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The ruling of the Constitutional Court on the Law decree opening the market to other copyright intermediaries, other than SIAE

With a ruling of 13 July 2020, the Constitutional Court rejected the question of the constitutional legitimacy of the rules that have extended the activity of copyright management in Italy to other collective management bodies, in addition to SIAE.

The case, referred by the Consiglio di Stato (Italy top administrative Court) originates from the appeal filed by SIAE for the annulment of the list of collective management organisations (CMOs) and independent management entities (IMEs) - list drawn up in accordance with Article 5, paragraph l, Annex A, of the resolution of the Communications Authority (AGCOM) of 19 October 2017 (no. 396/17/CONS) - in the part in which it includes among the CMOs a subject not deemed suitable by SIAE, the Lea Association - Free publishers and authors (LEA). Within the action pending before the Consiglio di Stato, the latter decided to refer to the Constitutional Court the question of the legitimacy of Article 19 of Law Decree no. 148 of 16 October 2017 (Urgent provisions on financial matters and for unavoidable needs. Amendment to the rules governing the extinction of the crime for reparative conduct), for failure to comply with the requirements for urgent decrees, as set out in Article 77 of the Constitution.

A brief premise is needed on the legislation pertaining to the decree under scrutiny: CMOs and IMEs are concepts defined and regulated in Directive 2014/26/EU (aka as the Barnier Directive) and in the regulations transposing the same, Legislative Decree no. 35 of 2017.

The Directive does not directly address the issue of the legal monopoly of the OGCs in their respective countries of origin. It aims to harmonize the rules on the activity of collecting organisations and entities. In this context, the text gives authors the freedom to choose the entities to which they assign the various types of rights. To this end, therefore, in addition to the CMOs, IMEs, which are commercial entities, may also be set up.

Legislative Decree no. 35 of 2017 made a clear distinction between the former, non-profit entities held or controlled by its members, and IMEs, which instead pursue profit-making purposes and are neither held nor controlled by rightholders. The latter may entrust a CMO or an IME of their choice with the management of GIVEN territories, regardless of the EU State of nationality, residence or establishment of the CMO, the IME and the rightholder. However, Legislative Decree no. 35 of 2017 is without prejudice to the provisions of art. 180 of Law no. 633 of 1941 (Copyright Law), which reserves to SIAE the activity of copyright management on behalf of authors, thus maintaining, in fact, the monopoly of SIAE itself. Authors' freedom of choice was thus limited to CMOs or IMEs established abroad, which could only operate upon prior agreement with SIAE.

Subsequently, the Government intervened with Law decree no. 148 of 16 October 2017 (Urgent provisions on financial matters and for unavoidable needs. Amendment to the rules governing the prescription of the offence for reparative conduct). Article 19 of the Decree amends Articles 15-bis and 180 of the Copyright Law, introducing in particular CMOs and IMEs among the persons entitled to manage copyright.

The decision at hand addresses the issue of the legitimacy of Article 19 of Decree Law 148/2017, declared unfounded by the Constitutional Court, which considered the instrument of the Law decree, as used by the Legislator, compliant with the correct interpretation of Article 77 of the Charter.

The Court pointed out that the choice to legislate through the instrument of the Law decree can be found in this instance in the need, also recognized by the referring judge, to fully harmonize internal and EU legislation on the liberalization of collective copyright management and in the urgency of avoiding the opening of an infringement procedure. In this respect, the decision refers to the case law of the Court, which in the past has made it clear that delays linked to the implementation of Community law can indeed ground the use of the Law decree (ruling no. 272 of 2005).

Nor did the Court consider relevant, in view of excluding the urgency requirement, that the rules at issue are not immediately applicable (they refer to subsequent implementing measures to be issued by the AGCOM).

Another point referred to the Constitutional Court concerns the alleged lack of organicity of the Law decree, which, in the proposal of the Consiglio di Stato, would respond to non-univocal purposes, linked to unavoidable needs in financial matters, with respect to which Article 19 would prove to be completely extraneous, regulating a matter that has no direct and relevant relationship with the State budget, since copyright does not flow into the Treasury.

The Court made it clear in that regard that "*the urgent need to provide can also concern a plurality of rules which are united not only by the unitary nature of the cases regulated, but also by the intent to deal with a complex and varied extraordinary situation, which requires objectively heterogeneous interventions, since they relate to different matters, but are all addressed to the sole purpose of urgently preparing remedies to this situation.*"