Kluwer Copyright Blog

LEA v Jamendo SA: a real liberalization of the EU market for the collective management of copyright?

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On 21 March 2024, the Court of Justice of the European Union (CJEU) issued its ruling in case C-10/22 *Liberi Autori ed Editori (LEA) v. Jamendo SA*.

The decision confirms that Independent Management Entities ("IMEs") can provide their copyright management services in the European Union (EU) alongside Collective Management Organizations ("CMOs").

National legislation in one Member State that entirely prohibits IMEs established in another Member State from operating in the former lacks justification and proportionality. It is therefore incompatible with Union law, and constitutes a restriction on the freedom to provide services infringing Article 56 of the Treaty on the Functioning of the European Union ("TFEU").

However, *LEA v Jamendo SA* is not the beginning of unbridled competition in the copyright management realm. Rather, it represents the CJEU's attestation of the need for Member States to regulate the sector to avoid favoring IMEs.

In fact, the Court clarifies that the huge discrepancy between the obligations imposed on IMEs and CMOs, according to Directive 2014/26/EU on collective rights management (CRM Directive), could harm copyright protection. To prevent this, Member States can subject IMEs' activities to particular regulatory requirements, if this proves necessary to guarantee a

consistent and systematic safeguard of rightsholders.

Background

The case originated from a referral made by the Court of First Instance (Tribunale) of Rome, concerning the conformity of Italian legislation with the CRM Directive. The question was whether the Directive prevented Member States from reserving access to the market for copyright intermediary services or the granting of licenses to users only to entities qualifying as CMOs, excluding those qualifying as IMEs.

The prelude to this ruling has been extensively discussed on this blog, with an analysis of the Italian legislative framework (see here)

Prior to the transposition of the CRM Directive by Decree-Law 148/2017 ('Fiscal Decree'), subsequently converted, with modifications, by Law no. 172/2017, Article 180 of the Italian Copyright Act ('LdA') granted SIAE (the Italian Society of Authors and Publishers) a monopoly over the collective management of authors' rights. Related rights of performing artists and phonogram producers were managed by Nuovo IMAIE (Institute for the Protection of Performers), AFI (Association of Italian Phonogram Producers) and SCF (Consortium of Phonogram Producers). While the original LdA permitted other CMOs, but not IMEs, to enter the Italian market, the subsequent Law no.27/2012 liberalized the related rights market for both CMOs and IMEs.

In fact, the reform of Article 180 LdA, prompted by an EC infringement procedure, resulted in only a partial liberalization of the Italian market. This reform admitted solely non-profit CMOs like SIAE to the market for copyright management, excluding private entities of a commercial nature. During the legislative process leading to the new law this approach faced significant criticism from the Italian Antitrust Authority ('AGCM'), which contended that such differentiation lacked any justification based on compelling public interest related to market functioning, and advocated instead for the inclusion of IMEs. The AGCM opinion was ultimately disregarded and the law approved as originally envisioned. As a consequence, foreign IMEs have been unable to operate in Italy, since Article 20(2) of the Legislative Decree no. 35/2017 mandates reciprocal representation agreements between such IMEs and the Italian CMOs, while it remains uncertain whether Italian IMEs may freely carry out intermediation activities for copyright, for they are not included in the list provided by Article 180 LdA.

In an attempt to circumvent the obstacles created by the new Italian legislation, Soundreef Ltd., a profit-making entity incorporated under British law, duly recognized as an IME by the UK Intellectual Property Office in 2016, sought representation in Italy by entering into an agreement with the newly established CMO, LEA. The British company delegated the collection of fees to LEA, which, as a non-profit organization managed and controlled by its members, was authorized to operate in Italy.

In 2014 SIAE filed a lawsuit against Soundreef Ltd. for unfair competition, alleging violation of Article 180 LdA.

The Rome Tribunal suspended proceedings and referred the case to the CJEU, seeking clarification on whether the CRM Directive prevented national laws from reserving access to the copyright

intermediation market solely to CMOs. However, the case did not reach Luxembourg, since SIAE withdrew all pending lawsuits after reaching an agreement with Soundreef Ltd. and LEA in 2019.

In 2022, LEA launched before the Tribunal of Rome a request for injunction against Jamendo, an IME operating under Luxembourgish law, claiming that the copyright intermediation activities the defendant carried out were unlawful and anti-competitive, since Jamendo was not a CMO and did not meet the requirements to operate in Italy. Jamendo responded by arguing that the Italian legislation did not correctly transpose the CRM Directive, for it did not provide for the possibility for authors to entrust the management of their copyright and related rights to a society of their choice within the EU, thus forcing IMEs to enter into agreements with SIAE or with another authorized CMO. The Rome Court, by order of 5 January 2022, considered the request for a preliminary ruling to be well-founded and referred the case to the CJEU, with an accelerated procedure.

The AG Opinion

The Advocate General's Opinion, issued on 25 May 2023, underlined how "no provision of Directive 2014/26 mentions the freedom of such entities (IMEs) with regard to access to the market of copyright management. That Directive only enshrines, in its Article 5, the freedom of rightsholders to choose between [CMOs], without mentioning [IMEs]". Consequently, "the answer to the question referred for a preliminary ruling as formulated by the referring Court can therefore only be negative since [the CRM Directive] in itself does not preclude Member States' legislation restricting access to the activity of copyright management."

However, the AG also emphasized the need to consider other EU acts, such as the E-Commerce Directive ('ECD'), Directive 2006/123/EC 'on services in the internal market', and, finally, the provisions of the TFEU.

For the AG, the ECD should have represented the starting point, as Jamendo's services may have fallen under information society services covered by the Directive. Determining the nature of Jamendo's activities is fundamental because Article 3(2) ECD prohibits Member States from restricting the free movement of service providers established in other Member States, and the case at stake does not fall under any of the derogations authorizing national laws to intervene, as set out in Article 3(4) (i.e. public policy, public health protection, public security or consumer protection). Should the referring Court have determined that the ECD does not apply to the claimant, the AG maintained that "its activity should be treated as a "physical" provision of services and therefore, in principle, falling under Directive 2006/123", which also prohibits restrictions to the provision of services by entities from other Member States. Last, the AG observed that the Italian legislation may conflict with Article 56 TFEU, which prohibits restrictions on the freedom to provide services within the Union. He therefore suggested that Article 3(2) ECD, read in conjunction with Article 16(1)-(2) of Directive 2006/123, should be interpreted so as to preclude Member States from reserving copyright management activities exclusively to CMOs, thereby excluding IMEs established in other Member States.

The CJEU judgment

The CJEU, in line with the AG Opinion, ruled that national legislation prohibiting IMEs established in other Member States from operating in Italy constitutes a restriction to the freedom to provide services. This may be justified only by compelling reasons of public interest, provided it is proportionate, which is not the case here, since the measure envisioned by the Italian legislation exceeds what is necessary to protect copyright, thus violating EU law.

The Court started its analysis by noticing that the CRM Directive does not harmonize the conditions for IMEs to access copyright management activities, leaving a certain margin of discretion to Member States, within the boundaries dictated by the need to respect the TFEU. In this sense, there is no obligation for Member States to ensure that rightsholders have the right to authorize an IME of their choice to manage their rights.

Despite the referring Court limiting its question to the interpretation of a specific provision of EU law, the Court offered further interpretative elements. First, and contrary to the AG Opinion, the CJEU clarified copyright and related rights management services do not fall within the scope of either the ECD or Directive 2006/123/EC on services in the internal market. Nonetheless, the Court states that the national legislation should be consistent with the TFEU provisions on fundamental freedoms, in light of the fact that the case at stake touches upon a matter of internal market trade.

According to the Court, Article 180 LdA, which restricts access to the Italian copyright management market to CMOs only, must be evaluated in light of Article 56 TFEU, in conjunction with the CRM Directive. This means that the constraints the provision imposes can only be justified if it is based on compelling reasons of public interest, and it is proportionate and strictly necessary to achieve this goal.

While a differentiated treatment may plausibly ensure consistent copyright protection, particularly in light of the fact that the CRM Directive imposes fewer obligations on IMEs compared to CMOs, the CJEU argued that the absolute ban on IMEs carrying out any copyright management activities exceeds what is necessary to achieve this goal, thus conflicting with the principle established by Article 56 TFEU.

As a result, the Court concluded that EU law does not allow Member States to indiscriminately and completely prevent foreign IMEs from offering copyright management services in another Member State. However, this does not prevent national laws from enacting specific additional requirements to effectively protect copyright, provided that they are suitable for ensuring the fulfillment of this public interest goal, and do not go beyond what is necessary for the purpose (see C?351/12, OSA).

LEA v Jamendo undoubtedly marks a decisive step towards the full liberalization of the copyright intermediary market across the EU. However, the CJEU’s increasing openness to the possibility for Member States to introduce further operational requirements for IMEs may lead to further fragmentation of national solutions in the internal market, with different conditions set in different countries. Divergences in Member States’ approaches to IMEs and the conditions set for their operation may already be found, with some national laws subjecting such entities only to the requirements outlined in Article 2(4) CRM, and others being much more incisive (e.g. Austria and Greece). It remains to be seen what conditions, obligations and restrictions may be deemed compatible with the limits set by Article 56 TFEU. Absent specific guidelines by the CJEU, the hope is that this grey zone of uncertainty will not create further obstacles to the smooth development of a competitive EU market for collective management of copyright and related rights.

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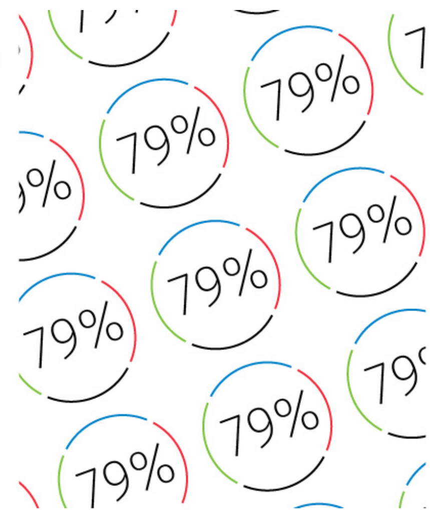

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