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Private Copying and Payment of Fair Compensation through the General State Budget (Case C-470/14 - EGEDA and Others)

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1 Background, facts and questions

On 9 June 2016 the CJEU ruled on [Case C-470/14 - EGEDA and Others](#) ('EGEDA'). This marks the tenth occasion on which the Court has ruled on the private copying exception or limitation in Article 5(2)(b) of Directive 2001/29/EC (the 'InfoSoc Directive') after *Padawan*, *Stichting de Thuiskopie*, *Luksan*, *VG Wort*, *Amazon.com*, *ACI Adam*, *Copydan*, *Reprobel*, and *Austro-Mechana*. Currently pending is *Case C-110/15 - Nokia Italia and Others*.

In 2014, the Spanish Supreme Court lodged a reference for a preliminary ruling with the CJEU in a case between the applicants, EGEDA, DAMA and VEGAP, and the defendants, the Spanish State Administration and AMETIC (a Spanish association of undertakings working in the information technology and communications sector). The case relates to Spanish legislation that allows fair compensation for private copying to be financed through the General State Budget, namely Royal Decree 1657/2012, in combination with Article 31 of the Spanish Intellectual Property Law. In particular, the legislation determines that the annual amount of fair compensation based on an estimate of harm is set "within the budgetary limits established for each financial year, by order of the Minister for Education, Culture and Sport", under a specific legal procedure (§2, 6-9: *all paragraph references are to the judgment unless otherwise specified*).

The applicants are collective rights management organisations authorised in Spain to collect, manage and distribute the private copying levy, who sought to annul Royal Decree 1657/2012 due to its incompatibility with Article 5(2)(b) of the InfoSoc Directive. The grounds for annulment are twofold. First, that Spanish law places the burden of compensation on all taxpayers and not on the natural persons making the copies. Second, that it does not guarantee the fairness of compensation, as it imposes an annual budgetary cap on its amount. Conversely, the defendants argued that the directive leaves sufficient discretion for Member States to establish such a scheme (§12-14).

Against this fact pattern, the Spanish Supreme Court asked whether the Spanish

scheme is compatible with Article 5(2)(b) of the InfoSoc Directive, taking into account that it is based on an estimate of the harm actually caused but cannot 'ensure that the cost of that compensation is borne by the users of private copies'. Should this be answered in the affirmative, the Spanish court further asked whether that scheme remains compatible if the total amount allocated by the budget for these purposes must be 'set within the budgetary limits established for each financial year.' (§16)

In the [Opinion of Advocate General \('AG'\) Szpunar](#) delivered on 19 January 2016, Member States have discretion to finance the private copying fair compensation through the General State Budget, provided the criteria for determination of compensation are met. However, the directive does not allow for the amount of fair compensation to be subject to ex-ante rigid fixation within budgetary limits, if those limits do not take into account the estimated harm caused to rights holders. As we shall see below, the CJEU did not follow the Opinion on several points, concluding that the Spanish law was inconsistent with Article 5(2)(b) of the directive.

2 Judgment

In *EGEDA*, the Court started by reiterating that the optional private copying limitation is aimed at establishing a compensation scheme for the harm caused to rights holders by acts of copying. If the limitation is adopted into national law, Member States are obliged to provide for the payment of fair compensation - an autonomous concept of EU law subject to uniform interpretation in the territory of the EU. This is an obligation of result: Member States 'must guarantee, within the framework of their competences, the actual recovery of the fair compensation intended to compensate the rightholders'. In doing so, because the limitation is facultative and the directive offers little guidance, national legislators enjoy 'broad discretion', e.g. in relation to form, detailed arrangements and level of compensation; this discretion, however, is subject to the rules of the directive and EU law (§19-23 & 38).

Most national laws compensate the limitation through a levy scheme. Yet, the aforementioned margin of discretion could, in theory, allow the establishment of a system financed through the General State Budget. To be compatible with the directive and the objective of securing a 'high level of protection' (recitals 4 and 9 of the InfoSoc Directive), such a scheme must ensure payment of fair compensation to rights holders and guarantee its actual recovery (§24-25).

On the other hand, it follows from recitals 35 and 38 that the limitation aims at adequately compensating rights holders for non-authorised reproductions. A useful criterion to determine the level of compensation is the harm suffered by rights holders from those uses. From here and the fact that the limitation benefits only natural persons, the Court deduced that it is for the individuals making (or having the capacity to make) those copies and causing the harm to recompense rights holders and finance the system (§26-29). On this point, the Court departed from the AG's interpretation of the CJEU's private copying jurisprudence in §27-41 of his Opinion.

The private copying limitation thus excludes from its scope copies made by legal persons or for professional purposes. It does not, however, prevent legal persons from being under an obligation to finance the payment of fair compensation in certain

circumstances. Such an obligation arises, for example, where there are practical difficulties in obtaining compensation directly from individuals. In that case, it is accepted that the system is financed by imposing a levy on providers of devices and media susceptible to use for making private copies. The provider is in turn allowed and assumed to pass on the levy to the final user (e.g. in the price of the goods), who will thus be ‘the person actually liable for payment’ (§30-34). In the Court’s view, this set-up is consistent with the InfoSoc Directive’s central objective of balancing the interests of rights holders and users, set forth in recital 3.[1]

Within this framework, and considering the autonomous nature of the fair compensation concept in EU law, legal persons should not be ultimately liable for the burden of compensation, whether the same is financed by a levy scheme or through the General State Budget (§36-38).

Under Spanish law, however, the revenue allocated to the payment of fair compensation is financed from the general budget resources, i.e. by all taxpayers, *including legal persons* (§39). Furthermore, the law does not contemplate exemptions for legal persons in this respect, or allow for their reimbursement (§40). Therefore, because it fails to “guarantee that the cost of compensation is ultimately borne solely by the users of private copies”, the Spanish scheme is incompatible with Article 5(2)(b) of the InfoSoc Directive (§41-42). This conclusion made it unnecessary for the CJEU to examine the second question referred by the Spanish court. (§43. However, for an analysis of the second question, see the AG Opinion, §54-70)

It is noteworthy that on this point too the CJEU strays from the AG’s Opinion, according to which financing the compensation from the General State Budget is consistent with the InfoSoc Directive, ‘since this is not a matter of extending the scope of a levy to all taxpayers, but of a system of financing based on a different rationale’ (AG Opinion, §52).

3 Conclusions

Despite its recent nature, *EGEDA* has already been described by one commentator as a ‘*thoroughly bad decision*’, mainly because it should have left to Member States the choice of the model and details of the system to finance fair compensation. While the criticism may be valid, it is important to note that *EGEDA* *does not* preclude a system that finances fair compensation for private copying through the State Budget. Rather, it opens the door for such a system provided it ensures payment of fair compensation to rights holders and guarantees its actual recovery (§37).

In disavowing the specific set-up of Spanish law, the CJEU clarified that any such alternative to the traditional levy scheme must ensure that the cost of compensation is ultimately borne solely by the final user. This goal can, in theory, be achieved by allocating the revenue for private copying compensation to a budgetary item that excludes taxes imposed on legal persons. For example, national laws could provide for a scheme for exempting legal persons’ taxes from inclusion in this budgetary item or, alternatively, allow legal persons to seek reimbursement of their taxes used for this purpose. Another possibility, briefly addressed by the AG, would be to introduce a specific tax or duty on natural persons to finance fair compensation (AG Opinion, §51).

Whether any of these variants is practical or cost-effective is, of course, a separate empirical question.

Looking forward, the most immediate impact of *EGEDA* will be on those Member States that, like Spain, finance the private copying compensation through the State Budget: Estonia, Finland, and Norway (AG Opinion §48). Stay tuned!

[1] *EGEDA*, para. 35, citing CJEU, *Padawan*, para. 49; CJEU, *Stichting de Thuiskopie*, paras 28–29; CJEU, *Copydan*, para. 53.

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