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Are Italian Rules on Copyright Collective Management in Line with EU Law?

Directive (EU) 2014/26 liberalised the market for collective management of copyright and related rights in Europe. In doing so it distinguished collecting societies into two categories. 'Collective Management Organisations' (CMOs) are entities that are either controlled (or owned) by rightholders or organised on a 'non-profit' basis. Conversely, 'Independent Management Entities' (IMEs) operate 'for profit' and are not controlled by rightholders. Prior to the adoption of this Directive, Italian law entrusted SIAE (Italian Society of Authors and Publishers) with a legal monopoly for the collective management of copyright. In 2017 a reform put an end to this system by opening the market to new entrants. However, according to the new rules, an entity can only manage copyright in Italy if it qualifies as a CMO. IMEs are therefore still not allowed to manage copyright in the Italian market. Such a restriction has raised a lively debate in Italy and its compatibility with EU law has recently been the object of a request for a preliminary ruling of the CJEU by the Tribunal of Rome. This work deals with the question of whether the choice of preventing IMEs from entering the Italian market is compatible with the principles of Directive 2014/26 and with general principles of EU law on the Internal Market.

I. Directive 2014/26 and its implementation in Italy

More than eight years have passed since the adoption of Directive (EU) 2014/26 (hereinafter 'CMO Directive') for the harmonisation of the law on collective management of copyright. The EU rules on this subject are however still the object of many discussions.

Among the controversial issues is the fact that the CMO Directive did not introduce the same rules for all collective intermediaries that operate in the European market. The Directive identifies two different categories of collecting societies. 'Collective management organisations' (CMOs) are collecting societies which possess at least one of the following elements: (a) they are 'owned or controlled' by rightholders (or organisations representing rightholders); and (b) they are organised on a not-for-profit basis (Art. 3, lit. a, CMO Directive). Conversely, 'independent management entities' (IMEs) are those collecting societies that operate 'for profit' and are not controlled by rightholders (Art. 3 lit. b, CMO Directive).[1] CMOs are subject to all the rules of the CMO Directive. They are thereby regulated with regard to their internal organisation, their relationship with rightholders and with users, and the granting of multi-territorial licensing, etc. Conversely, IMEs are subject to a very small number of provisions (Art. 2, para. 4 CMO Directive). More specifically, the Directive provides that IMEs must carry out negotiations with users in good faith (Art. 16, para. 1 CMO Directive), that they have some duties of transparency (Art. 18, Art. 20 and Art. 21 CMO Directive), and that they are subject to the vigilance of competent authorities (Art. 36 CMO Directive).

Prior to the adoption of the CMO Directive, Art. 180 of the Italian Law on Copyright (hereinafter ICL) entrusted SIAE (in English: Italian Society of Authors and Publishers) with a legal monopoly for the collective management of copyright. The Legislative Decree 35/2017 implemented the CMO Directive in Italy. In so doing, however, it did not amend Art. 180 ICL. This prompted some vigorous debate on the consistency of SIAE's monopoly with the new regulatory framework introduced by the Directive.[2] A few months later, Art. 180

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1 The vast majority of collecting societies in Europe falls within the category of CMOs. CMOs are thereby the main object of the regulation introduced by the Directive. See art 2 of CMO Directive. Conversely, intermediation by IMEs is less common in Europe. However, according to recent studies the number of IMEs is growing in Europe. See the study prepared for the European Commission by Visionary Analytics, 'Study on selected issues relating to the application of CRM Directive' [2021] Publications Office 68.

2 See, eg, the critical opinion expressed by the Italian Competition Authority on this point: AGCM, opinion of 1 June 2016, 'Gestione collettiva dei diritti d'autore e dei diritti connessi e licenze multiterritoriali per i diritti su opere musicali per l'uso online nel mercato interno' AS1281. Doubts on the compatibility of SIAE's legal monopoly with EU law were also raised by legal scholars, at least in so far as art 180 ICL prevented foreign collecting societies from operating on the Italian market. See, eg, Giuseppe Mazziotti, 'Il monopolio SIAE e la direttiva Barnier: come stanno davvero le cose?' [2017] Il diritto industriale 78; Mario Libertini, 'La direttiva Barnier e il servizio universale' in Maria Francesca Quattrone (ed), *Gli effetti della direttiva Barnier nel mercato italiano e paneuropeo della gestione dei diritti d'autore e connessi* (LUISS University Press 2016) 28; Davide Sarti, 'Il d.lgs. n. 35/17 di attuazione della direttiva collecting: accesso al mercato, controlli e governance' [2017] Le Nuove Leggi Civili Commentate 1143; Gabriele Spina Alì, 'Collective monopolies: SIAE v. Soundreef and the implementation of Directive 2014/26 in Italy' (2018) 40 EIPR 125; Eleonora Rosati, 'Sviluppi a livello di Unione Europea ed il monopolio SIAE' in Angelo Miglietta (ed), *L'esclusiva legale della SIAE. Profili di diritto interno, comparato ed europeo* (IUSE press 2017) 39. The possibility for foreign entities to operate in Italy independently of art 180 ICL had been sometimes recognised by the case law before the implementation of the Directive. See Trib. Milan, 6 October 2014, [2015] Annali Italiani del Diritto d'Autore (AIDA) 891 (with a critical case note by Davide Sarti) and Trib. Trento, 20 July 2015, [2016] Annali Italiani del Diritto d'Autore (AIDA) 1007.

ICL was thereby amended, with the result that the Italian market was opened to new entrants (Art. 19 law decree 148/2017, converted with law 172/2017). However, liberalisation was not fully accomplished. According to the new version of Art. 180 ICL, an entity can only manage copyright in Italy if it qualifies as a CMO. In other words, IMEs are still not allowed to manage copyright in the Italian market.[3]

This work deals with the question of whether the choice of preventing IMEs from entering the Italian market is compatible with EU law. Such a question has recently been referred to the CJEU for a preliminary ruling by the Tribunal of Rome.[4]

II. Incompatibility of Italian law with EU law

A first question that must be asked is whether there is a direct conflict between Art. 180 ICL and the rules of the CMO Directive. There is no provision in the CMO Directive clearly imposing a duty on Member States to admit IMEs in the national market. Recital 15 reads 'rightholders should be free to entrust the management of their rights to independent management entities'. However, it must also be considered that the liberalisation of the market is mainly based on Art. 5 of the CMO Directive, which entrusts rightholders with the freedom to authorise the CMO of their choice for the management of rights. This article is not included in the list of provisions that are applicable to IMEs (see Art. 2 CMO Directive).[5] What's more, the Directive itself recognises that Member States are free to introduce systems of prior authorisation and specific requirements for entry in the national market.[6] Therefore, it seems that while expressing a preference for 'fully liberalised' systems, the CMO Directive does not go as far as imposing on Member States a duty to admit IMEs on the national market.[7] This approach may, at first sight, appear contradictory. However, it is probably justified by the fact that national laws took different positions on 'for-profit' collective management prior to the Directive. In several Member States, collecting societies had a duty to operate as 'non-profit' trustees of rightholders.[8] Therefore, leaving Member States some leeway on the admission of IMEs might be regarded as an attempt to avoid conflicts among Member States on a secondary issue.[9]

However, according to Art. 180 ICL, entry on the market is restricted not only to IMEs that are established in Italy, but also to those established in other Member States. This is confirmed by Art. 20 of Legislative Decree 35/2017, according to which IMEs that are established in a foreign country can only collect royalties in Italy through reciprocal representation agreements. Thus, Italian law potentially constitutes a restriction on the freedom to provide services. As a consequence the rule must also be assessed in light of the principles on free movement of the TFEU (see especially Art. 56 TFEU) in order to reach a conclusion on the compatibility of Art. 180 ICL with EU law.[10]

3 More precisely, IMEs are prevented from managing the specific rights that are listed in art 180 ICL. These are, in particular, the rights of public performance, the right of mechanical and cinematographic reproduction, and the rights relating to radio broadcasting, including the communication to the public through satellite. According to the majority of opinions, this list is exhaustive. Therefore, rights that are not expressly mentioned by art 180 ICL can be managed by IMEs. IMEs would then be free to manage, eg rights of communication to the public through the internet and related rights. On the exhaustive character of art 180 ICL, see, among others, Simona Lavagnini, 'L'estensione dell'esclusiva della SIAE ex art. 180 l.a.' (1996) 1 Giurisprudenza Commerciale 987. The point has also been recognised by the case law in some cases: Trib. Rome, 3 October 2006, [2007] Annali Italiani del Diritto d'Autore (AIDA) 962, and TAR Lazio, 16 April 2019, ord., GU 1° serie speciale Corte Cost. No. 46, 13 November 2019.

4 Trib. Rome, 5 January 2022, *LEA v Jamendo SA* [2022] Annali Italiani del Diritto d'Autore (AIDA) (forthcoming), raising the following question: '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?' The case was assigned the number C-10/22. A similar question had already been referred to the CJEU in another case, but the request was subsequently withdrawn: see Case C-781/18 *SIAE v Soundreef* ECLI:EU:C:2019:656.

5 Spina Alì (n 2) 125.

6 See especially recitals 12, 19 and 50. On this point see also Spina Alì (n 2) 125.

7 Sarti, 'Il d.lgs. n. 35/17 di attuazione della direttiva' (n 2) 1131. See also Davide Sarti, 'L'abrogazione del monopolio SIAE (art. 180 l.a.) nel contesto dell'attuazione della direttiva collecting' [2018] Le Nuove Leggi Civili Commentate 1064, where the Author expresses the view that excluding foreign IMEs from the national market would run counter to the principles of the Directive. See also Spina Alì (n 2) 125.

8 Eg this was the case in Spain (see on the evolution of Spanish law on the point Abel Martín Villarejo, 'El nuevo marco normativo de las entidades de gestión en el ámbito de la Unión europea' in Eduardo Serrano Gómez (ed), *Cuestiones de derecho de autor en la Unión europea* (Editorial Reus 2017) 101) and in France (see Sylvie Nérisson, *La gestion collective des droits des auteurs en France et en Allemagne: quelle légitimité?* (Iris Editions 2013) 64; see also, on the recent reform on the point, Julien Beaupain, 'Retour sur la directive européenne "gestion collective" et sa transposition en France' (2017) 29 Les Cahiers de propriété intellectuelle 475). Other legal systems also imposed limitations on the possibility to adopt 'for-profit' legal forms for collecting societies. See on this point Adolf Dietz, 'Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe' (2002) 49 J. Copyright Soc. USA 905; Josef Drexl, 'Copyright, Competition and Development' [2013] Report by Max Planck Institute for Innovation and Competition 231 <https://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/02_copyright_competition/report_copyright-competition-development_december-2013.pdf> accessed 11 November 2022.

9 On the treatment of IMEs in the Directive see Mazziotti (n 2) 77. The need to include entities like IMEs within the scope of the regulation in this field had been highlighted before the final adoption of Directive 2014/26 by Josef Drexl and others, 'Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market COM (2012)372' (2013) 44 IIC 322.

10 The CJEU clarified that collective management must indeed be regarded as a 'service' for the purposes of EU law. See Case 7/82 *GVL v Commission* ECLI:EU:C:1983:52, para 38 and Case C-351/12 *OSA v Léčebné lázně Mariánské Lázně a.s* ECLI:EU:C:2014:110, para 63. Also on the further question whether the Services Directive (2006/123/EC) should be applied to CMOs, see Josef Drexl, 'Collective management of copyrights and the EU principle of free movement of services after the OSA judgment – In favour of a more balance approach' in Kai Purnhagen and Peter Rott (eds), *Varieties of European Economic Law and Regulation* (Springer 2014) 459 and Thomas Riis, 'Collecting societies, competition and the Services Directive' (2011) 6 J. Int. Prop. L. & P. 482; Eleonora Rosati, 'Sviluppi a livello di Unione Europea ed il monopolio SIAE' in Angelo Miglietta (ed), *L'esclusiva legale della SIAE. Profili di diritto interno, comparato ed europeo* (IUSE press 2017) 48. The CJEU clarified that art 16 of the Services Directive does not apply to collective management of copyright. However, general principles on free movement enshrined in the Treaty remain applicable in the field: *OSA v Léčebné lázně Mariánské Lázně a.s* (this note) paras 64-66.

National restrictions on fundamental freedoms are allowed by EU law insofar as they are justified by overriding reasons in the public interest, they are suitable for securing the attainment of such public interest objectives, and they do not go beyond what is necessary to attain them.[11]

Thus, as a first step, one must identify a possible 'reason in the public interest' for the restriction brought about by Art. 180 ICL. The logic behind the exclusion of IMEs is not clearly explained in the preparatory documents of the Italian reform. Therefore, one has to rely on the arguments that have been so far used in national systems to justify restrictions on 'for-profit' collective management. It appears that there are, at least, two possible explanations for such restrictions.

First, in many Member States collecting societies are conceived as 'trustees' that must operate in the exclusive interest of rightholders.[12] An IME is a company owned by shareholders who are not rightholders. The aim of maximising the profit distributed to shareholders is potentially in conflict with the aim of maximising revenues distributed to rightholders.[13] In other words, IMEs involve two potentially conflicting interests. There is therefore the risk that such collecting societies adopt strategies that favour their shareholders to the detriment of rightholders. This, in turn, could be considered contrary to the 'trustee' role that collecting societies are expected to play in national systems. Moreover, since rightholders are not shareholders of IMEs, they are not able to avoid detrimental decisions by influencing the administration of the repertoire from the inside. In summary, keeping IMEs out of the market could be seen as a means of reducing conflicts of interest in copyright management.

There is a second traditional justification for excluding 'for-profit' collecting societies. 'Non-profit' CMOs traditionally adopt a policy of open membership, accepting rightholders as members independently of the profitability of the rights that are entrusted.[14] Conversely, for-profit entities could have an incentive to select works that maximise the value of the repertoire. Therefore, the entry of IMEs on the market could (at least theoretically) lead to a situation where most successful repertoires are managed by closed entities, while niche or local works remain in the hands of CMOs.[15] Should this scenario indeed arise, CMOs would be losing control over the most valuable works, thereby being exposed to the risk of failing to cover their high administrative costs. What's more, fragmentation of repertoires would also increase transaction costs for users, potentially discouraging them from acquiring less valuable repertoires. So, admitting 'for-profit' collecting societies could generate permanent disadvantages for certain forms of cultural production, at least in the long run. Protection of diversity could therefore be a second possible explanation for preventing entry by IMEs.[16]

According to the CJEU case law, effective protection of intellectual property and cultural diversity may justify a restriction in the free movement of services as a matter of principle.[17] Therefore, it appears that the restrictions brought about by Art. 180 ICL are grounded on valid 'reasons in the public interest'.

However, this is not sufficient to conclude that Art. 180 is compatible with EU law. A second step of the analysis is that of verifying whether the restrictions produced by Art. 180 are effectively capable of fulfilling their objectives and whether less restrictive measures to achieve the same purposes are available.

By excluding IMEs from managing copyright, Art. 180 ICL is capable of ensuring that conflicts of interest between rightholders and shareholders do not arise. However, the same result could probably be achieved by means of softer regulation. Instead of entirely excluding IMEs from the market, Italian law could introduce provisions protecting rightholders in their relationships with IMEs. These could, for example, include: introducing a cap on the deductions that IMEs can apply to rights revenue; introducing collective complaint procedures for rightholders against certain resolutions adopted by IMEs; and allowing rightholders to appoint representatives in the relevant corporate bodies of the entity, etc.[18] Therefore, completely excluding IMEs from the market does not seem to be the only possible way to deal with conflicts of interest between shareholders and rightholders and it is certainly not the less restrictive available measure to this end.

11 See Case C-67/98 *Questore di Verona v Zenatti* ECLI:EU:C:1999:514, para 29; Case C-55/94 *Gebhard v Consiglio dell'Ordine degli avvocati e procuratori di Milano* ECLI:EU:C:1995:411, para 37; and, with specific reference to CMOs, *OSA v Léčebné lázně Mariánské Lázně a.s* (n 10) para 70.

12 See Drexl (n 8) 232.

13 Sarti (n 2) 1131.

14 Under the CMO Directive, CMOs now have a duty both to accept the mandate given by rightholders and to admit them as members. The CMO Directive leaves little room for refusals in this regard: see art 5 and art 6 CMO Directive.

15 This potential consequence of liberalisation has been highlighted, among others, by Ruth Towse and Christian Handke, 'Regulating copyright collecting societies: current policy in Europe' (SERCI Conference, Humboldt University Berlin, July 2007) <http://www.serci.org/congress_documents/2007/towsehandke.pdf> accessed 11 November 2022. See also Davide Sarti, 'Liberalizzazioni e Gestione Collettiva dei Diritti di Proprietà Intellettuale' [2014] Orizzonti del Diritto Commerciale 2 <http://images.rivistaodc.eu/f/articoli/80_articolo_DH73u_ORIZZONTI.pdf> accessed 11 November 2022 and Reto M Hilty and Sylvie Nérisson, 'Collective copyright management' in Ruth Towse and Christian Handke (eds), *Handbook of the Digital Creative Economy* (Edward Elgar 2013) 222. See, more recently, on this point the study prepared for the European Commission by Ecorys, IVIR and Erasmus University Rotterdam, 'Study on selected issues relating to the application of the CRM Directive: final report' [2021] Publications Office 77.

16 The idea that liberalisation on the market for copyright management could bring about marginalisation of certain cultural productions is shared by many scholars. See, among others, Adolf Dietz, 'The European Commission's proposal for a directive on collecting societies and cultural diversity – a missed opportunity' (2014) 3 Int. J. of Music Business Research 7; Emanuela Arezzo, 'Competition and intellectual property protection in the market for the provision of multi-territorial licensing of online rights in musical works – lights and shadows of the new European directive 2014/26/EU' (2015) 46 IIC 553.

17 See, with reference to IP protection, Case 262/81 *Coditel v Cine Vog Films* ECLI:EU:C:1982:334; Joined Cases C-403/08 and C-429/08 *FA Premier League v QC Leisure et al.* ECLI:EU:C:2011:631, para 94. See also, in a similar vein, but with regard to protection of cultural interests, Case C-180/89 *Commission v Italy* ECLI:EU:C:1991:78, para 11 and Case C-288/89 *Stichting Collectieve Antennevorziening Gouda ed altri v Commissariaat voor de Media* ECLI:EU:C:1991:323, para 13.

18 Interestingly, in implementing the CMO Directive, some Member States decided to impose more extensive regulation on IMEs compared to what was required by the Directive. On national rules concerning IMEs see the study prepared for the European Commission by Visionary Analytics, 'Study on selected issues relating to the application of the CRM Directive: final report' [2021] Publications Office 71 and 154.

Regarding the second issue raised by IMEs – i.e. the risk of marginalisation of certain repertoires – it must be recalled that the CMO Directive provides that every rightholder has a right to manage his or her rights on an individual basis, without recourse to CMOs. Therefore, even if national rules exclude IMEs from the market, successful rightholders might still administer their rights individually, thus separating their management from that of 'less valuable' repertoires. Article 180 ICL is therefore not *per se* capable of eliminating the risk of marginalisation of 'niche' and local repertoires. Furthermore, even if Art. 180 was effective in eliminating such a risk, the issue could probably be addressed with less restrictive means. Italian law could, for example, open up the market to competition and, at the same time, impose 'universal service obligations' on a specific collecting society supported by proper financial aids (derived either from taxation or from compensation funds financed by other market players).[19] This regulation could also be coupled with the creation of common databases or single portals for the aggregation of licences to reduce transaction costs. Thus, it appears that barring IMEs from entering the market is not the less restrictive way of dealing with issues of possible marginalisation of certain cultural expressions.

Considering all the above reasons, it seems fair to conclude that Art. 180 ICL is not compatible with EU law. At first sight, an objection to this conclusion might be derived from the CJEU judgment in the *OSA* case.[20] Here the CJEU ruled that EU principles on free movement do not preclude the establishment of a legal monopoly in the field of copyright collective management. However, such an objection is not convincing. The CJEU motivated its ruling by stressing the fact that in certain sectors copyright management necessarily requires a territorial infrastructure for controlling the market. In these circumstances having more than one collective manager could be inefficient. A legal monopoly is thereby justified, since there are no equally efficient alternatives to manage copyright in these cases. This reasoning cannot be applied to the case of Art. 180 ICL. The new version of this rule does not provide for a legal monopoly. It clearly says that copyright can be managed in Italy by any entity falling within the category of CMOs. Thus, Art. 180 now allows for the presence of more than one collecting society on the market. In so doing, Italian law implicitly acknowledges that control of the market can now be efficiently carried out by a multitude of competing players. In these circumstances, the entry of IMEs on the market in addition to CMOs should not raise issues with regard to territorial control. In other words, the *OSA* ruling could possibly justify the creation of legal monopolies in certain market sectors where the presence of more than one player is inefficient. However, once national law chooses to open the market to more than one player, this ruling cannot justify the discrimination of certain categories of collecting societies over others without a clear overriding reason of public interest.[21]

III. IMEs that are established in Italy

Having concluded that Art. 180 ICL is incompatible with the free movement principles of the TFEU, the rule must then be considered inapplicable to the extent it would prevent foreign IMEs from issuing licences for the use of works in Italy or Italian rightholders from entrusting their rights to foreign IMEs.

However, EU principles on free movement only apply to cross-border situations, not to purely internal ones such as where an Italian IME is willing to offer its own services to Italian rightholders for the Italian territory.[22] In other words, Art. 180 ICL would remain theoretically applicable to Italian-based IMEs.[23]

This would result in a paradoxical situation since foreign IMEs would be allowed to operate in the Italian market while IMEs based in Italy could only manage copyright abroad. In other words, it is a case of 'reverse discrimination' – the application to Italian players of rules that are less favourable compared to foreign operators. Italian law specifically regulates such situations. According to Art. 53 of Italian Law No. 234/2012, 'Italian regulations or internal practices that are more restrictive compared to the situation and the treatment reserved by the Italian legal system to EU citizens shall not apply'. It follows that Art. 180 ICL should be considered inapplicable not only to foreign IMEs, but also to Italian ones.[24]

What's more, doubts are also raised about the compatibility of Art. 180 ICL with Italian Constitutional principles.[25] By reserving a specific economic activity to only certain players, Art. 180 imposes restrictions

19 Libertini (n 2) 31.

20 *OSA v Léčebné lázně Mariánské Lázně a.s* (n 10). See on this possible objection Davide Sarti, 'Concorrenza e *level playing field* europeo nella gestione collettiva dei diritti d'autore e connessi' [2016] Le Nuove Leggi Civili Commentate 858.

21 On this point see Mario Libertini, 'Gestione collettiva dei diritti di proprietà intellettuale e concorrenza' in Paolo Spada (ed), *Gestione collettiva dell'offerta e della domanda di prodotti culturali* (Giuffrè 2006) 122. See also Spina Alì (n 2) 128 where the author states that traditional arguments for justifying a monopoly in this field (such as the need to simplify monitoring and enforcement) no longer seem to hold, at least in the online world.

22 See Case C-332/90 *Steen v Deutsche Bundespost* ECLI:EU:C:1992:40; Case C-212/06 *Gouvernement de la Communauté Française and Gouvernement Wallon* ECLI:EU:C:2008:178, para 33.

23 There are also situations where an IME established in Italy could be said to be involved in cross-border activity. This is the case, eg where an Italian IME offers its management services for the Italian territory to foreign rightholders. According to the CJEU, the freedom to provide services can be relied upon by an undertaking against the State in which it is established if the services are provided to persons established in another Member State (see Case C-384/93 *Alpine Investments v Minister van Financiën* ECLI:EU:C:1995:126, para 30; Case C-60/00 *Carpenter v Secretary of State* ECLI:EU:C:2002:434, para 29).

24 Interestingly, some proposals involving full liberalisation of the market are currently being examined by the Italian Parliament: see Law Proposal, AC 2716, Modifiche alla legge 22 aprile 1941, n. 633, e altre disposizioni in materia di intermediazione e gestione collettiva dei diritti d'autore e dei diritti connessi, presented 13 October 2020; Law Proposal, AC 1305, Modifiche alla legge 22 aprile 1941, n. 633, e altre disposizioni in materia di disciplina, intermediazione e gestione dei diritti d'autore, presented 25 October 2018; Law Proposal, AC 1735, Modifiche alla legge 22 aprile 1941, n. 633, in materia di intermediazione e gestione dei diritti d'autore e per la liberalizzazione del settore, presented 3 April 2019.

25 The compatibility of the old version of art 180 ICL with Italian Constitution has sometimes been raised in front of the Constitutional Court. So far, the Court has ruled that art 180 ICL is in line with the Constitutional rules. See Const. Court, 17 April 1968, n. 25; Const. Court, 19 April 1972, n. 65; Const. Court, 25 May 1990, n. 241. Rulings of the Italian Constitutional Court can be accessed at <https://www.cortecostituzionale.it/actionPronuncia.do> accessed 11 November 2022.

on the freedom to conduct a business (Art. 41 Italian Constitution) and it qualifies as a case of discriminatory treatment (Art. 3 Italian Constitution). It is true that Art. 180 aims to protect IP and, therefore it could be considered as falling within the Constitutional principle for the protection of competition.[26] This however does not mean that Art. 180 can restrict other Constitutional principles without limits. Rules on IP protection should always be clearly aimed at maximising collective welfare and should never consist of 'unreasonable' measures concerning the aims that they pursue.[27] Therefore, to assess the compatibility of Art. 180 with the Italian Constitutional order, one should carry out an analysis on the 'reasonableness' of the restrictions that this rule generates. For all the reasons already explained with reference to EU principles, it appears that excluding IMEs from the market altogether cannot be regarded as a reasonable way to protect IP. The same objective could be reached through alternative means that would bring about less restrictions on other principles.[28] Thus, it seems fair to conclude that Art. 180 should also be considered incompatible with Italian Constitutional rules.

IV. Regulation of IMEs in national law

IMEs should therefore be allowed to operate in the Italian market, irrespective of the Member State of establishment. However, this does not exclude the fact that IMEs can be potentially problematic. As said above, such entities could raise potential conflicts of interest and produce risks for cultural diversity. These issues are not resolved by the CMO Directive, and will therefore need to be addressed by national regulators.

There is however a last point worth analysing: could national rules regulating these problems be applied to foreign IMEs or just concern national players? In other words, are national legislators competent to regulate foreign IMEs operating in the national territory? The answer to this issue requires analysis of a further question, namely whether the existence of EU harmonisation rules in a certain field allows Member States to apply their own more stringent rules to foreign players.

EU case law identified different forms of harmonisation. On the one hand, there is the case where a directive regulates all the interests that are involved in a specific matter (so-called 'exhaustive' harmonisation). In such a case EU regulation ensures that all the relevant interests are properly protected in each Member State. Therefore, although in certain cases Member States are allowed to enact more stringent standards, additional national rules cannot be applied to foreign players.[29] On the other hand, there is the case in which EU rules only regulate certain aspects of a specific matter (so-called 'partial' harmonisation). Here, a distinction is needed. To the extent that a problem is covered by harmonisation rules, Member States shall not require foreign players to comply with more restrictive national standards. Conversely, with regard to all the matters that are not covered by the directive, Member States can demand that foreign players comply with national standards, at least in so far as such national rules are compliant with general EU principles.[30]

As already said, the CMO Directive mainly regulates collecting societies falling within the category of CMOs. As far as IMEs are concerned, only a very limited set of principles is introduced by EU law. However, these rules do not deal with the specific conflicts of interest raised by IMEs, nor with the potential impacts on cultural diversity that entry of IMEs on national markets could produce. Thus, the EU regulator seems to have opted for partial harmonisation in this field. Such a conclusion also seems to be confirmed by another fact: collective management plays an important role in the protection of national cultural expressions, something that is recognised by the Directive itself (see recital 3 CMO Directive). As already said, IMEs raise several questions that are precisely related to the protection of cultural diversity. On issues of culture the EU is only given a 'supporting competence' (Art. 6 TFEU). This means that the EU can only support, complement or coordinate the action of Member States, but cannot impose on them forms of harmonisation or regulation for the attainment of objectives of cultural protection (see Art. 167, para. 5 TFEU). Therefore, EU law was probably not even allowed to exhaustively regulate a 'culturally sensitive' topic such as IMEs.[31]

As a result, it seems fair to conclude that Member States cannot impose restrictive rules to foreign players about matters that are specifically regulated by the CMO

26 See on this point Mario Libertini, 'Impresa, proprietà intellettuale e Costituzione' [2005] Annali Italiani del Diritto d'Autore (AIDA) 63.

27 Mario Libertini, 'Tutela e promozione delle creazioni intellettuali e limiti funzionali della proprietà intellettuale' [2014] Annali Italiani del Diritto d'Autore (AIDA) 299.

28 As already noted, some Member States indeed decided to impose specific rules on IMEs instead of excluding them. For example, in French law, IMEs are subject to some rules on the distribution of royalties (see art L 324-12 Code de la Propriété Intellectuelle), on the conditions of licences (art L324-6 CPI), on multi-territorial licensing (art L325-1 ff. CPI), etc. Under Austrian law IMEs are subject to several of the rules that apply to CMOs (see § 4 Verwertungsgesellschaftgesetz). In Spanish law, IMEs have an obligation to conclude collective contracts with associations of users (see art 165 Ley de Propriedad Intelectual). For a deeper overview on national regulations on IMEs see the study prepared for the European Commission by Visionary Analytics, 'Study on selected issues relating to the application of the CRM Directive: final report' [2021] Publications Office 71 and 154.

29 Case C-491/01*British American Tobacco* ECLI:EU:C:2002:741, para 77; Case C-150/88 *Parfümerie Fabrik v Provide* ECLI:EU:C:1989:594, para 28.

30 See on this point Amedeo Arena, 'The twin doctrines of primacy and pre-emption' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law*, vol I (OUP 2018) 334; Case C-313/94 *Graffione v Ditta Fransa* ECLI:EU:C:1996:450, para 29; Joined Cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen v De Agostini et al.* ECLI:EU:C:1997:344; Case C-547/14 *Philipp Morris v Secretary of State for Health* ECLI:EU:C:2016:325, para 71.

31 This point is also highlighted in Mazziotti (n 2) 77. The fact that CMO Directive brings about merely partial harmonisation is further confirmed by some of its recitals. Here it is clearly stated that there are several aspects of collective management with which the rules of harmonisation do not intend to 'interfere' and which thereby remain outside the scope of the harmonisation. See, eg recital 12 where it is stated that the Directive will not 'interfere' with specific arrangements on collective management adopted by Member States. See also recital 50: 'This Directive should remain neutral as regards the prior authorisation and supervision regimes in the Member States, including a requirement for the representativeness of the collective management organisation, in so far as those regimes are compatible with Union law and do not create an obstacle to the full application of this Directive'. See on this point Mihály Ficsor, 'Collective management and multi-territorial licensing: key issues of the transposition of Directive 2014/26/EU' in Irini A Stamatoudi (ed), *New developments in EU and International Copyright Law* (Wolters Kluwer 2016) 228.

Directive. On the other hand though, for issues that are not touched upon by the Directive, each Member State can apply its national rules to foreign players, provided that such rules do not pose excessive restrictions on EU fundamental freedoms and provided that they do not deprive EU law of any meaningful effect.[32]

V. Conclusion

This work had the purpose of dealing with the question whether a national rule such as Art. 180 ICL, which prevents IMEs from entering the market for copyright management, is compatible with EU law. The conclusion reached here is that, although excluding IMEs can be theoretically connected to legitimate objectives, there are less restrictive ways of reaching the same purposes. Consequently Art. 180 ICL appears to be a disproportionate restriction on the principles on free movement of the TFEU. It should therefore be considered incompatible with EU law. This does not mean, though, that national law should admit IMEs in the market without regulating them. A Member State might (and arguably should) adopt rules to deal with the specific problems raised by IMEs. Such national rules might also be applied to entities that operate on the national market while being established abroad. This is because the CMO Directive cannot be qualified as an instrument of 'exhaustive' harmonisation, but rather as a form of 'partial' harmonisation.

32 This position seems to be shared also by the study prepared for the European Commission by Ecorys, IVIR and Erasmus University Rotterdam, 'Study on selected issues relating to the application of the CRM Directive: final report' [2021] Publications Office 80. It should be noted that the above conclusion could theoretically be challenged by referring to the contents of arts 36 and 37 of the CMO Directive. According to these provisions, national authorities are allowed to exercise their powers only over collecting entities based in their-own territory. In light of the foregoing, one could infer that national rules that set out requirements or duties on IMEs can be applied only to entities based in such national territory. This reading of the Directive is however not convincing; arts 36 and 37 only refer to compliance with rules 'adopted pursuant to the requirements laid down in this Directive', ie with rules concerning harmonised aspects (art 36, para 1 and art 37, para 2). As already said, there is no question that with reference to such matters Member States are not allowed to demand that foreign entities respect more restrictive national standards. On the other hand, though, arts 36 and 37 do not say anything on national rules concerning matters not covered by the Directive. With regard to these matters, each Member State can still exercise its full competence and apply its own rules to foreign players.