LEXOLOGY

Decision CJEU C-10/22 (LEA): Independent Management Entities cannot be excluded from offering copyright management services

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European Union, Italy | September 25 2024

The facts of this case, had, briefly, as follows:

LEA (Liberi editori e autori) is a collective management organisation governed by Italian law and authorised to operate in the field of copyright intermediation in Italy.

Jamendo is a company incorporated under Luxembourg law and acts as an independent management entity which has been operating in Italy since 2004.

LEA brought an action for an injunction against Jamendo before the District Court, Rome, Italy, which is the referring court, seeking an order that Jamendo cease its activity of copyright intermediation in Italy. In support of that application, LEA claims that Jamendo is carrying out that activity in Italy unlawfully.

Before the referring court, Jamendo submits that Directive 2014/26 was incorrectly transposed into Italian law, arguing that the Italian legislature failed to confer on independent management entities the rights provided for by that directive.

In that regard, Jamendo claims that, under Article 180 of the Law on the protection of copyright, the activity of intermediation in Italy is exclusively reserved to SIAE and to the other collective management organisations referred to therein, the effect of which is to prevent independent management entities from operating in the field of copyright intermediation and to compel them to enter into representation arrangements with the SIAE or other authorised collective management organisations.

In those circumstances, the District Court, Rome decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Directive [2014/26] be interpreted as precluding national legislation that reserves access to the copyright intermediation market, or in any event the granting of licences to users, solely to entities which can be classified, according to the definition in that directive, as collective management organisations, to the exclusion of those which can be classified as independent management entities incorporated in that Member State or in other Member States?’

Consideration of the Court

At first the Court decided that the request for a preliminary ruling had to be declared inadmissible to the extent that it related to independent management entities established in Italy since Jamendo was not an Italian IME.

The Court held that a national measure such as that at issue in the main proceedings, which does not allow independent management entities established in another Member State to provide their services for the management of copyright and related rights in Italy, thus compelling such entities to enter into representation arrangements with a collective management organisation that is authorised in that Member State, plainly constitutes a restriction on the freedom to provide services guaranteed in Article 56 TFEU.

However, the Court also stated that such a restriction may be justified by overriding reasons in the public interest, provided that it is suitable for securing the attainment of the public interest objective concerned and does not go beyond what is necessary to attain that objective

The Court therefore held that legislation such as that at issue in the main proceedings is capable of being justified in the light of the objective of copyright protection.

The Court went on saying that the effect of that provision is to prevent independent management entities established in another Member State from carrying out the activity of copyright management in Italy, while allowing collective management organisations established in other Member States to carry out such an activity.

Consequently, the Court decided that it is necessary to examine whether the different treatment, under the Italian legislation at issue in the main proceedings, of collective management organisations and independent management entities meets that requirement.

In the light of the foregoing considerations, the Court held that the different treatment, under the national legislation at issue, of independent management entities, as compared to collective management organisations, does meet the concern to attain the objective of copyright protection in a consistent and systematic manner, since independent management entities are subject, under Directive 2014/26, to less demanding requirements than collective management organisations as regards, in particular, access to the activity of managing copyright and related rights, licensing, the modalities for their governance and their supervisory framework. In those circumstances, such different treatment may be considered to be suitable for securing the attainment of that objective.

However, as regards, the question whether the restriction consisting in the exclusion of independent management entities from the activity of copyright intermediation does not go beyond what is necessary to secure the attainment of the public interest objective relating to copyright protection, the Court held that a measure that is less restrictive of the freedom to provide services might consist, in particular, in making the provision of copyright intermediation services in the Member State concerned subject to particular regulatory requirements that would be justified in the light of the objective of copyright protection.

Decision of the Court

On the basis of the above considerations the Court decided that Article 56 TFEU, read in conjunction with Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market,

must be interpreted as precluding legislation of a Member State which generally and absolutely excludes the possibility of independent management entities established in another Member State providing their copyright management services in that first Member State.

‘Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

Impact of the CJEU decision on Greek Law

The CJEU in its decision clearly states that a legislation which generally and absolutely excludes IEMs from the activity of managing copyrights and related rights could be considered as being incompatible with EU legislation in place as less restrictive measures such as imposing to IMEs additional regulatory requirements concerning the modalities for their governance and their supervisory framework should apply instead of an absolute exclusion.

The CJEU decision did not examine the case of Italian IEMs as it refused to deal with a hypothetical question (Jamendo is not an Italian IME) but the Court held that the question that is addressed by the judgment is whether the distinction made by Italian law between IMEs and CMOs (allowing only to the latter the access to certain copyright management activities) is or not compatible with EU Law.

And the reply was in our view negative.

What the CJEU seem to have decided is that national legislations should not exclude, in an absolute and general manner, IMEs from collective copyright management but instead they are obliged to grant to IMEs access to this market subject to IMEs complying with stricter regulatory requirements concerning their establishment and operation than those applicable now.

There is no doubt that Greek law is very similar to Italian law as far as the treatment of IMEs is concerned as Art. 32 of Law 4481/2017 on collective management of rights excludes in an absolute manner any and all IMEs, independently of their nationality, etc. from managing rights which are subject by law to obligatory collective management which is allowed only to CMOs.

Greek law also makes a distinction between IMEs and CMOs allowing only to CMOs operating/registered in Greece the exercise of rights which are subject to mandatory collective management according to the law. It has to be noted with emphasis that there are considerations in the CJEU decision which may put in question the compatibility of Greek law with the EU Directives in place in particular since IEMs, under Greek law, are totally excluded from mandatory collective management although the LEA decision can be interpreted as implying that a more compatible with EU laws solution would be to allow IMEs to exercise rights which are subject to mandatory collective management but under stricter requirements of information, accounting etc. to right holders.

Greek Law makes an exemption for IMEs who have a dominant position in the market which, subject to imposing themselves, to the same operational, information, accounting, etc. requirements that apply by law to CMOs are allowed to provide collective management services.

This exception was a photographic provision aiming to deal with the gap that emerged when the biggest Greek CMO (AEPI) collapsed in 2017/2018 and as a result lost its state license to act as a CMO and then intended to operate as an IME.

This CMO is out of the market now and there is not in Greece an IME (and it is no likely that there will ever be one) that would possibly have a dominant position in the Greek market.

Greek law allows the mandatory collective management only to CMOs (independently of their nationality as long as they comply with the establishment requirements of Greek law) and not to IMEs or to individual publishers etc. This restriction per se seems to be in principle compatible with EU law as it applies to all IMEs independently of their nationality. As a result, the Greek Court will have to reply to the

question and decide whether this exclusion is proportional and justified for the protection of right holders or whether IMEs should be allowed (like CMOs are) to carry on collective management activities which means that Greek law will have to be amended in order to allow IMEs to provide mandatory collective management to their members too.

In conclusion, in our view, Art. 32 of Law 4481/2017 excluding as such and without any qualification IMEs from collective management of copyright and related rights appears to be inconsistent with EU Law only as a result have to be rendered inapplicable by the Courts and amended by a legislative provision that would meet the principles of this landmark decision.

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