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Deputy Prime Minister

Minister of Culture and National Heritage

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Comments on the Statute of the Authors' Association ZAiKS

Dear Sir Deputy Prime Minister,

On behalf of the Polish Music Publishers' Association (PSWM) I wish to present some important objections of the music publishing community against the wording of the new Statute of the Authors' Association ZAiKS which was approved by the Extraordinary Delegates' Convention of this organization on 6 April 2019, in fulfillment of the obligation defined in Article 138.1 of the Act on Collective Management of Copyrights and Related Rights (hereinafter "the OZZ Act") dated 15 June 2018.

Music publishers constitute a special category of the eligible and thus a special category of members, as it is and will be a relatively small group, representing, however, a significant portion of the repertoire remaining in collective management of ZAiKS and generating a vast majority of the income obtained by ZAiKS from collection (in relation to the total of revenues). This particularly important circumstance was, however, totally ignored during the process of creating and approving ZAiKS's new Statute, whereas the adopted mechanisms of electing the Association's authorities and of representation of each eligible group, especially in the Delegates' Convention, which is the Association's highest authority, have totally marginalized the music publishers as a category of the eligible.

Specific comments

a) Definition of a music publisher – alleged infringement of Article 14.1 of the OZZ Act.

Analysis and evaluation of the Statute's provisions should begin with the way a music publisher was defined in the Statute.

In accordance with the wording of §5.2 of the Statute „A music publisher within the meaning of the Statute is a natural person, a legal person or an organizational entity, who is granted legal capacity by the Act, who has entitlement to author's economic rights to musical works, works comprising text

and music and textual works on the basis of appropriate agreements, who in their own name engages in publishing activity, it being one of the main objects of their business activity, consisting, in particular, in execution of their rights to musical works, works comprising text and music, and textual works, including distribution of such works and undertaking marketing activities in relation to these works and in representing interests of the eligible, and who receives in return an agreed portion of revenue from these rights.”

It should be noted that a music publisher is the eligible within the meaning of the OZZ Act. A definition of a publisher should not be contrary to the definition of the eligible contained in the Act, it should not change the criteria of granting the status of the eligible to anyone, but should, at most, clarify those criteria.

According to Article 3.4 of the OZZ Act, the eligible should be understood as everyone who is entitled to copyrights or related rights, or holds a legal title to the income from these rights, and who is not an organization of collective management of copyrights or related rights. However, the Statute definition of a music publisher refers to a criterion of running publishing activity, which is to be characterized by, in particular, distribution of works and undertaking marketing activities in relation to these works. **Thus, in the definition of a music publisher non-statutory criteria of distribution of works and of undertaking marketing activities in relation to these works have been introduced, which we consider unacceptable.** These criteria are so vague and so difficult to verify that they cannot be a basis of granting a given entity the right to become a member of the Association.

b) **The Delegates’ Convention – alleged infringement of Article 18 of the OZZ Act**

The Delegates’ Convention is the highest authority of the Association. According to §31.2 of the approved Statute the Delegates’ Convention comprises the members of managements of the Sections which group together ordinary members, as well as the delegates elected within the Sections which group together ordinary members (authors and music publishers), in a total number of no less than 200 delegates.

It should be pointed out that among the existing membership Sections, within the meaning of the approved Statute, ordinary members will be grouped together in 11 Sections.

Among the existing Sections, four group together ordinary members who are entitled to musical works and works comprising text and music, i.e. Sections A, B, D and Music Publishers’ Section. According to §21.2 of the Statute, each Section has Management consisting of 5 persons. Thus, using this calculation, the above mentioned Sections, which according to CISAC generate almost 90% of the income collected by ZAiKS, can be represented at the Delegates’ Convention by the total of 20 ordinary members who are also the members of the Sections’ managements. The remaining Sections, which have a total share of income of no more than 10%, will be represented at the Delegates’ Convention by 35 ordinary members who are also the members of the Sections’ managements.

In each Section grouping together ordinary members, there are in addition delegates elected to the Delegates’ Convention, whereas according to §31.3 of the Statute the number of delegates from a given Section is defined in proportion to the number of ordinary members of the Section, determined three months in advance of the date of the Delegates’ Convention. The proportion,

balanced for each category of the eligible, is to be determined by the Board of the Association at the same time.

The wording of the aforementioned provision of the Statute clearly indicates that the number of delegates from a given Section is determined solely in proportion to the number of ordinary members of that Section. The only criterion is the size of the Section.

Such a solution is in blatant contradiction to the provisions of Article 18 of the OZZ Act, according to which the principles of electing the delegates defined in the statute should ensure a fair and balanced way of representation at a delegates' convention of the members of a collective management organization who belong to different categories of the eligible, according to:

- 1) a number of members** of a collective management organization who belong to a given category of the eligible, or
- 2) the amount of revenue from the rights** derived by the members of a collective management organization who belong to a given category of the eligible, or
- 3) the number of works or subjects** of related rights of the members of a collective management organization who belong to a given category of the eligible, whose rights are collectively managed by that organization.

Although the OZZ Act requires to take into account all the three criteria and to balance the number of delegates according to them, ZAIKS stops at applying the sole criterion of the number of ordinary members in the Sections. This action is directed against the music publishers and it discriminates them with a clear violation of the explicit requirements of the OZZ Act.

In this respect the provisions of the new Statute flagrantly infringe the purpose, the spirit and the letter of the Directive 2014/26/EU and of the OZZ Act.

The approved solutions mean that in key issues connected with the execution of collective management decisions will be made by members who are delegates of the Sections which generate for the Association 10% of the income, while the representatives of the Sections generating 90% of the revenue will, in fact, be a minority with regard to the number of delegates.

c) The Management Board of the Association

What gives rise to concern is the wording of §40 of the approved Statute, which defines the composition of the Management Board of the Association, and which states that the Management Board shall consist of the President, elected by the Delegates' Convention, and representatives of each Section grouping ordinary members, who are elected by the Delegates' Convention from among the candidates selected by the Sections, whereby a Section of more than 500 ordinary members will have two representatives in the Association's Board and the remaining Sections will be represented in the Board by one representative each.

Taking into consideration the above regulation, as well as the number of Sections and their composition, it should be noted that going by the provisions of §40 of the Statute, the Management Board will presently be made up of 13 members, out of which the Sections A, B, D and the Music Publishers' Section will be able to elect the total of 5 members of the Board (Section D will have the right to elect 2 representatives to the Board). Thus, also in this case, the Sections representing the

subjects who have the rights to the repertoire generating 90% of the income will have far fewer representatives in the Management Board than the authors associated in other Sections, who account for 10% of the income collected by the organization.

d) The Audit Committee – alleged infringement of Article 27.3 of the OZZ Act

What is apparent from the wording of Article 27.3 of the OZZ Act, the principles of electing the Audit Committee's members, as defined in a statute, ensure a fair and balanced influence of the individual categories of the collective management organization's members upon the make-up of the Committee.

However, from the wording of §44.1 of the Statute it transpires that the Audit Committee is made up of seven members elected at the Delegates' Convention from among the candidates / ordinary members of the Association, who are selected by the Sections grouping ordinary members.

Taking into consideration the earlier reservations as to the fair and balanced representation of music publishers at the Delegates' Convention, as well as to the constitution of the Delegates' Convention and the number of votes per each category of the eligible, it should be unequivocally concluded that music publishers will be, in fact, deprived of the right to participation in the Association's body meant to exercise surveillance of the CRM organization's activity. Other categories of the eligible will simply not be interested in electing a candidate from outside their Section.