The adventures and misadventures of the implementation of the Directive on collective management of copyright in Greece and Cyprus (Part I)

Kluwer Copyright Blog
March 27, 2018

Tatiana Synodinou (University of Cyprus)

Please refer to this post as: Tatiana Synodinou, 'The adventures and misadventures of the implementation of the Directive on collective management of copyright in Greece and Cyprus (Part I)', Kluwer Copyright Blog, March 27 2018, http://copyrightblog.kluweriplaw.com/2018/03/27/adventures-misadventures-implementation-directive-collective-management-copyright-greece-cyprus-part/

Four years have passed since the adoption of Directive 2014/26/EU on collective management of copyright and related rights. The Directive aimed to provide a remedy for certain of the pathogenies of collective management organisations (CMOs), which have been often denounced for their lack of transparency and abusive practices, but also came as a response to the extensive fragmentation of national rules on the topic. The Directive has two main purposes: to establish rules on

transparency and good governance for the collective management of copyright and related rights; and to create a legal framework which promotes the development of multi-territory and multi-repertoire licensing by collective management organisations in the field of music.
The Directive, which imposes a significant number of obligations and formalities on CMOs, was seen by certain Member States as an opportunity to reshape the landscape of collective management in their territories, in order to remedy chronic problems and to modernise the existing legal frameworks. This was the case in both Greece and Cyprus, where the transposition of the Directive brought significant changes.

Greece and Cyprus, which share the same language and, as a result, often the same Greek speaking repertoires of works, have completely different traditions in relation to the regulation of CMOs. While in Greece a mechanism of state supervision of CMOs was introduced in 1993, in Cyprus no such mechanism existed until the implementation of Directive 2014/26/EU. The implementation of the Directive reversed the existing status quo in relation to the regulation of CMOs in both Member States, although for different reasons. The juxtaposition of the cases of those Member States is also justified by the significant presence of Greek CMOs in Cyprus.

As will be shown in the first part of this blogpost (Part I), which focuses on the case of Greece, the attempt to construct a stricter mechanism for control of CMOs was paradoxically related to the deconstruction of the oldest CMO operating in Greece. On the contrary, the case of Cyprus, which will be presented in the second part of this blogpost (Part II), is an interesting example of construction of a mechanism of state supervision of CMOs *ex nihilo*.

Greece: implementation under the shadow of the AEPI scandal

Prior to the implementation of the Directive, Greek Law 2121/1993 provided for a legal mechanism of state supervision of CMOs by requiring that they could operate legally only if an approval of the Ministry of Culture was granted, while the supervision of CMOs has been operated with the help of the state-controlled Hellenic Copyright Organisation (OPI)[1]. In this context, seventeen CMOs, covering a variety of rightholders and rights, have been granted an authorisation to function since 1993.

The law did not provide a specific legal form for CMOs. As a result, even legal

persons with a for profit purpose were allowed. This was the case for the oldest and powerful collective society operating in Greece, AEPI, which was authorised to operate as a "Societe Anonyme". AEPI, which was founded in 1930, is the CMO for the administration of rights of authors of works of music. While AEPI has often been brought to the courts for its abusive practices in relation to the terms of its contracts with the authors and its management costs,[2] a big scandal emerged in 2015 concerning its financial situation.

In this context, the process of implementation of Directive 2014/26/EU in Greece was puzzlingly closely related to the fate of AEPI[3]. It should be mentioned that even prior to the implementation of the Directive, a special auditing by chartered accountants started in September 2015 on the grounds of former article 54 of Law 2121/1993 which provided for such a possibility. On 20 June 2016, a special administrative fine was imposed on AEPI by the Greek Ministry of Culture due to its refusal to cooperate with the chartered accountants.

As regards the process of implementation of the Directive, this has proven to be a surrealistic enterprise, full of twists, turns, and paradoxes and heavily politicised. The draft implementation law, which was modified several times, initially contained provisions which would not allow AEPI to continue to operate in Greece since, as an organisation with a dominant position, it had to be transformed to a CMO owned or controlled by its members and organised on a not-for-profit basis. This was also the reason for the initial decision of the Director's board of AEPI to transfer the company's activities to Cyprus, where a new company limited by shares was established with a view to permitting AEPI to continue its activities in Greece as a company based in Cyprus. This decision, which was finally reversed by AEPI itself, provoked a lot of controversy and public criticism. In the meantime, the long and unstable deliberations in relation to the final version of the law and the uncertainty as to the fate of AEPI caused confusion and serious disagreements between the authors of works of music. On the one hand, some authors expressed serious concerns about the impact of the eventual brutal shutdown of AEPI on the management and the collection of fees. On the other hand, the opinion of other authors, but also associations representing the users of works, was that the closing of the "corrupted" AEPI was inevitable. The authors were also divided in relation to the eventuality of assigning the economic management of AEPI to a temporary Commissioner who would be appointed by the Ministry of Culture and Sports. For some of them, this was an appropriate measure which could lead to the

“purification” and the reorganisation of the company, while others considered it simply as a decorative means, which would not solve the labyrinthian problems of AEPI.

The situation became more complicated when the report of the special management audit carried out in AEPI was published in February 2017. The report revealed the disastrous financial situation of AEPI (negative equity of approximately € 19.9 million, losses in the period 2011-2014 of € 11.3 million, significant uncertainty and doubt as to the ability of AEPI to continue its business smoothly, existence of unallocated rights to members of € 42.5 million, retention of a commission of € 1.6 million from the distributed rights of a foreign repertoire during the period 2011-2014, of which 1.2 million were used for maintenance and enrichment of the AEPI music record)[4].

After those major revelations and the subsequent negative publicity, a significant number of users stopped paying for the licensing of music. So, while the implementation of the Directive should logically result in making the collection of royalties by CMOs smoother, its lengthy process and its connection to the regulation of AEPI lead awkwardly to an opposite effect. Following the impact of the audit report, Article 54 of Law 2121/1993 was finally modified in March 2017 in order to introduce the possibility for the Ministry of Culture and Sports to appoint a temporary Commissioner to a CMO if there is a strong chance that the collecting society is unable to fulfill its obligations, and in particular to collect and secure the reimbursement for right holders of the sums it receives due to indicative negative own funds. Since the main aim of the modification was to deal with the critical situation of AEPI, on 24 April 2017 a temporary commissioner for AEPI was appointed. The competence of the Temporary Commissioner is to ensure the smooth collection by users and the reimbursement to beneficiaries of the sums they receive. It is noteworthy that the temporary commissioner functions in a peculiar “cohabitation” with the Directors’ board of the CMO, which is still competent for other management issues. For those issues, the Director’s board has to inform the temporary Commissioner who, if he disagrees with the decision or action that may affect the viability of the organisation or the interests of the beneficiaries, decides on his own.

Law 4481/2017 which implemented the Directive was finally voted in a few months later (on 20 July 2017) and repealed the provisions of Law 2121/1993 in relation to CMOs. The new law provides for a strict mechanism of state control of CMOs. CMOs

and independent management entities can operate lawfully only if they receive an authorisation from the Ministry of Culture and Sports. At the same time, Article 50 of Law 4481/2017, which introduces the peculiar legal category of "independent management entity with a dominant position", enables AEPI to continue to operate in Greece as an independent management authority on the condition that a general assembly of its members and a supervisory body are established. On 25 January 2018, the extension of the mandate of the temporary Commissioner of AEPI was extended for six months. For the time being, the Ministry of Culture is considering the possibility of a new legislative intervention for specifically dealing with the problems which will arise through the revocation of the authorisation of AEPI[5].

Article 51 of the Law introduces the possibility of appointment by the Court – upon the request of the creditors, the supervisory body or the Ministry of Culture acting upon the suggestion of OPI – of a Commissioner in charge of the reorganisation of the CMO or the independent management entity, where CMOs or independent management entities in a dominant position have failed to discharge outstanding financial obligations or in the event of their current or imminent non-performance of financial obligations, or if they are confronted with a serious financial problem or a management problem which could jeopardise right holders' royalties. The law also provides for the appointment of a temporary commissioner by the Minister of Culture and Sports upon the advice of the OPI if there is a serious allegation that the CMO is not able to fulfil its obligations.

It is also noteworthy that Law 4481/2017 provides heavy sanctions for violation of its provisions, such as the imposition of administrative fines ranging from €2,000 to €200,000, together with the temporary or permanent withdrawal of the authorisation. The law also sets a cap on management costs (article 18, para. 3 of Law 4481/2017), which should not exceed an average of 20% of gross revenue of the CMO[6].

As a result, Law 4481/2017 strengthened and deepened the regime of state control of CMOs by providing, in addition to heavy fines for violation of the provisions of the law, the possibility of appointment by the court of a commissioner in charge of reorganisation and of the appointment of a temporary commissioner by the Minister of Culture and Sports, upon advice from OPI where there is a serious allegation that the collective management organisation is not able to fulfil its obligations. Ironically, the linking of the implementation process with the fate of

AEPI was a source of confusions and delays, which destabilised the collection of royalties in the field of music.

In the next part (Part II) of this post, a completely different paradigm, the case of the implementation of Directive 2014/26/EU in Cyprus will be discussed.

To make sure you do not miss out on posts from the Kluwer Copyright Blog, please subscribe to the blog ***here.***

——

[1] Article 54 of Law 2121/1993 (now repealed by the Law 4481/2017).

[2] For example, see: Administrative Court of Appeal of Athens n° 1102/2017 and Administrative Court of Appeal of Athens n° 1103/2017.

[3] For an analytical infographic presentation of the process of implementation of the Directive in conjunction with the procedures and public debates concerning AEPI, see: Th. Chiou, Draft Law on Collective Management and the case of AEPI, http://www.iprights.gr.

[4] See: Th. Chiou, Draft Law on Collective Management and the case of AEPI, http://www.iprights.gr.

[5] See: Th. Chiou, http://www.iprights.gr.

[6] For a critical analysis of the provisions of the law, see: Dionysia Kallinikou, Pierrina Koriatopoulou, News from Greece, RIDA n°254, October 2017, p. 107.