Kluwer Copyright Blog

Is the Italian Legislation on Collective Copyright Management compliant with EU Law?

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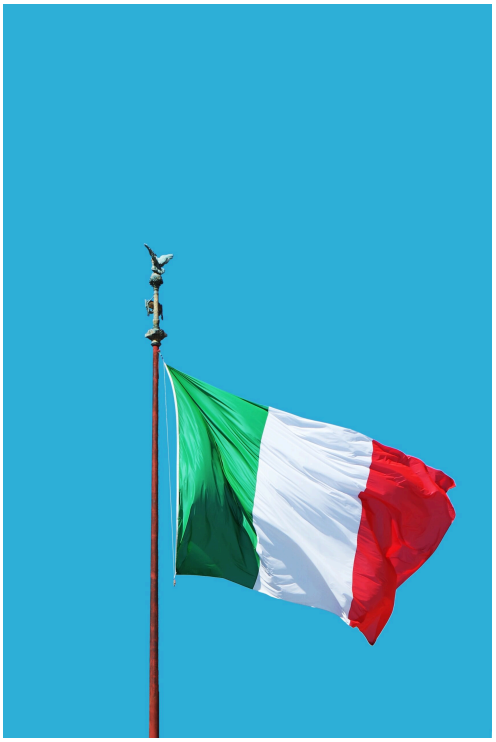

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1. Introduction

Last week, a preliminary hearing took place before the European Court of Justice (CJEU), in a case dealing with the implementation of the Collective Rights Management (CRM) Directive (2014/26/EU) in Italy. The AG Opinion is expected on 11th May.

The Civil Court of Rome submitted a preliminary ruling request (No. 10/2022), in the case issued by the Italian collective management organisation ("CMO") LEA – *Liberi Editori Autori* against Jamendo SA, an independent entity that manages its repertoire within the Italian territory.

The question referred by the national Court is the following: "*Must Directive 2014/26/EU 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 [CMOs], to the exclusion of those which can be classified as independent management entities incorporated in that Member State or in other Member States?*"

To fully understand the context and the importance of the decision that the CJEU is expected to issue, there is a need to examine the legal framework provided by both EU and Italian law on the collective management of copyright.

2. EU Law

On 26th February 2014, the CRM Directive was adopted.

The CRM Directive aims inter alia at strengthening the protection of the interests of members of CMOs, rightholders and third parties. One of its main purposes is to set common minimum requirements regarding the governance, financial management, transparency and reporting of the CMO themselves (for an earlier analysis, see here).

Moreover, with the purpose of empowering rightholders to freely choose the entity to which to entrust the management of their rights, alongside CMOs the CRM Directive introduces Independent Management Entities ("IMEs"). The latter differ from the CMOs as long as they are (i) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and (ii) organised on a for-profit basis.

This distinction and the *rationale* behind it are crucial for the preliminary ruling by the Court of Rome in the context of the judgment described below.

3. Italian Law

Historically speaking, the Italian regulation of CMOs is peculiar. In fact, until 2017, when the Decree-Law No. 148/2017 was issued, which changed the legal position, a legal monopoly was granted to a public entity (SIAE – *Italian Society of Authors and Publishers*) by Article 180 of the Italian Copyright Law (Law No. 633 of 1941). Following the reform, other CMOs are allowed to manage copyright on behalf of authors and publishers.

However, the Italian legal system has transposed the CRM Directive through the Legislative Decree No. 35/2017, whose Art. 2 (respectively, at the first and second subparagraph) provides a definition of CMOs and IMEs that is identical to that in the CRM Directive. Within the Italian legislation, the collective management of copyright is regulated by the combined provisions of Article 4(2) of the Decree and Article 180 of the Italian Copyright Law.

Article 4(2) of the Decree provides for the freedom for right holders to entrust a CMO or an IME with the management of their rights for the relevant categories or types of works and other subject-matter for the territories of their choice, irrespective of the European Member State of nationality, residence or establishment of the CMO, IME or right holder, except as provided by Art. 180 of the Italian Copyright Act concerning the copyright intermediation activity.

In other words, the Italian legislation, by transposing the directive, has limited Italian copyright collecting societies to CMOs, preventing IMEs from operating in the Italian territory.

In this respect, Italian law seems to differ from the other Member States in which (as reported by the official study on selected issues relating to the application of the European Commission) the IME may operate. Also, in light of the above, the provision of Italian law may be contrary to the objectives of the CRM Directive's competition principles. The reason is that, as noted below, the Directive provides that IMEs can be in charge of the collective management of copyright and related rights and that, *inter alia*, "*right holders should be free to entrust the management of their rights to independent management entities*."

Nonetheless, said legislative intervention does not seem to address the doubts of the European Commission. Indeed, with regard to CMOs established in other Member States, the Italian legislative framework is uncertain and contradictory. In the face of clear indications from the

European Commission that CMOs established in other Member States should be allowed to operate in Italy directly (i.e. with no need for a representation agreement with a CMO incorporated under Italian Law) – the Italian legal order still provides no clear and direct affirmation of said principle and, in certain respects, seems to contradict it.

In essence, the combined provisions of Articles 4(2) and 20(2) of the Decree and Art. 180(1) of the Italian Copyright Act currently seem to represent an obstacle to the free movement of services and the freedom of establishment, to the extent that they: (i) forbid the establishment in Italy, and therefore in a relevant area of the Community market, of IMEs operating in the field of the intermediation of (part of) copyright; (ii) prevent legitimately established CMOs and IMEs operating abroad (*i.e.* in other Member States) from providing their services in Italy in relation to the collective management of copyrights.

In light of the above, and given that the CRM Directive does not hold that Member States shall allow IMEs to operate in their territory, a contradiction seems to lie in the fact that the Italian legal system on the one hand deems the opening up of the market to IMEs a measure capable of strengthening the protection of related rights while, on the other hand, excludes IMEs from the market for collective management of copyright for the same reason – that is, to strengthen the protection of copyright.

4. The internal proceedings promoted by LEA against Jamendo

Within this legal framework, in 2021 the plaintiff LEA raised a claim against the activities of Jamendo within the Italian territory. The claim was based on the fact that Jamendo is an IME – and thus is not allowed to operate within the Italian territory – and also that it did not comply with the obligation to be registered in the register managed by the Italian Communications Authority (AGCom).

For its part, Jamendo argues that excluding IMEs from operating in the Italian territory and subordinating the access to a national market to the fulfillment of certain requirements other than those provided by its own national law, goes against the fundamental freedom (such as: establishment, provision of services, etc.) provided by the European law, especially the TFEU (articles 49 and 56).

In this scenario, it may be argued that the choice of the internal judge to bring the question mentioned in point 1 above to the European Court was correct and necessary.

In fact, on the one hand, it may be arguable that enrollment within the national registry managed by AGCom is a lawful requirement, particularly considering the legislation of other Member States which impose restrictions equal to those provided by Italy; on the other hand, Italy is the only Member State that does not allow IMEs to operate in its country. Such an exclusion may be at odds with the requirements of the CRM Directive.

5. Conclusion

The decision to be issued by the CJEU will be crucial not only for the Italian copyright market, but

also for that of the other Member States.

Considering the scope of the preliminary ruling, the entire functioning of the EU collecting copyright management market will be affected in as far as the decision will clarify whether the CRM Directive, aimed at ensuring competition in this sector, shall be interpreted as prohibiting a Member State from precluding access to its market to IMEs.

Should the Court opt for this solution, it will be interesting to read the motivation for such a decision. Presumably, it would be based on the fundamental freedoms (of establishment and services especially) granted by the TFEU – and to which the Directive itself makes reference – that would be considered as violated by such an exclusion, apparently grounded only by the juridical status of one entity (IME) with respect to another (CMO).

In light of the above, it is clear that following the Court's decision the EU collecting copyright management sector will never be the same.

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