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Private Copying Levies, Exemptions and Reimbursements (Case C-110/15 – Microsoft Mobile Sales International and Others)

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Background, Facts, and Questions

On 22 September 2016 the Court of Justice of the European Union ('**CJEU**' or '**Court**') ruled on Case C-110/15 – *Microsoft Mobile Sales International and others*. (The case was formerly known as *Nokia Italia and Others* before Nokia Italia SpA changed its name to Microsoft Mobile Sales International Oy.) This is yet another judgment on the private copying exception in Article 5(2)(b) of Directive 2001/29/EC (the '**InfoSoc Directive'**), and it was preceded by an Opinion of Advocate General Whal on 4 May 2016. In essence, the Court followed the Advocate General's opinion in this case.

The judgment comes in the wake of disputes between, on the one hand, different hardware companies selling equipment susceptible of use to make private copies (PCs, CDs, recording devices, mobile telephones and cameras) and, on the other, various Italian governmental and rights holders organisations, such as the MIBAC (the Italian Ministry of cultural assets and activities and tourism) and the SIAE (the Italian society for authors and publishers). In particular, the disputes refer to the payment of 'fair compensation' due to authors for acts of private copying made with the aforementioned recording equipment.

The InfoSoc Directive's provisions on private copying were incorporated in the Italian Copyright Act by inserting Articles 71 *sexies*, 71 *septies* and 71 *octies* relating to 'private reproduction for personal use'. Pursuant to these provisions, the MIBAC set the amount of compensation for the private reproduction of phonograms and videograms through a decree of 30 December 2009. Importantly, the decree extended the scope of fair compensation by extending the number of levy targets, specifically to multipurpose devices. The decree contained a sole article and a technical annex. The annex defined *inter alia* a list of 26 product categories subject to payment and the respective amounts. It also empowered SIAE to negotiate protocols with debtors for the application of the legal rules, including possible exemptions from payment.

The applicants in the main proceedings (hardware producers, including Microsoft Mobile Sales) sought to annul the 2009 decree on the basis that it was contrary to EU law. Among the grounds for annulment were the arguments that the levy applied to legal persons and professional users, and the discriminatory nature of the delegation of powers from MIBAC to SIAE.

The case eventually made its way to the Italian Council of State, which decided to refer different questions to the CJEU on the interpretation of Article 5(2)(b) InfoSoc Directive. In typical fashion, the Court rephrased the questions as follows:

- Does EU law preclude national legislation "which, on the one hand, subjects exemption from payment of the private copying levy for producers and importers of devices and media intended for use clearly unrelated to private copying to the conclusion of agreements between an entity which has a legal monopoly on the representation of the interests of authors of works, and those liable to pay the compensation, or their trade associations, and, on the other hand, provides that the reimbursement of such a levy, when it has been unduly paid, may be requested only by the final user of those devices and media." (24)

Judgment

The Court starts its analysis by restating its relevant case law on private copying. It first recalls that the obligation to pay fair compensation is "triggered by the existence of harm to rightsholders" (§ 26). Members States enjoy broad discretion in determining the debtors of compensation, as well as its form, detailed arrangements and possible level. Fair compensation must in any case be linked to the harm caused to rights holders by the acts of private reproduction.

For the system that finances fair compensation to be compatible with the requirements of 'fair balance' (stemming from Recital 31 InfoSoc Directive) it must target only equipment that is susceptible of use for private copying and likely to cause harm to authors of the copied works. Because the harm is caused by the private user making the copies it is in principle for him to make good that harm by financing the compensation paid to the rights holder.

However, it is in practice challenging to have individual users directly pay the compensation. As such, it is accepted that Member States set up systems that charge the levy to intermediaries that make the reproduction equipment or media available to end-users. These intermediaries are then allowed to pass on the levy to private users by including it in the price of the respective equipment, media or copying service supplied. In this way, the CJEU argues, the requirements of fair balance are met.

For the levy system to be consistent with the InfoSoc Directive, it must be justified by the aforementioned practical challenges and ensure that intermediary debtors are reimbursed where the levy is not due. This means, for example, that the levy should not be applied where it is clear that the equipment or media in question are used by legal persons for professional purposes. It also means that the levy system should provide for an effective and simple reimbursement mechanism that counteracts the practical difficulties giving rise to it.

Having restated the relevant case law, the CJEU proceeds to apply it to the dispute at hand. The Court first discusses the issue of an *ex ante* exemption from the private copying levy, and then turns to the topic of an effective *ex post* reimbursement system. On both counts the Italian law is considered problematic.

The Court first notes that Italian law does not contain a general ***ex ante*** **exemption** from payment of levies for producers/importers of devices/equipment acquired by legal persons for purposes other than private copying. The private copying levy should not apply to these devices, as such application is contrary to the principle of fair balance.

Italian law attempts to address this issue by granting SIAE the power to enter into protocols with debtors, in particular with a view to establishing 'objective and subjective exemptions', e.g. for professional use equipment.

However, the private copying limitation must be applied in a manner consistent with the principle of equal treatment in Article 20 of the Charter of Fundamental Rights of the EU. In this case, the CJEU notes that the Italian legislation "does not make it possible to ensure equal treatment in every case between the producers and importers required to pay the private copying levy, who might be in comparable situations." (§ 46)

In essence, this is because the Italian law at issue:

- Fails to include a general (*ex ante*) exemption of payment for devices/media clearly not used for private copying. The possibility that SIAE 'promotes' protocols for this purpose is insufficient in the eyes of the Court.
- Does not contain sufficiently objective and transparent criteria for intermediary debtors to conclude agreement protocols with the SIAE.
- Provides that the agreement protocols are governed by private law and freedom of contract, thus failing to guarantee that intermediary debtors in comparable situations will be treated equally by SIAE.

In this light, Italian law fails to ensure that the requirement of equal treatment "is satisfied effectively and in accordance, in particular, with the principle of legal certainty." (§ 50)

Continuing its analysis, the Court notes that the ***ex post* reimbursement** procedure set up by SIAE is problematic. Indeed, only *final users that are not natural persons* can request reimbursement, but not producers or importers of devices/media, or natural persons that acquire them for professional purposes. For the Court, this makes the Italian system incompatible with EU law, as interpreted for example in *Copydan*. (That judgment, readers are reminded, allowed such restrictions on reimbursements only where the persons responsible for payment that were not final users could benefit from *ex ante* exemptions).

In addition, because the Italian levy system fails to include corrective mechanisms, like (*ex ante*) exemptions and (*ex post*) reimbursements, it will lead to instances of 'overcompensation', making it contrary to the principle of fair balance.

On these grounds, the CJEU concluded that the Italian law at issue here is incompatible with Article 5(2)(b) InfoSoc Directive.

In addition to this decision on the substance, the Court further rejected SIAE's request to limit the temporal effects of the present judgment. SIAE based the request on its purported good faith interpretation of the law and the risk of serious financial repercussions of the decision regarding compensation already paid to its members. The Court found that SIAE failed to satisfy either criterion, as the correct interpretation of the law was clear following *Padawan*, and SIAE merely alleged – but failed to demonstrate – the existence of serious difficulties.

All in all, the Court's decision in *Microsoft Mobile Sales* was a defeat for SIAE and a victory for the hardware companies involved (not only Microsoft, but also other high profile names like Telecom Italia, Hewlett-Packard, Samsung, Dell, and Sony). From a legal technical perspective, the Court's reasoning appears solid. Of particular note are the central role afforded to the

requirement of fair balance and the principle of equal treatment in the field of private copying. From a practical perspective, it will be interesting to observe the economic impact of the decision on SIAE's operations, as well as the effect of the decision in other Member States with looser exemption and reimbursement procedures.

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