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Collective management in Cyprus: a constitutionalist approach

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On 9 April 2025, the Supreme Constitutional Court of Cyprus handed down an Opinion concerning the constitutionality of two amendments to Section 26 of Law 65(I)/2017 on collective rights management and the granting of multi-territorial licenses for online use of musical works (Reference No. 5/2024). The amendments had been enacted by the House of Representatives in July 2024, but were remitted by the President of the Republic in August 2024. The issue was then referred to the Supreme Constitutional Court for its opinion.

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Background

A signi?cant contribution of the *acquis communautaire* in terms of Cypriot copyright law is the harmonisation of rules governing collective management, as effected by Directive 2014/26 on collective management of copyright and related rights. This was given effect under Cypriot law by Law 65(I)/2017.

The Law 65(I)/2017 has been fraught with challenges from the start. It was hastily enacted in order to comply with the deadline for transposing Directive 2014/26/EU and made reference to Regulations, which were meant to provide more practical detail. For example, Regulations are needed for fixing the application fee for CMO registration (s. 13(1)(b)) and the renewal fee (s. 51(2)(c)), determining the hearing procedure for complaints against collective management organisations (CMOs) (s. 43(5)), enacting a procedure for the operation of the supervising authority (s. 51(2)(a)), and determining the content and ways to publicise the Register(s) of CMOs (s. 51(2)(b)). The speed with which the primary legislation was passed meant that these

Regulations were not enacted at the time. This meant that key provisions of the legislation were rendered very difficult – or even impossible – to enforce; indeed, even today, basic matters such as the registration process for CMOs are currently in limbo.

Negotiations have been underway on this topic in the Committee of Commerce and Industry of the Parliament of the Republic of Cyprus for years and these Regulations have still not been issued. However, on 6 April 2023, an amendment to the Law was tabled with the Parliamentary Committee of Energy, Commerce, Industry and Tourism. On 11 July 2024, the amendment was adopted by the plenary session of the House of Representatives, but it was remitted by the President of the Republic of Cyprus in August 2024. The matter was referred to the Supreme Constitutional Court by the President of the Republic for its opinion as to whether the two legislative amendments made to section 26 of the Law 65(I)/2017 were unconstitutional.

The amendments in question

Article 16 of Directive 2014/26/EU relates to the licensing mechanisms available to CMOs and provides that licensing terms must be based on objective and non-discriminatory criteria. This was transposed into Cypriot law by Section 26 of the Law. The amendments in question related to this section and concerned the following:

1. An amendment that would allow users who dispute the CMO's set fees to pay what they consider to be a reasonable fee and deposit half of the disputed amount into a special fund, where it would be frozen until the resolution of the dispute.
2. An amendment that would allow users to pay a lump sum annually (or as otherwise agreed) to a single CMO, as the fee corresponding to each right for which it has been licensed.

The position of the President of the Republic of Cyprus – who had referred the matter to the Supreme Constitutional Court – was that the amendments in question were contrary to Articles 1? (supremacy of EU law over national law), 23 (protection of the right of property), 26 (protection of the freedom to contract), 28 (equality of all persons before the law) and 179 (supremacy of the Constitution as a source of law with the exception of Article 1?) of the Constitution.

The Court's analysis

The first amendment in question

The Court began by pointing out that there is no distinction between absolute and exclusive rights on the one hand, and the rights to equitable remuneration on the other. It went on to say that in the event of a dispute, it is the users who determine the remuneration; furthermore, regardless of the nature of the right, users are indiscriminately exempted from the obligation to pay the remuneration, which the rightsholder is (provisionally) demanding.

At the same time, the Court opined that CMOs, as authorised managers of the rightsholders' rights, are deprived of the right to issue a reasoned refusal, which serves as a counterbalance to the principle of the organisation's obligation to enter into a contract. This contradicts section 26(3)(b) of the Law 65(I)/2017 (Article 16(3) of the Directive), which provides that CMOs shall reply without undue delay to requests from users, indicating, inter alia, the information needed in order for the CMO to offer a licence.

The Court then found that the first amendment in question is a restriction on intellectual property rights protected by Article 17(2) of the Charter of Fundamental Rights of the European Union and movable property rights protected by Article 23(2) of the Cypriot Constitution. Moreover, no persuasive ground for such a restriction had been put forward by the House of Representatives; on the contrary, it disrupted any existing balance within the Law in favour of the users.

It was, therefore, held that the first amendment in question was contrary to Article 23 of the Constitution.

The second amendment in question

The Court set out the framework for the operation of CMOs and went on to describe the essence of the second amendment as an attempt to allow any CMO, at the discretion of any third party or user, to collect and distribute sums on behalf of any other third party CMO – once again without any explanation put forward.

The applicant's position was that this was contrary to the constitutional right to freedom of contract. The position of the House of Representatives was that the user's obligation to pay the total amount of remuneration to all CMOs (e.g., CMOs representing composers, CMOs representing performers, etc) remains, and that it is only for the sake of convenience that this amount will be paid to a single CMO, which then has the obligation to distribute the amounts to the other CMOs. This, counsel for the respondent claimed, is intended to facilitate the overall system, without affecting the rightsholder's core rights; after all, the Law already recognises the transfer of amounts from one CMO to another in relation to deductions and payments provided for in representation agreements (section 25 of the Law; Article 15 of the Directive).

The Court found that the assignment of the collection and distribution of the remuneration falls within the scope of the authorisation or contract of assignment between the rightsholder and the CMO, which the rightsholder has the absolute right to choose. The freedom to contract includes the freedom to choose one's counterparty.

With the second amendment in question, rightsholders are required to accept the payment of their remuneration through a third-party CMO and not through the organisation they themselves selected

and established a contractual relationship with, expecting to receive their rights from it. This third-party CMO would have no contractual relationship with such rightsholders. Nor would it bear any of the obligations imposed by law on the organisation authorised by the rightsholder to represent their interests, such as obligations of trust, accountability, and transparency. This leads to the blatant violation of the contractual relationship between the rightsholder and the organisation that the rightsholder had the absolute contractual right to choose. The Court found that this constitutes a breach of the rightsholders' right to freedom of contract.

Moreover, the Court went on to say, the third-party CMO is burdened with an obligation that does not arise from its contractual relationships with the rightsholders that chose it and whose authorisation it has accepted. Rather, this obligation arises from the contractual obligations of another organisation (i.e. the one that the beneficiary originally selected). The Court found that the third-party CMO's constitutional right to freedom to contract is also violated.

Consequently, the Court held, the second amendment in question is contrary to Article 26 of the Constitution.

Commentary

This is an important case for many reasons. First, it is the first time the Supreme Constitutional Court of Cyprus has dealt with the Law 65(I)/2017. Given the scarcity of the case-law related to copyright and related rights and the nascent status of collective management in Cyprus, this is a milestone. The Opinion clarifies that rightsholders' rights must be balanced with users' rights; it also affirms that copyright and related rights constitute property under the Constitution (Article 23) and EU law (Article 17(2) of the Charter of Fundamental Rights). As the Court stressed, copyright and related rights should, according to recitals 11 and 12 and the whole spirit of the Directive 2001/29 benefit from a high level of protection.

It is also noteworthy that the Court places a strong emphasis on the protection of contractual freedom by the Constitution and more specifically on the freedom to choose the contracting party. In Cypriot constitutional law, the protection of contractual freedom is not considered to be absolute and, specifically, three exceptions are set: (i) the general principles of contract law; (ii) the public interest; and (iii) the Constitution itself. The absolute manner in which this freedom is protected in this Opinion might raise some doubts on the compatibility of mechanisms of extended collective licensing and mandatory collective rights management with Article 26 of the Constitution. With respect to collective licensing with extended effect, Article 12 of Directive 790/2019 has been transposed almost verbatim in section 33 of Law 59/1976. However, since the Constitution of Cyprus established the supremacy of EU law even over the Constitution itself (Article 1 A of the Constitution), Article 12 of Directive 790/2019 may take precedence over Article 26 of the Constitution. Nonetheless, the same reasoning is not possible for any other potential mechanism of collective licensing with extended effect in the future, which would have resulted from the initiative of the Cypriot legislator.

Furthermore and from a more practical perspective, it is also curious that the legislator saw a need

to improve the enforcement of the Law on Copyright collective management when, in fact, the absence of the Regulations for the past eight years has meant that the most effective dispute resolution mechanism – that of the so-called Competent Authority, established per the requirement under Article 36 of Directive 2014/26/EU – was inactive and so it was not really possible to assess whether a need for improvement existed. Arguably, the legislature's priority ought to have been pushing through the Regulations rather than tweaking the Law before it had a chance to be properly enforced.

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