSSIBLE REMEDIES

ORDA has identified a series of problems that come from a number of errors of Law no. 8/1996. Regarding the errors pointed out here, we specify that, in practice, a number of inconsistencies arose in the text of Law no. 8/1996, but we consider that such errors can

only be overcome when amending the law and not by a decision issued by ORDA.

The reason is that any amendment to Law no. 8/1996 can be done only by another normative act with a force greater than or equal to it, namely by meeting the principle of hierarchy of normative acts, according to Law no. 24/2000 on Legislative Technique for Law Drafting. As such, ORDA, in virtue of its regulatory powers, in cannot intervene in changing a law (*stricto sensu*) by its decision (which represents a unilateral administrative act) in favor of the collective management organizations representing 2% of the repertoire used on the Romanian territory and to the detriment of the collective management organizations that manage 98% of the repertoire used on the Romanian territory.

Despite all stated arguments, in the sense that a regulation decision for the transparency obligation is not necessary, ORDA's Decision no.114/2016[3] was issued, an administrative act that shall be analyzed below.

The transparency obligation of collective management organizations assigned as collector in the field is already regulated, expressly and exhaustively, by the provisions of Law no. 8/1996 on Copyright and Related Rights. The provisions of art. 133, paragraphs (6) – (8) refer to the single collector, and they apply to equitable remuneration in the field of „*private copy*". Their application cannot be extended by analogy to the other fields, given that Law no. 8/1996 sought to create an exceptional procedure for the field of private copying.

According to art. 133, paragraph (7) of Law no. 8/1996, as quoted above, it applies only to sole collectors and it cannot be transposed to the collectors designated by ORDA for various fields of collection, even if they are subject to the mandatory collective management.

Besides, even for collector in other fields than the „*private copying*" the obligation to ensure transparency operates in the collection activity, in accordance with art. 130, paragraph (1), letter i) of Law no. 8/1996, which states that „***the collective management organizations have the following obligations: i) to ensure the transparency of the collective management organizations in relations with public authorities which have the right to control and, through them, with the users;"***

We appreciate that the transparency in the collection activity of the collecting organization can be assessed only in relation to the relevant information for the activity of the recipient collective management organizations. In other words, the gross amount collected for members other than belonging to each recipient collective management organization, cannot be regarded as constituting a legitimate interest for these collective management organizations. We do not know the relevance and, moreover, we have not been communicated any reasons why a recipient organization should know the amount collected by CREDIDAM for its members, for direct or indirect foreign members. Also, one should also note the arbitrary and oscillating context in which the decision was issued. We recall that ORDA firstly concluded that it is unnecessary to issue such a decision, and then, only a few months later, it issued the Decision no. 114/2016, on the basis of some undisclosed letter from other competing collective management organizations.

ORDA places in charge of the collective management organization designated as collector, the obligation to communicate to the recipient organizations that are competing entities on the market, documents received from third parties, i.e. users, documents having the character of "trade secret". According to art. 130 paragraph 1 letter h) of Law no. 8/1996 it is the task of the collective management organization to request them, and where these users refuse to communicate them, these organizations can invoke the legal provisions.

The transparency obligation is already regulated at national and European level, without the need to legislate through an administrative act, beyond the legal provisions in force.

ORDA has regulated the transparency obligations of the collective management organizations designated as collectors/sole collectors for the rights subject to mandatory collective management.

Even the issuing authority considered that the title of the initial draft decision contravenes the provisions of Law no. 8/1996, being changed upon publication in the Official Gazette of the final version of the text.

We have introduced the difference between the concept of **„collective management organization designated as sole collector"** and **„collective management organization designated as collector in a field"**, by showing for each of them the incumbent legal obligations. However, without acknowledging the thoroughness of this distinction provided by the legislature, when issuing the Decision no. 114/2016, ORDA appreciated that it is necessary to refer to both categories of subject matters. For better illustrating the above, we show below a comparison between the titles given to the initial draft and, subsequently, the final text of the decision, as pbulished in the Official Gazette:

THE TITLE OF THE DRAFT SUBMITTED BY ORDA	THE CURRENT TITLE OF ORDA'S DECISION NO. 114/2016
The draft decision on the transparency obligation of **collective management organizations designated as collector**	Decision no. 114/2016 on the transparency obligation of **collective management organizations designated as**

[3] Decision no. 114/2016 on Transparency Obligations of collective maangement organizations appointed as collector/sole collector for the rights subject to mandatory collective management.

for the rights subject to mandatory collective management	**collector/sole collector** for the rights subject to mandatory collective management

Compared to the above, the title of the draft was changed in order to be applied to CREDIDAM, which is a collective management organization that cannot be considered as sole collector for the purposes of Law no. 8/1996, but a collector on source/field of collection. The transparency obligations provided for each of the two collective management organizations above, are referred to differently in Law no. 8/1996. The art. 133 paragraphs 6–8 refer to the sole collector, and this applies to equitable remuneration in the field of „*private copying*"[4] and only for the sole collectors (UPFR and OPERĂSCRISĂ.RO) and cannot be transposed upon the collectors appointed by ORDA in various collection fields, even if they are subject to mandatory collective management, such as CREDIDAM.

Beyond the terminology used by the legislature in Law no. 8/1996 and the obligations incumbent upon each collective management organization, be it a sole collector, or a collector in certain field/source *(e.g. public communication)*, **it is essential to note that the national legislation regulates the transparency obligation incumbent upon the two organizations**. Therefore, a regulation beyond the legal provisions already provided, by ORDA's Decision no. 114/2016 respectively, supplements the legal framework without any grounds or reasons. The Law no. 8/1996 already provides for the transparency obligations of CREDIDAM, namely: **art. 125[1] – towards the general public**; **art. 130 paragraph 1 letter f – towards the members** and **art. 135 paragraph 1 – towards ORDA**. They were also detailed on the www.orda.ro website. As one can see, the legislature did not provide for the transparency obligations incumbent upon one collective management organization by comparison to another collective management organizations competing in the market.

Moreover, at Community level, the Directive 2014/26/EU of February 26th, 2014 in Chapter 5 speaks about the transparency of the collective management organization towards the other collective management organizations for which it manages rights ***under a representation agreement***. Beyond the fact that this condition is not fulfilled when it comes of the relationship between the collective management organization appointed as collector for the rights subject to mandatory collective management and the recipient collective management organizations, you shall see that ORDA's Decision no. 114/2016 exceeds including such legal provisions. In other words, by an individual administrative act the transparency obligations of the undersigned are unduly extensive, such obligations which are not provided for even at European level. We mention that, Law no. 8/1996 has implemented, since 2004, all the transparency obligations incumbent upon the collective management organizations, which are provided for by the above directive.

Therefore, we consider that ORDA's Decision no. 114/2016, extends the content of transparency obligation as much as possible, beyond any national and European legal provision.

By ORDA's letter no. RGII/INT/8266/ 11.11.2016 - RGII/IES/No.8266/17.11.2016[5] **the provisions of ORDA's Decision no. 114/2016 are changed, thus leading to other obligations imposed to the collective management organizations concerned.**

The text of ORDA's Decision no. 114/2016 lacks in precision, which is why CREDIDAM was forced to seek further clarifications from the issuing body in order to apply it. Thus, even if **ORDA's decision is a unilateral administrative act, it must be clear, precise, and unambiguous regarding its enforcement by the subject of law which it is intended for**. Writing a confusing, unclear text, even for the person who is subject to that regulation, it lacks predictability and can cause serious damages to the subject of law.

Specifically, by corroboration of the title of art. 2 with point A letter a), it results clearly that only the gross amount collected for the recipient organizations toward which there is a transparency obligation, must be communicated to them. But, by ORDA's letter no. RGII/INT/NR.8266/11.11.2016-RGII/IES/NR.8266/17.11.2016, the same provisions have been construed to refer to the total amounts collected by CREDIDAM for all the performers, for whom and whose repertoire it grants non-exclusive licenses to users.

Thus, we find ourselves in a situation where the text of ORDA's Decision no. 114/2016 expressly provides an obligation incumbent upon CREDIDAM, and then, by ORDA's clarification, to be substantially amended. An indisputable proof in this respect are the opinions of other recipient collective management organizations: „***In this context, the clarifications brought by ORDA, while having no regulatory power, their mere exposure in some letters does not ensure and guarantee the practical application thereof, and from this perspective we are convinced that ORDA knows ...***[6]" In other words, although the text of the decision concerns the disclosure of the gross collected/distributed amount payable only to recipient

[4] According to art. 133, paragraph (7) of Law no. 8/1996 on Copyright and Related Rights: „the collective management organization, which is the sole collector, is required to issue the authorization through a non-exclusive license, in writing, on behalf of all recipient collective management organizations and to ensure both transparency of collection activities and the related costs in relations to the recipient collective management organizations.".

[5] Not published.

[6] UNART letter no. 2495/21.11.2016; first page, last paragraph; not published.

organizations, by a later document this obligation is changed, providing that it refers to the total collected/distributed amounts.

There unquestionably follows, firstly that the text of ORDA's Decision no. 114/2016 is neither clear, nor predictable and, secondly, that the same was amended by extending the limits of the obligation initially set. Or, the legal standard, even if in this case it is an individual administrative act, it is binding and „*it must be clear, comprehensible, as the addressees should not only be informed in advance of the consequences of their acts and deeds, but to understand the legal consequences thereof. Otherwise, the principle ignore nemo censetur legem could no longer be applied, which would have serious consequences for the security of social relations, for the existence of society in general*[7]*"*.

Beyond the issues above, if the collected gross amount indicated in letter a) refers to the total amount collected by CREDIDAM on collection sources for all the performers, **then the letter d) cannot be implemented, because d) is never equal to a) – h)**. ORDA wrongly claimed that at letter d) does not indicate a calculation formula, as the text of ORDA's Decision no. 114/2016 is clear on this aspect, and the texts of the law shall be construed to the effect and not in a sense that produces no effect. Considering that the formula indicated in letter d) should not apply, as stated, it would mean that the second sentence of the text of the decision would not produce any effect, in which case this mention is not justified. Including the wording of the text and after correlating with the other provisions, it is very clear that the collected gross amount indicated in letter a) refers to the gross amounts collected for the members of recipient organizations, in which case the letter d) can be implemented based on the calculation formula specified in the decision at letter d), namely d) = a) – h).

Moreover, by ORDA's letter no. RGII / INT / NR.8266 / 11.11.2016 – RGII / IES / NR.8266 / 17.11.2016, **the point B) of art. 2 in ORDA's Decision no. 114/2016 was also changed**. Thus, if the initial construing of the decision text as published, referred to the communication of the list of works used by indicating the holders (Playlists), through the clarifications brought, ORDA has extended this obligation to all the information required by art. 130 paragraph 1 letter h) of Law no. 8/1996.

Likewise, also the assertion of ORDA's letter no. RGII/INT/NR.8266/11.11.2016-RGII/IES/NR.8266/17.11.2016, namely that: „ ... in ORDA's Decision no. 114/2016 neither playlists are specified (either raw or processed) nor established a form in which the collective management organizations should communicate the information provided by users on the use of the repertoire managed by the recipient organization, in order to determine the remuneration distributed to the latter.", shows that the decision text lacks in clarity.

The legality of the administrative act represents one of the most important validity conditions of administrative acts and refers to the obligation of its compliance with the constitutional provisions, with the laws adopted by the legislative power, including with all normative acts that have a higher legal force. This feature shall be assessed, both in relation to the relevant provisions at national level, and also at international level. Thus, the illegality hypothesis of ORDA's Decision no. 114/2016 provisions, must be assessed in relation to other national and European legal provisions in force governing the transparency obligation.

Neither the provisions of art. 2 point B) of ORDA's Decision no. 114/2016 as published, nor the exhaustive construction given by the letter of clarification are to be found in the existing national or European legislation at this moment.

The provisions of art. 2 point B) set as a task of the collective management organization appointed as collectors to communicate certain information which is not **related to collection but to the distribution that each collective management organization must do for its members**. CREDIDAM is not in the legal position to intervene in the distribution activity of other collective management organizations, and such interference was not prescribed by the legislature in the provisions of Law no. 8/1996 and, consequently, it is neither the prerogative of ORDA.

The information provided at art. 130 paragraph 1 letter h) of Law no. 8/1996, is covered by the **confidentiality clauses** that CREDIDAM must comply with. These are trade secrets having economic value as a result of the business model implied by the information they contain regarding the duration of advertising during TV shows, the income earned by users, retransmitted programs etc. Disclosure of such confidential information without the consent of the users from which they emanate, makes the collective management organization responsible for the damages caused by these facts.

Under art. 1 letter d) of Law no. 11/1991 on Fight against Unfair Competition: *„**trade secret** – **any information which, in whole or in part, is not generally known or is not easily accessible to people who usually deal with this kind of information and acquires commercial value by the fact that it is secret, for which the legitimate holder took the reasonable steps under the circumstances in on order to be kept under secrecy; trade secret protection operates as long***

[7] The principle of legal security as legal foundation of the rule of law, case law markers, Ion Predescu - Judge of the Constitutional Court, Marieta SAFTA – Assistant Chief Magistrate – „*In a rich case law, the European Court of Human Rightsstressed the importance of ensuring accessibility and foreseeability of law, instituting a series of markers which the legislature must consider in order to ensure these requirements. Thus, in cases like Sunday Times vs. the United Kingdom of Great Britain and Northern Ireland, 1979, Rekvényi vs. Hungary, 1999, Rotaru vs. Romania, 2000, Damman vs. Switzerland, 2005, European Court of Human Rights stressed that "there can be regarded as "law" only a rule formulated with sufficient precision to enable the individual to regulate his/her conduct".*

as the conditions set out above are cumulatively fulfilled;". During time, CREDIDAM has taken active measures in order to protect the trade secret represented by works used list indicating the holders, notified to users, meaning it established including a procedure, since 2012, to classify them as confidential information.

Likewise, ORDA's interpretation that the above information may not represent trade secrets is based on the wrong legal reasoning, in our opinion. Asserting that: „***the recipient organizations do not have the capacity as third parties in relation with the users but with the organization appointed as collector***" cannot be accepted, as the only one that can say to whom/which third party allows access to such secret information is the holder of the trade secret itself. **ORDA cannot subrogate the holder of this right, and neither CREDIDAM nor the recipient collective management organizations**. The users are the only ones that, as subjects of law that can invoke the protection of confidential information against any third party, authorize for them to be disclosed or not to other subjects of law than CREDIDAM. Although obtaining such information is achieved by fulfilling a legal obligation of users, namely the provisions of art. 130 paragraph 1 letter h) of Law no. 8/1996, this is not enough to conclude that, after obtaining it, the same can be disclosed to other third parties.

More specifically, the undersigned cannot invoke any legal provision to exempt itself from liability that may be drawn for disclosing certain secret information to other people. It is wrong to assume that the legal effects of the legal basis that allows obtaining this information can be extended „*ope legis*" through CREDIDAM to the competing collective management organizations. CREDIDAM showed through its opinions communicated to ORDA that the recipient collective management organizations could have effectively invoked the provisions of art. 130 paragraph 1 letter h) of Law no. 8/1996[8]. We think that this proposal is a fair and legal solution by which the recipient collective management organizations could legally get the above information. These legal provisions apply uniformity to all collective management organizations, providing the same rights and obligations for them. Law no. 8/1996 provides an **OBLIGATION** for all the collective management organizations to ask directly from users all the information needed for distribution, this being one of the objects of activity for which they were established.

Since art. 134[4], paragraph (4) of Law no. 8/1996 expressly regulates as incumbent upon the collective management organizations the confidentiality obligation regarding the information received from users during the access procedure to data of their members, the more this obligation subsists in the relations with the other collective management organizations on the market.

Regarding legislation at EU level, none of the articles 18, 19, 20 and 21 of Directive governing the transparency obligation both to users, right-holders and between other collective management organizations with which they concluded representation agreements, **do not provide for the communication of information referred to in art. 2 point B) of ORDA's Decision no. 114/2016**. Likewise, art. 18 paragraph 1 letter d of the Directive speaks about making available certain information „*(...) except that the collecting society cannot provide this information for objective reasons related to reports made by users."* It is noted that the Community legislature has taking into account the possibility that some information cannot be disclosed due to confidentiality.

We have not identified any legal basis for issuing this decision, unless the provisions referring to the prerogative of issuing authority to issue administrative acts that must be in accordance with Law no. 8/1996.

Stating the grounds for administrative acts represents an additional guarantee of legality and effective protection of citizens' rights and freedoms. Verifying this condition can diminish the risk that the issuing authorities might issue arbitrary, unfair decisions. Doctrine is unanimous in assessing that, to the extent that the law imposes the obligation to state the grounds, the administrative act issued in breach of this obligation is null and void.[9] Indicating some letters and of the legal basis which empowers the administrative authority does not represent the rightful grounds for issuing this decision. Accordingly, the subject of law is damaged, being unable to properly exercise its rights of defense as provided by art. 1 paragraph (3) in conjunction with art. 31 paragraph 2 of the Constitution of Romania. These legal provisions require, as a prerequisite to the rule of law, **the obligation of public authorities to provide accurate information to citizens on matters of their personal interest**, a condition which cannot be seen as fulfilled as far as no legal basis is indicated.

Likewise, we refer to the case law of Bucharest Court of Appeal – 8th Section – Administrative and Fiscal Disputes which ruled by the Decision no. 2973 on September 10th, 2012 issued on appeal that: „***stating the grounds for an administrative decision cannot be limited to considerations of issuer's competence or the legal grounds thereof, but it also contain elements in fact which allow, on the one hand, the recipients to know and assess the justification for the decision, and on the other hand, to make it possible the exercise of judicial reviews.***" In this case, besides the jurisdiction,

[8] Art. 130 alin. 1 lit. h – „to ask for users or for their intermediaries to communicate information and send the documents needed in order to determine the remuneration amounts they collect, as well as information regarding the used works, indicating the right-holders, in order to distribute them; both users and their intermediaries are required to provide, in writing and electronic format, within 10 days of request, the requested information and docuements, signed by the legal representative and stamped;".

[9] A. Trăilescu. Administrative Law – Elementary Treaty, Ed. All- BecK 2002, pg. 193.

there is no other legal basis. The High Court of Cassation and Justice, by the decision no. 1153/2008 has noted: „***stating the grounds is decisive to make the delimitation between the adopted administrative act at the discretion conferred by the law to the public authorities and the one adopted by abuse of power, as that concept is defined in article 2 paragraph 1) letter n) of Law no. 554/2004"***.

Through the Civil Judgment no. 6185 dated October 29th, 2013 delivered by Arad Court of Justice in the case file no. 7108/108/2013, was established that: „*In fact, even in the Community case law is held that the explanatory statement should be appropriate for the issued document and it must provide in a clear and unequivocal manner the algorithm followed by the institution that adopted the contested measure, so as to allow the persons concerned to prepare the explanatory statement for such measures and also to allow the competent Community Courts to review the document (case C - 367/1995) and, as decided by the European Court of Justice, the dimension and details of the explanatory statement depend on the nature of the adopted document and the requirements which the reasoning must meet depend on the circumstances of each case, an insufficient or erroneous reasoning is considered to be equivalent to a lack of grounds for the acts and, moreover, the insufficient reasoning or lack of reasoning entail nullity or invalidity of Community documents (case C - 41/1969) and specifying in detail the reasons is necessary even when the issuing institution has a wide assessing discretion, because the explanatory statement gives transparency to the document, in this manner giving individuals the possibility to check if the document is properly grounded and, at the same time, allowing the Court to exercise the jurisdictional review (causa C - 509/1993)"*.

At European level, according to art. 41 paragraph 2 letter c of the Charter of Fundamental Rights of the European Union **the right to a good administration refers, among other things, also to the fact that administration obligation is to give reasons for the issued decisions**[10]. Also the European case law has held the same conclusion, namely the nullity of the administrative act for the lack of its reasoning in considering the principle of „equality of arms". It requires that **„*each party to such a trial should receive a reasonable opportunity to present their case to the Court under conditions that do not disadvantage them significantly in relation to the opposing party "(European Court of Human Rights, Dombo Beheer BV vs. the Netherlands, Judgment of October 27th, 1993, series A no. 274, p. 19; European Commission of Human Rights, Judgment of July 16th, 1968, Complaint no. 2804/66 Annuaire de la Convention, vol. XI, p. 381; European Court of Human Rights, Georgiadis vs. Greece, Judgment of May 29th, 1997).*

Likewise, the High Court of Cassation and Justice, Administrative and Fiscal Disputes Section, by the Judgment no. 1580/2008, delivered in the case file no. 70703/42/2006, during the public session of April 11th, 2008, noted: „*Therefore, the High Court held that any decision likely to have an effect on the rights and fundamental freedoms must be justified not only in terms of competence to issue that administrative act, but also in terms of the possibility of the person and society to assess the legality and merits of the measure or the compliance boundaries between discretion and arbitrariness. To accept the argument that the employer does not have to give reasons for decisions, is tantamount to rendering innocuous the essence of democracy, the rule of law based on the principle of legality*".

ORDA's interpretation that implementing the provisions of the Decision no. 114/2016 does not imply additional costs for the collecting collective management organizations is contradicted by the provisions of the arbitration award that set a maximum fee for covering the collection costs of 3% for the cable retransmission sourse or 9% for the public communication source *(i.e. the information at point A)* and fail to provide a management fee for covering the costs for processing the information required for distribution of the amounts payable to other collective management organizations, i.e. the information at point B). Thus, there will be additional costs for human resources that will be responsible for the preparation and communication of the information to the competing collective management organizations, costs that will be incurred by the members and non-members represented by CREDIDAM, whom are withheld an unlawfully higher fee than in previous years.

Referring to the ability to collect and distribute to its members of the collecting collective management organizations, does not justify for the supervisory body to decide that they have the financial resources to also achieve the task of the recipient collective management organizations. This situation causes damages to the collecting collective management organization which is bound by the Decision no. 114/2016 to incur additional costs that were not provided even by the Arbitrators or Courts.

3. Conclusions

There are a number of differences between the two procedures and the main cause is that for the "private copy" field the sole collector represents and collects for several categories of right-holders (authors, performers and producers of phonograms), a fact which

[10] Article 41 The right to good management (1) Every person has the right for its/his/her problems to be handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. 26.10.2012 the Official Journal of the European Union C 326/403 RO (2) This right mainly includes: (a) the right of every person to be heard before any individual measure which could prejudice it/him/her; (b) the right of every person to access its/his/her file, while meeting the legitimate interests of confidentiality and of professional and business secrecy; (c) ***the obligation of the management to give reasons for the decision****.; (...).*

also determines a special regime for the two procedures.

There is no legal basis to regulate beyond the provisions of Law no. 8/1996 on Copyright and Related Rights the contents of the transparency obligation incumbent upon the collective management organizations other than those designated for the private copying source.

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- ORDA's Decision no. 114/2016 published in the Official Gazette, Part I, no. 889 of November 7th, 2016;
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