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

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Tatiana Synodinou (University of Cyprus)

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The first part of this post discussed the implementation of the Directive in Greece. As shown, the implementation of the Directive was seen as an occasion to impose a mechanism of stricter control of CMOs, especially when they face significant financial difficulties. The implementation of the Directive in Greece was made significantly more complicated due to its connection with the foggy landscape surrounding the regulation of AEPI, one of the oldest and most powerful CMOs operating in Greece. The second part of this post discusses the implementation of the Directive in Cyprus, where the law implementing the Directive brought a completely new regulatory framework for CMOs.

The Cypriot paradigm: in search of effective CMO regulation

Prior to the implementation of the Directive, the regulation of CMOs in Cyprus was far more liberal, in the sense that no specific state supervision was introduced for CMOs. Therefore, "licensing bodies" (the term CMOs did not appear in the Law on

Copyright 59/1976), were able to operate in Cyprus without any specific obligations and formalities, provided that they had been properly formed as legal entities according to the law of Cyprus. A "licensing body" was broadly defined as a society, firm or other organisation which has as its main object, or one of its main objects, the negotiation or granting of licences in respect of copyright works and included also an individual carrying on the same activity. Supervision was provided only in relation to the refusal of a licensing body to grant a licence or as regards the imposition of unreasonable terms or conditions on the granting of such licences, upon complaint by the users of works. In that case, a special competent authority, appointed by the Minister of Commerce, would decide about the granting of a licence or fix the fees which have to be paid[1]. Although this mechanism, which acted as a kind of "Copyright tribunal", could theoretically resolve many of the practical problems of collective management in Cyprus, it never functioned properly. There was no appointment of its members for long periods, while some claims have mysteriously been pending for examination for years.

In this context, the regulation of CMOs was minimal and, in practice, non-existent. Furthermore, there was no official registry of the licensing bodies operating in Cyprus. As a result, users faced requests from various persons who claimed that they represented authors and other right holders, without official information about the status, repertoires or tariffs of those licensing bodies. This has been extremely confusing, especially because CMOs based in Greece were also operating in Cyprus either independently or via local agents in relation to the licensing of the Greek repertoires. The enforcement of rights by licensing bodies was also problematic, since the law on Copyright (Law 59/1976) did not contain special procedural privileges in relation to court proceedings initiated by licensing bodies. So, while Article 15 par. 3 of Law 59/1976 provided a general presumption of legal representation in favour of the licensing bodies (they were deemed to have the competence to manage or protect all works for which they declare in writing that the relevant rights have been assigned to them or that they were mandated to represent the right holders and they were able to exercise, either in court or in their own name, all the rights transferred to them or covered by proxy), it did not contain any provisions concerning the precise information in relation to the right holders, categories of rights and works the licensing bodies should present in court in order to prove their standing. Accordingly, on 29 September 2010 the District Court of Nicosia rejected the claim of "Dioynysos Zagreas" (the collecting

society managing actors' rights in Cyprus) to receive remuneration from a Cypriot broadcasting organisation for the broadcasting of Greek films on the basis of a reciprocity agreement with the Greek collecting society "Dionysos". The Cypriot court rejected the demand due to lack of sufficient evidence about the standing to sue of the collecting society and the lack of proof of the rights of the claimant. According to the court, the licensing body failed to prove the proper representation of all the actors who participated in the films which were broadcast in Cyprus. The individual assignments by certain Greek actors could not serve as a solid legal basis for their representation in Cyprus, since it was not clear whether they were signed by the actors themselves or by their heirs. In the end, according to the District Court, the collecting society did not manage to prove the factual basis of the claim, since it was not clear from the evidence which was brought to the court whether the actors participated in the movies.

It is noteworthy that this issue could have been dealt with differently in Greece, where a specific procedural privilege for CMOs was recognised in some instances by the Courts[2] and was finally officially introduced by Law 4481/2017 which implemented the Directive in Greece. The law of Cyprus, however, was not modified in order to include a similar or analogous provision, even after the implementation of the Directive on collective management.

However, Law 65(I)/2017 which implements Directive 2014/26/EU brought significant changes because a mechanism of control of CMOs was instigated for the first time in Cyprus. Indeed, the law provides for the creation of registries of the CMOs and independent management entities which operate in Cyprus. The registries will be kept by a new "competent authority", whose members will be appointed by the Ministry of Commerce. CMOs which are based in Cyprus or CMOs established in another EU Member State but willing to be established in Cyprus shall be entered on the register too. In the case of non-compliance with the obligation of registration, the competent authority shall impose administrative fines. The law does not specify whether the competent authority can deny the registration of the CMO where all the necessary information is provided, or indeed any grounds for refusal. Therefore, it may be assumed that the registration cannot be denied if all the necessary documents and information are provided by the CMO. Indeed, the procedure appears to have similarities with the procedure for registration of companies where the Registrar of Companies – which in Cyprus is also competent for intellectual property and shall provide the Competent Copyright

Authority, where necessary, with the necessary logistical and secretarial support[3] – must register the application for registration, if it is satisfied that the requirements are complied with. The law does not specify whether the certificate of registration, once granted, is conclusive evidence that the requirements of the law have been complied with, and on what grounds it can be annulled judicially and by whom an application for review can be brought in the case of a positive decision in favour of the registration of the CMO.

The law also addresses the issue of CMOs which are established in another Member State, but operate in Cyprus. There was significant discussion on the appropriate degree of control of such entities, which are most often established in Greece. Indeed, there was a need to clarify which CMOs from other Member States operate in Cyprus, but without imposing obligations which would not be compatible with the freedom of providing services in the EU. The law finally opted for a compromise. CMOs or independent management authorities established in another Member State may provide services in Cyprus without the need to register in the Register if they move to Cyprus only for the purpose of temporarily and occasionally exercising their services, on the condition that they are established in another Member State and lawfully provide similar services in that State. However, even if they are exempted from the obligation to register, those entities have to inform the competent authority in writing about their intention to provide services in Cyprus before they start business in Cyprus. The law does not define what exactly is meant by temporary and occasional provision of services. It is the competent authority which shall, on a case-by-case basis, assess the temporary and occasional nature of the service and, in particular, its duration, frequency, periodicity and continuity. Accordingly, the competent authority shall keep a list of those persons. CMOs or independent management authorities established in another Member State and providing temporary and occasional services in Cyprus shall also submit to the competent authority their certificate of registration or any other evidence of their registration or authorisation in their Member State of establishment, a list of their directors, the works they represent, the rights they manage, directly or by virtue of reciprocal agreements, and the territories covered; or where such works cannot be identified, the types of works or other objects they represent, the rights they manage and the territories covered (Article 13 (9) of the Law).

If the competent authority finds a violation of the provisions of the Law, it shall set

a reasonable period within which the CMO is required to comply with the provisions. The competence of the authority is broad, since it is also empowered to sanction users. If a CMO, users and / or any other person found to be responsible for violating the provisions of the Law neglects, omits or refuses to comply within the reasonable period which has been set by the competent authority, the latter is empowered to impose an administrative fine of up to twenty thousand euro (€ 20,000) on any CMO, user and / or any other person found to be responsible for violating the provisions of the Law and, in the case of the CMO, it may decide to remove it from the relevant Registry, which results in the cessation of its business in Cyprus. Therefore, while the non-compliance of a CMO with the obligation for registration is sanctioned only with a pecuniary administrative fine (article 13 (3)) without the law further specifying that the CMO cannot lawfully operate in Cyprus, for a CMO which has already been registered the non-compliance with the provisions of the law after the expiry of the deadline for compliance which was set by the competent authority may result in its removal from the registry which, as the law expressly states, means that the CMO cannot legally operate in Cyprus (article 46 (8) and (9)). This creates the oxymoron that CMOs which have not been registered appear to be in a more favourable position than those which have been registered, since only the latter risk being removed from the registry and, therefore, they are faced with the legal sanction that they cannot lawfully operate in Cyprus.

The competent authority can also decide to carry out audits of CMOs. In this context, it can order the CMO to provide any document or relevant information deemed necessary for the audit control. If the CMO does not comply, the competent authority may impose an administrative fine of up to ten thousand euros (€ 10,000), and / or decide to temporarily suspend the functioning of the CMO by temporarily removing it from the relevant Registry.

Finally, Article 51 of Law 65(I)/2017 provides that the Council of Ministers may issue Regulations for the determination of any matter which, in accordance with this Law, is in need of or is susceptible of designation, such as operational issues and procedures of the competent authority, the content and means of disclosure of the Registers, the fee for registration in the Register and the renewal fee for registration in the Register. CMOs and independent management entities which were already operating in Cyprus at the date of entry into force of the Law shall be entered in the registers within one month from the date of entry into force of the

Law.

Paradoxically, those provisions have been a source of confusion, since to date no Regulations have been issued. As a result, while CMOs have been under an obligation to register in the relevant registry by 16 July 2017, the registration fees have not yet been defined. At the present time, the content of those Regulations is under discussion in the Committee of Commerce and Industry of the Parliament of the Republic of Cyprus. However, following pressure and lobbying by the representatives of users of works (such as bars, restaurants and hotels), the Committee has unexpectedly decided to include in the Regulations provided for in Article 51 a series of criteria for the calculation of the tariffs of CMOs which are due to be paid by the users for the licensing of works and other protectable subject matter. The issue is still pending and no criteria have yet been fixed. If such a mechanism is decided, this will be a great novelty for Cyprus.

Concluding remarks: a fictitious harmonisation?

The Directive on collective management is an instrument of minimum harmonisation. Consequently, Member States may impose stricter obligations and formalities on CMOs than those foreseen in its text.[4] Greece and Cyprus are characteristic examples of diverging attitudes to the regulation of CMOs. In Greece, 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 the appointment of a temporary commissioner by the Minister of Culture and Sports upon advice by OPI if there is a serious allegation that the CMO is not able to fulfil its obligations. In contrast, the law of Cyprus has continued the long tradition of *de minimis* control of the functioning of CMOs. The entry in the registry serves publicity purposes and at the same time is the basis for control of the CMO by the competent authority for any violation of the obligations of the CMOs provided for by the law (and mainly correspond to those which have been established by the Directive) and of the complaints of users in relation to the licensing of CMOs (articles 26 and 43 (4)). Nonetheless, the possibility of fixing the tariffs of CMOs or criteria for their definition by Regulations issued by the Ministry of Commerce might completely reverse the regulatory model adopted so far and result in an interventionist system, if the remuneration for copyright and related rights via CMOs is strictly and imperatively defined or fixed by the state. Even if this evolution can be partially justified by the chaos which has been dominating

the collection of rights to date due to the lack of supervision and official information on the CMOs operating in Cyprus, it should be viewed with skepticism.

This joint presentation of the situations in Cyprus and Greece brings to the forefront the significant disparities that still exist in the internal market between the Member States as regards the regulation of CMOs. On the verge of the global harmonisation of copyright law, the question of the practical feasibility of transnational copyright management and of cross border licences is raised. On the other hand, the liberalisation of the CMO market could also work as an incentive towards a more effective and transparent collective management of copyright.

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[1] See former Article 15 of Law 59/1976 (now repealed by Law 65(I)/2017).

[2] Multimember District Court of Athens, n°953/2008 (unpublished).

[3] Article 10 of Law 65(I)/2017.

[4] Recital 9 of the Directive.