

Case C-10/22

Request for a preliminary ruling

Date lodged:

5 January 2022

Referring court:

Tribunale ordinario di Roma (Italy)

Date of the decision to refer:

5 January 2022

Applicant:

Liberi editori e autori (LEA)

Defendant:

Jamendo SA

ITALIAN REPUBLIC

TRIBUNALE ORDINARIO DI ROMA (District Court, Rome)

CHAMBER XVII SPECIALISED IN COMMERCIAL MATTERS

[...]

makes the following

REFERENCE FOR A PRELIMINARY RULING under the expedited procedure

(Article 267 TFEU and Article 105 of the Rules of Procedure of the Court of Justice)

in the case [...]

between

LEA – LIBERI EDITORI E AUTORI [...]

Applicant

v

JAMENDO SA [...] with registered office in [Luxembourg] [...]

Defendant

SUBJECT MATTER OF THE MAIN PROCEEDINGS

- 1 LEA is a collective management organisation, which allows it to operate in the field of copyright intermediation in Italy pursuant to Article 180 of the Legge sul diritto d'autore n. 633 del 1941 (Law on Copyright No 633 of 1941). It therefore acts as agent for the management and promotion of copyright on behalf of its members and collects the corresponding revenues. LEA manages the copyright for around 39 000 authors and publishers (of whom more than 22 000 are Italian) on an exclusive basis, directly and under representation agreements concluded with independent management entities and collective management organisations, including those outside the European Union. As far as the present case is concerned, the mandate also includes the collection of all royalties under licences agreed for background music played in businesses via in-store radio.
- 2 Jamendo is an independent management entity incorporated in Luxembourg. Since 2004, it has been operating in Italy with a view to bringing together artists and music fans from all over the world to create a global independent music community. Jamendo Music provides access to an extensive catalogue of over 700 000 tracks shared by more than 45 000 artists from no fewer than 150 countries. Under the terms of the licence, the tracks can be downloaded from Jamendo's website and listened to free of charge for personal use. Part of the digital music catalogue is also made available for commercial use, subject to the rightholders' permission.
- 3 LEA brought an action before the referring court seeking an injunction against Jamendo *ante causam*, on the basis that the defendant's copyright intermediation activity in Italy is unlawful since:
 - Jamendo is not registered on the list of organisations authorised to perform copyright intermediation in Italy;
 - Jamendo does not meet the specific criteria laid down in decreto legislativo n. 35/2017 (Legislative Decree No 35/2017) transposing Directive 2014/26/EU on collective management of copyright;
 - Jamendo failed to notify the Ministero delle Telecomunicazioni (Ministry of Telecommunications) of the commencement of its activity, as required under Article 8 of Legislative Decree No 35/2017.

Consequently, LEA is seeking an injunction against Jamendo for its commercial activity in Italy, in addition to a fine for non-compliance of EUR 20 000 per day and the publication of the injunction in three leading national newspapers.

4 Jamendo entered an appearance in the interlocutory proceedings, relying on an interpretation of Italian legislation compatible with the provisions of Directive 2014/26/EU, which provides that holders of copyright and related rights on musical works are free to entrust the management of their copyright to a collective management organisation or to an independent management entity. Article 3 of the directive identifies and defines two distinct categories of entities authorised to manage copyright:

- **the collective management organisation (CMO)**, or any organisation which is authorised ‘by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria: (i) it is owned or controlled by its members; (ii) it is organised on a not-for-profit basis’, and

- **the independent management entity (IME)**, or any organisation which is authorised ‘by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is: (i) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and (ii) organised on a for-profit basis’.

5 Jamendo submits that, in transposing the EU legislation, the Italian legislature failed to grant independent management entities the rights covered in the directive. Indeed, Article 180 of the Law on Copyright – the content of which is not affected by the Implementing Decree – still identifies the Società Italiana degli Autori ed Editori (Italian Society of Authors and Publishers; SIAE) and CMOs as the only entities able to carry out intermediation activities, with no mention of IMEs. Italian legislation thus precludes IMEs from operating in Italy in the field of copyright intermediation, leaving them the sole option of concluding agreements with the SIAE or with authorised CMOs.

6 In the alternative, Jamendo affirmed that its activity does not come under the collective management of copyright, but under the direct management of copyright. It therefore relies on recital 16 of the directive, which excludes the possibility of including in the definition of independent management entities those categories (such as publishers or producers) that license the rights that have been transferred to them on the basis of ‘individually’ negotiated agreements.

PROVISIONS OF EU LAW AND NATIONAL LAW RELIED ON

- 7 Directive 2014/26/EU is based on the premiss that in ‘an internal market where competition is not distorted, protecting innovation and intellectual creation also encourages investment in innovative services and products’ (recital 1) and that ‘when established in the Union, collective management organisations should be able to enjoy the freedoms provided by the Treaties when representing rightholders who are resident or established in other Member States or granting licences to users who are resident or established in other Member States’ (recital 4). In particular, reproducing the content of the Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (OJ 2005, 21 October 2005), and extending it to the entire sector of works protected by copyright, Article 5(2) of the directive provides: ‘Rightholders shall have the right to authorise a collective management organisation of their choice to manage the rights, categories of rights or types of works and other subject matter of their choice, for the territories of their choice, irrespective of the Member State of nationality, residence or establishment of either the collective management organisation or the rightholder.’
- 8 The directive states that there are two distinct categories of actors entitled to perform activities of copyright management, to which it gives the following definitions (Article 3): “‘collective management organisation” [(CMO)] means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria: (i) it is owned or controlled by its members; (ii) it is organised on a not-for-profit basis’, while “‘independent management entity” [(IME)] means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is: (i) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and (ii) organised on a for-profit basis’.
- 9 At the centre of copyright law in the Italian legal system is legge 22 aprile 1941, n. 633 (Protezione del diritto d’autore e di altri diritti connessi al suo esercizio, GU n.166 del 16-7-1941) (Law No 633 of 22 April 1941 on the protection of copyright and related rights, *Gazzetta ufficiale della Repubblica italiana* No 166 of 16 July 1941), as amended.
- 10 By means of Decreto Legislativo 15 marzo 2017, n. 35 (Legislative Decree No 35 of 15 March 2017) (‘the Implementing Decree’), the Italian Government transposed the Barnier Directive, leaving substantially unchanged the content of Article 180 of the Law on Copyright, which essentially precluded the correct application of the Barnier Directive in Italy. In effect, the SIAE retained its

monopoly in the field of copyright intermediation, while rightholders were not guaranteed the freedom to choose an organisation to manage their rights. Following the significant uncertainties that emerged as a result of this incomplete transposition, and following the infringement procedure initiated by the European Commission against Italy, the Italian Government, by means of Decreto Legge 16 ottobre 2017, n. 148 (Decree Law No 148 of 16 October 2017) laying down urgent provisions on tax and financial matters, amended Article 180 of Law No 633/1941, extending ‘to the other collective management organisations referred to in Legislative Decree No 35 of 15 March 2017’ – and therefore not to IMEs – the reservation originally provided in favour only of SIAE. The text currently in force of Article 180 of the Law on Copyright reads: ‘[1.] The activity of intermediary, however implemented, by any direct or indirect form of intervention, mediation, mandate, representation and even assignment for the exercise of rights of representation, execution, performing, broadcasting including communication to the public via satellite and mechanical and cinematic reproduction of protected works, shall be exclusively reserved to the Società Italiana degli Autori ed Editori (Italian Society of Authors and Publishers; SIAE) and to the other collective management organisations referred to in Legislative Decree No 35 of 15 March 2017. [2.] Such activity shall be carried out for the purpose of: (1) granting, on behalf of and in the interests of the beneficiaries, licences and authorisations for the economic exploitation of protected works; (2) collecting the proceeds deriving from those licences and authorisations; (3) distributing those revenues among the beneficiaries. [3.] The activity of the Società Italiana degli Autori ed Editori (Italian Society of Authors and Publishers; SIAE) shall also be carried out according to the rules established by regulation in the foreign countries in which it has organised representation. [4.] The abovementioned exclusivity of powers shall not affect the power of the author, his or her successors or beneficiaries to exercise directly the rights recognised by this law.’

SUCCINCT PRESENTATION OF THE REASONING IN THE REQUEST FOR A PRELIMINARY RULING

- 11 It is clear that Jamendo performs copyright intermediation activities in Italy. According to Jamendo’s General Terms of Use, artists can post one or more of their musical works (either tracks or albums) on the platform provided by Jamendo, creating their own artist account and posting their works directly on the Jamendo platform by clicking on ‘upload your music’. In addition, for each work uploaded, artists can choose the type of Creative Commons licence they want to apply, thus deciding for each individual work which rights are to be granted to the platform’s users (in other words, the people who use the services offered by Jamendo). Once their music has been uploaded to the portal, artists can then decide whether to register for the Jamendo Licensing service on the digital platform by signing the distribution agreement. After registering, artists can (manually) add one or more works to the Jamendo Licensing service and decide whether to participate in the commercial programmes available: namely, the ‘In-

Store Program’ (licence for background music played in businesses [...]) and the ‘Catalog Program’ (licence for the synchronisation of music with audiovisual content or for other multimedia projects). By signing the distribution agreement, the rightholders warrant to Jamendo that they are not affiliated with any collective management company and that they have no contractual relationship with such entities, nor with any other private operator (such as broadcasters, distribution platforms, manufacturers or brands) that would prevent them from using the Jamendo Licensing program worldwide, and consequently opt for the independent management of their copyright. With the Jamendo In-Store Program, the works of the Certified Artist are included in the playlists created by Jamendo – of which there are currently 27 – to be played as background music in premises open to the public (‘the Playlists’).

- 12 Therefore, the defendant’s activity does not appear to be immediately classifiable as direct management, given that by its own admission, Jamendo grants licences and sublicences, collects royalties based on the number of times the work is played and deducts a fee calculated as a percentage of the revenues. Moreover, the agreements that Jamendo signs with its members do not appear to be negotiated individually; the choice of various membership options that Jamendo offers its members through different versions of the agreement and different forms of copyright management does not detract from the binding nature of the contract, a factor that precludes each individual contract from having been specifically negotiated.
- 13 Incidentally, Jamendo itself states that it manages ‘a technological platform (available online at www.jamendo.com) for the distribution and licensing of musical works owned by independent authors/artists around the world’.
- 14 Conversely, it is common ground between the parties that LEA meets the legal definition of a collective management organisation.
- 15 Equally undisputed by the parties is the fact that Jamendo does not appear on the list of authorised collecting societies pursuant to Article 5(1) of Annex A to *delibera n. 396/17/CONS* (Resolution No 396/17/CONS), nor may it be registered/accredited according to the provisions of Article 180 of the Law on Copyright.
- 16 The potential existence of the *fumus boni iuris* in favour of LEA may be asserted since the activity carried out by Jamendo is fully comparable to that of LEA, with whom the defendant acts in direct competition without meeting the legal requirements for copyright intermediation in the form of collective management.
- 17 As regards the *periculum in mora*, it is the established opinion of this court that this inherently exists whenever there is an infringement of intellectual property rights. Furthermore, the injunction gives the most satisfaction to the rightholder and the wider community, particularly in the light of the considerable economic

damage done to the copyright system by disseminating counterfeited works or by operating in breach of the specific rules governing the sector.

- 18 At this point, the question referred for a preliminary ruling by Jamendo seems decisive: the applicable Italian legislation excludes IMEs from the category of entities authorised to act as ‘intermediary, however implemented, by any direct or indirect form of intervention, mediation, mandate, representation and even assignment for the exercise of rights of representation, execution, performing, broadcasting including communication to the public via satellite and mechanical and cinematic reproduction of protected works’.

OPINION OF THE REFERRING COURT

- 19 It is the opinion of the referring court that the question is well founded. Although it is true, as submitted by LEA, that the directive is an instrument that lends itself to flexible transposition in domestic law, this does not undermine the principle of the correct and full transposition of a directive, which is the system designed by the EU legislature to produce the intended harmonisation effects. Partial, incomplete or illogical transposition of an EU directive constitutes, according to the settled case-law of the Court of Justice, an infringement of EU law.
- 20 Accordingly, the national legislature had a duty when transposing the directive to ensure that (recital 7 of the directive) ‘the laws of the Member States relating to copyright management and multi-territorial licensing of online rights in musical works should be coordinated with a view to having equivalent safeguards throughout the Union. Therefore, this Directive should have as a legal base Article 50(1) TFEU.’ Furthermore, it is clear to the referring court that the lack of harmonisation in Italian legislation of the powers and authority granted to independent management entities (IMEs), or their exclusion from the category of entities authorised to perform copyright intermediation, amounts to a choice that cannot be made by the national legislature – despite the discretionary nature of the transposition – since it raises obstacles to the exercise of equivalent economic activities within the national territory for subjects of EU law, such as Jamendo, established in the alternative form of an independent management entity. That contradiction can also be found in the Italian implementing legislation, in so far as Article 4 of the implementing legislation states that ‘rightholders may entrust to a collective management organisation or to an independent management entity of their choice the management of their rights, the related categories or types of works and other materials protected for the territories indicated by them, regardless of the Member State of the European Union of nationality, residence or establishment of the collective management organisation, of the independent management entity or of the rightholder’, thus implying that rightholders may entrust the management of their rights either to a CMO or to an IME of any Member State of the European Union. However, the same text states that it is without prejudice to ‘Article 180 of Law No 633 of 22 April 1941 in respect of the activity of copyright intermediation’, which reserves this activity in the national

territory to the SIAE and to the CMOs. In essence, the Italian legislature, while fully transposing the spirit of the directive, has introduced a limitation in the form of an exception which is illogical and contrary to the principles of the directive.

- 21 The national rules, as laid down in Article 4(2) of Legislative Decree No 35 and the text currently in force of Article 180 of the Law on Copyright, as amended for the purpose of adapting it to the directive, preclude IMEs from operating in Italy, thus requiring them to conclude representation agreements with SIAE or with other CMOs, while the possibility of direct management by the rightholders remains unaffected.
- 22 The directive's recognition of IMEs as legitimate entities operating in copyright management and intermediation, in the light of the pro-competitive nature of the EU legal order, should require any territorial limitation on their operation to be underpinned by specific justification coming within one of the situations expressly envisaged by that legal order. It must also be noted that, in many Member States of the European Union, statutory reserves in copyright intermediation have virtually disappeared and IMEs, including those established in other Member States, are permitted to operate in addition to CMOs.
- 23 IMEs, like CMOs, are bodies authorised to manage copyright on behalf of more than one rightholder, for the collective benefit of those rightholders. The structural and functional differences between those entities, if they can be observed in the internal regulations and controls, do not seem *prima facie* relevant to the purposes of any limitations on intermediation activities, which, consisting in winning mandates and issuing licences in the interests of the rightholders, are structurally identical.
- 24 In most of its provisions, the directive considers the two aspects of collective management of rights (winning mandates from authors and issuing licences to users) to be one activity, so that the right of IMEs to operate can be inferred from recital 15 of the directive also as a corollary to the right of rightholders to award a mandate to such entities freely ('Rightholders should be free to entrust the management of their rights to independent management entities'), in line with its pro-competition approach.
- 25 The *fumus cautelare* is therefore contingent on the application of a national rule that expresses a principle potentially contrary to the EU legislation that is being transposed.
- 26 It is clear that the question raised is of relevance to EU law, both because an entire national market, in the present case that of Italy, is undoubtedly a substantial part of the common market, and because the dispute is between LEA and a collecting society lawfully operating in other EU countries and dealing in copyright management and intermediation services for both Italian and foreign authors.
- 27 If the question is considered to be well founded, the case should be decided by application of Article 4(2) of Legislative Decree No 35, which gives rightholders

the option of entrusting the management of their rights either to a collective management organisation or to an independent management entity of their choice, incorporated or established in any Member State, but without reference to Article 180 of the Law on Copyright and the reservation provided for therein in favour of SIAE and other CMOs; therefore in application of national law that is in conformity with the directive and not in direct application of it.

- 28 The question is relevant in the present case, since the applicant claims the persistent and ongoing unlawfulness of the defendant's conduct, which is a precondition of the injunction requested and of extension of the claim for damages also to the subsequent period.
- 29 Therefore, it should be assessed whether it is necessary to disapply the national rule in order to ensure compliance with the rules of EU law on freedom of establishment and freedom to provide services (Articles 49 TFEU and 56 TFEU) and of Directive 2014/26/EU, and for that reason it is necessary to refer to the Court of Justice for a preliminary ruling the question reformulated below.
- 30 The question is of an urgent nature within the meaning of Article 105 of the Rules of Procedure of the Court of Justice since, as mentioned above, Jamendo's activity is officially categorised as unlawful, so any rejection of the request for a preliminary ruling would result in the need to dispose of the case in favour of LEA by means of an urgent injunction.

THE QUESTION REFERRED FOR A PRELIMINARY RULING

'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 collective management organisations, to the exclusion of those which can be classified as independent management entities incorporated in that Member State or in other Member States?'

On those grounds

Orders the immediate transmission of this order [...] to the Registry of the Court of Justice of the European Union, to be dealt with under the expedited procedure pursuant to Article 105 of the Rules of Procedure of the Court.

[...]

Rome, 5 January 2022

[...]