

◀ RULING PARTY LOOKS TO BREAK IMPASSE OVER COLLECTION OF COPYRIGHT FEES

Pros & cons of the draft law aiming to improve the system of collection of fees for private copying

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In late Dec. 2020, Ukraine's ruling party attempted to bring to an end the long-running saga surrounding the collection of copyright fees from manufacturers/importers of electronic devices able to reproduce copyright-protected content. The issue has been paralysed due to a stand-off between the Collective Management Organizations responsible for collecting these fees and the impacted business community, which has looked to block the initiative at every turn. A draft law was tabled in Parliament which aims to revitalize the fee collection system.

In 2003 the copyright fee was introduced in Ukraine as a compensation mechanism for right-holders' losses caused by piracy. This innovation was driven by Ukraine's international obligations towards intellectual property protection.

The system operated with disruptions until 2014, when the copyright fee collection was effectively blocked by the business community, which exploited legal loopholes in the legislation and was unwilling to negotiate with Collective Management Organizations, the nominated representatives of the right holders. The conflict largely focused on the fee rates and list of devices charged. The stakes are relatively high – the annual fee collection for laptops and PCs alone could amount to USD 3 million nationwide.

At the end of 2020, the ruling party attempted to relaunch the copyright fee collection system, prompted by concern among its international partners over the weak IP protection within the country. Despite the fresh approach, however, critics say the root causes of the conflict have not been addressed.

The new draft proposes the following:

- to empower the Government to define the fee rates within the limits established by the Law (no higher than 0.12%);
- to define an exhaustive list of devices from which the fee for private copying shall be collected – only from data storage devices: SSDs, HDDs, flash drives and memory cards.

The proposed changes mainly benefit importers and producers of electronic devices, since the list of devices impacted and the rates themselves will be reduced significantly. On the other hand, there are no guarantees that the new system will secure efficient protection of the rights holders – in which case criticism from the EU and other international partners can be expected, as well as potentially a negative impact on trade relations.

Please find below our deeper analysis of what the respective developments could mean for businesses and possible future scenarios.

BACKGROUND TO THE DEVELOPMENT OF THE DRAFT LAW

The fee for private copying of protected content is not a Ukrainian innovation; it exists in many countries, including EU Member States. The fee was developed to ensure remuneration for the free reproduction of phonograms and audiovisual compositions (private copying)¹. To comply with international and EU law, Ukraine introduced the fee on June 27 2003 by adopting governmental Resolution No. 992.²

Compliance with the European system/Existing problems of the Ukrainian approach

Despite the fee`s broad international coverage, there is no universal system for its functioning.

The current Ukrainian model requires collection of the fee on behalf of rights holders by Collective Management Organizations (CMOs)³ as a percentage of the sales/import price of relevant devices. The rates, as well as a list of applicable electronic devices, shall be adjusted by means of negotiations between CMOs and producers/importers.

Here we should note that the system does not fully comply with EU law since:

- the fee affects all customers regardless of the source of downloads and whether such downloads were even made:
 - in other words, customers who paid to download a licensed song or video would still have to pay the copyright fee within the purchase price of their device: critics say this is double charging;
 - such practice contradicts EU law, which states that in case of licensed downloads, no additional fee can be levied. However, to give some credit to Ukraine`s legislators, it is important to note that this issue remains a problem in the EU member states which levy fees on phones, laptops and other gadgets, and causes constant controversy, often being escalated as high as the Court of Justice of the European Union. The controversy based on conflicting rules of EU Law remains unsolved despite numerous pleas to the European Commission by businesses, European CMOs, artists` unions, scholars and officials;
- 25% of collected fees shall be forwarded to support the Ukrainian Cultural Fund:

¹ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) and the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society

² Resolution of the Cabinet of Ministers of Ukraine No. 992 of June 27, 2003 on amounts of the fee to be paid by manufacturers and importers of equipment and data storage devices which allow private copying of compositions and performances fixed in phonograms and/or video-games.

³ The Ukrainian Government authorized two CMOs to collect the fee:

- 1) Ukrainian Music Alliance - responsible for collecting the fees for copying of music and videos. It is an NGO which represents Ukrainian and foreign singers, composers, musicians and movie-makers and represents interests of Universal Music Group, Sony Music Entertainment, Warner Music Group in Ukraine;
- 2) Ukrainian Author`s Rights Agency - responsible for reprographic copying fees. It is an NGO which represents Ukrainian and foreign artists, photographers, men of letters. It has contacts and assists in protection of copyright to CMOs in France, Czech Republic, Romania, Russia, Canada and Argentine.

- › Thus, the fee could be regarded as a “culture tax” and therefore inconsistent with EU practice, where the Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical work for online use in the internal market (CRM Directive)⁴ allows distribution to third parties only if the amounts due to right holders cannot be distributed to them for objective reasons.

Further criticism of the Ukrainian system includes the following:

- › it has proven impossible to actually collect copyright fees (since 2014) due to constant court challenges, focusing on both the fee rates and list of devices impacted;
- › the State has not provided a systemic vision of the issue and parameters of its functioning. Instead, it has brought about sporadic and unsuccessful attempts to change the existing legislation to launch the collection of the fee:
 - › *May 2018* – adoption of the Law on Efficient Management of Rights of Copyright Holders and (or) Related Rights (hereinafter – the Law on CMR). The Law in particular:
 - ◇ legitimized CMOs as representatives of the right holders to whom the fee must be paid and eliminated a legal loophole used from 2003 onwards to block the collection of the fee as illegal;
 - ◇ established an obligation for the Government to determine provisional fee rates in case the parties failed to reach a compromise on the final rates in the process of negotiations.
 - › *June 2020* – adoption of amendments to the Law on CMR⁵. These amendments:
 - ◇ authorized Ukrainian courts (instead of the Government) to determine provisional rates in case the parties failed to reach a compromise on the final fee rates during negotiations;
 - ◇ renewed negotiations between business and CMOs on final rates.

However, these amendments failed to break the impasse and the system has remained in limbo. Negotiations between CMOs and manufacturers/importers stalled due to the conflicting position of the parties:

- › CMOs contend that the fee rates must be increased from the 2014 rates and that the list of devices and media covered by the fee must be extended due to technological developments compared since 2014 (see the table below);
- › Importers/manufacturers argue that the rates proposed by CMOs are high, unjustified, discriminatory, and not determined by objective criteria. At the same time, business stakeholders refrain from suggesting rates they are ready to pay and continue to use legal loopholes to block enforcement of the Law on CMR.

Device Type	% proposed by CMOs in 2021	% previously applied (2014)
HDD	2.61	0.3 – 0.75
Sound systems and recorders	2.61	0.06 – 0.35
TVs	0.44	0.17
PC, laptop, tablet	0.52	0.2
Mobile phone	0.52	0.15
CD, DVD, memory card, USB drive	3.01	0.75

Source: European Business Association

As of today, negotiations have been frozen due to the COVID-19 pandemic and provisional rates still not determined.

⁴ Ukrainian legislation must be harmonized with the CRM Directive by December 31, 2023, based on the Association Agreement between the EU and Ukraine.

⁵ Law on amending some legislative acts of Ukraine to provide for state support of culture, creative industries, tourism, SMEs under restrictive measures introduced due to COVID-19 pandemic.

WHY DOES THE DRAFT LAW MATTER?

The Draft Law submitted by the ruling party in December 2020 is a direct response to the European Commission [Association Implementation Report on Ukraine](#) (Dec. 2020). Specifically, the report states that the Law on CMR, which represents the legal basis for the fee for private copying, does not comply with EU Law.

- › **The price issue.** In Jan. – Sept. 2020, official imports of electronic goods amounted to USD 1.5 billion.⁶ Thus, assuming a fee set at 0.75%, annual fee collection for laptops and PCs alone could amount to USD 3 million. Drastic changes in the list of devices and media subject to the fee⁷ will exclude a majority of importers/producers from application of the Law on CMR. As a consequence, these importers/producers will not bear additional costs to pay the fee.
- › **Enforcement practice.** Despite remarkable imports statistics, CMOs have never managed to collect substantial sums of the fee due to the non-stop court involvement blocking its enforcement. CMOs are actively lobbying to increase applicable fee rates (see the table above), meaning the positive impact of December 2020 Draft Law amendments excluding most electronic devices (PCs, laptops, phones, TV-sets, recorders etc.) will be much greater than under the current rates and a list of covered devices.
- › **Consequences of the Draft Law implementation.** Future fee rate increases will mostly affect importers, and in turn consumers: most electronic devices available in Ukraine are imported rather than produced domestically.
 - › According to available data, about 23% of all electronic devices supplied to Ukraine are grey imports: mobile phones and smart TVs alone comprise 29% of grey imports, HDDs 31%⁸.
 - › The launch of the fee collection and increase in rates (according to CMOs' wishes) could see a further rise in grey imports, given their comparative price advantage. The introduction of an applicable rate cap (0.12 %) in the Law on CMR would largely avoid this.
- › **Postponed implementation expected.** Despite the explicit requirements of the Law on CMR for importers to pay the fee no later than 30 calendar days after customs clearance of devices and/or media, the existing legal vacuum regarding procedures of payment and applicable rates makes it impossible for importers to comply fully with the Law on CMR straight away.

POSSIBLE FUTURE SCENARIOS (WHICH WE EXPECT WILL DEVELOP SIMULTANEOUSLY)

Victory for business - consideration and adoption of the Draft Law by the Parliament (60 % probability)

According to the Parliamentary Committee for Economic Development's (the lead committee) tentative agenda for 2021, it will evaluate the Draft Law in June. As a result, the Committee may issue a recommendation for its inclusion/non-inclusion on the parliamentary agenda. The Parliament must decide whether to include the Draft Law in the agenda within 30 days from the date of receiving the lead committee's recommendation.

If the draft is included on the parliamentary agenda it will kickstart the voting process. The successful passage of the Draft Law by Parliament could be hampered by its inherent deviations from EU Law – specifically the abolition of negotiations between CMOs and importers/manufacturers. The latter is a direct violation of

⁶ <https://cbr.com.ua/press-release-import-pte/>

⁷ The Draft Law suggests to levy the fee only on data storage devices: SSDs, HDDs, flash drives and memory cards.

⁸ <https://ua-news.liga.net/economics/news/siriy-rinok-pobutovoi-tehniki-perevishue-20-mlrd-grn-doslidjennya-gfk>

applicable principles of EU law, which demand negotiations in good faith and the application of fees determined on the basis of objective and non-discriminatory criteria.

Further uncertainty - possible adverse decision of the Supreme Court of Ukraine (20% probability)

Currently, the Supreme Court considers an appeal on the July 2020 decision which quashed the August 2019 amendments of the Resolution No. 992 on provisional application of 2014 rates. According to procedural deadlines, the court was supposed to decide on the appeal in November 2020, thus the decision may not appear any time soon.

There are several scenarios without clear potential outcomes:

- › What might happen if the highest judicial instance decides not to uphold the decision of the court of appeal and restores the amendments?
- › What legal provisions would apply if that happens? August 2019 amendments to the Resolution No. 992 or the Law on CMR? Both contain different provisions on provisional applications of old rates (Resolution No. 992 allows their application for up to six months after unsuccessful negotiations between CMOs and business; Law on CMR – until December 31, 2021).

In any case, manufacturers and importers of electronics should expect delays at customs and practical complications related to payments of the fee.

Protracted decision-making - determining the fee rates via further negotiations and/or via a court of law (20 % probability)

After the end of the current quarantine measures, which will last at least until March 31, the Ministry for Development of Economy, Trade and Agriculture is set to resume negotiations on the new rates. The Law on CMR (in its current wording) allows only 60 calendar days for such negotiations, although given all previous negotiations have stalled, the chance of reaching a consensus seems very small. It is unlikely that CMOs will abandon the idea of increasing applicable rates or that businesses will agree to an increase and neither party looks ready to compromise.

According to the Law on CMR, any party to the negotiations has the right to appeal to a court of law to establish the rates should the negotiations fail. However, the Law does not stipulate how the court should then determine the fee rates. In the Ukrainian reality, it is certain that any litigation on the issue will be protracted and complex, creating further pressure on all stakeholders.

CONCLUDING REMARKS

The Ukrainian saga of levying fees on electronic devices has dragged on since 2003, demonstrating in the process a range of inherent weaknesses both to current and proposed government policies on protecting copyright and related rights: non-compliance with international standards, frequent legislative amendments, failure to engage experts and interested stakeholders, the inability to find a compromise, endless possibilities to block enforcement.

Any new attempts to enforce the Law on CMR will affect importers of electronic devices to Ukraine: uncertain legal provisions, uncertain rates, the involvement of unpredictable Ukrainian courts, protracted customs clearance of imports – all these and more can be expected. Legislative changes to remedy these complications will take time and may not be successful unless importers agree to a compromise with CMOs.

For further discussion on the subject of this paper, or for advice on how to engage with relevant authorities, please contact us: ukraine@kesarev.com



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