Court of Justice of the European Union: Private copying compensation cannot be funded through general state budget

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On 9 June 2016, the Court of Justice of the European Union (CJEU) delivered its judgment in Case C-470/14, EGEDA v. Administracion del Estado. The case was a reference from the Spanish Supreme Court seeking a preliminary ruling on the interpretation of Article 5(2)(b) of Directive 2001/29/EU (the "InfoSoc Directive").

On 7 December 2012, the Spanish government had adopted Royal Decree 1657/2012, which regulates the procedure of compensating rightsholders for acts of private copying. This was a continuation of the derogation by Royal Decree Law 20/2011 of the private copying levy and the introduction of a new system whereby fair compensation for acts of private copying is paid to rightsholders from the state budget. This new system was a result of the government's intention to achieve full conformity with the regulatory framework and jurisprudence of the European Union following the decision of the CJEU in the Padawan case (see IRIS 2012-8/19, IRIS 2011-5/20, IRIS 2011-4/23 and IRIS 2010-10/7).

The applicants in the main proceedings are intellectual property rights collecting societies, which are entitled to collect the fair compensation owed to copyright holders in instances of private copying of their protected works or subject matter. On 7 February 2013 they brought an action for annulment of Royal Decree 1657/2012 before the Tribunal Supremo (Spanish Supreme Court). In support of their claims, the applicants in the main proceedings submitted that Royal Decree 1657/2012 is incompatible with Article 5(2)(b) of Directive 2001/29.

Article 5(2)(b) provides that Member States may provide for exceptions or limitations to the reproduction right "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation".

The first question referred to the CJEU was whether a scheme for fair compensation for private copying is compatible with Article 5(2)(b) of the Directive, where the scheme, while taking as a basis an estimate of the harm actually caused, is financed from the General State Budget, as it is thus not

possible to ensure that the cost of that compensation is borne by the users of private copies.

The second question was whether, if the first question is answered in the affirmative, the scheme is compatible with Article 5(2)(b) where the total amount allocated by the General State Budget to fair compensation for private copying, although calculated on the basis of the harm actually caused, has to be set within the budgetary limits established for each financial year.

In his Opinion of January 2016, Advocate General (AG) Szpunar expressed the view that the financing of the compensation from the general state budget is not contrary to the principles established by the Court in the Padawan case (see IRIS 2016-2/2). This was because it does not expand the scope of the levy to all taxpayers, but is a funding system based on a different logic. In its judgement of 9 June 2016, the CJEU departs substantially from the Opinion of the Advocate General by considering that the InfoSoc Directive precludes such a scheme, as it is not possible to ensure that the cost of the compensation is borne by the users of private copies.

The CJEU first recalled that, further to Recitals 35 and 38 InfoSoc Directive, Member States may provide for a private copying exception on the condition that it is accompanied by a fair compensation scheme. This is “triggered by the existence of harm caused to rightholders, which gives rise, in principle, to the obligation to ‘compensate’ them”, according to the Court. Furthermore, Article 5(2)(b) of the InfoSoc Directive imposes “an obligation to achieve a certain result upon the Member States which have implemented the private copying exception, in the sense that they must guarantee, within the framework of their competences, the actual recovery of the fair compensation intended to compensate the rightholders”.

On the other hand, the Court afforded to the Member States a broad discretion on how this result is to be achieved, including determining who has to pay the fair compensation, what form it would take, and according to what arrangements and level.

The Court notes that in principle, nothing in the InfoSoc Directive precludes the establishment of a fair compensation scheme financed by the general state budget of a Member State, in lieu of a levy system. However, it is for the person who reproduced the protected works or subject matter without the prior authorisation of the rightholder concerned, and who therefore caused harm to them, to make good that harm by financing the fair compensation provided for that purpose.

The Court considered that, in the Spanish scheme, the payment of the fair compensation is financed from all the budget resources of the general state

budget, and therefore also from all taxpayers. According to the CJEU, such a scheme is not a guarantee that the cost of that compensation is ultimately borne solely by the users of private copies.

The Court concluded that Article 5(2)(b) of the InfoSoc Directive precludes a fair compensation scheme financed from the general state budget in such a way that it is not possible to ensure that the cost of that compensation is borne by the users of private copies.

Judgement of the Court (Fourth Chamber) in case C-470/14, EGEDA and Others, 9 June 2016

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