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"Ex-ante" exemption and "Ex-post" reimbursement schemes for Private Copying Levies under EU law and their implementation across Member States' regimes

1. Scope

This paper concerns "ex-ante" exemption and "ex-post" reimbursement schemes for private copying levies applicable to business and professional users from the perspective of the jurisprudence of the Court of Justice of the European Union ("CJEU").[1] It provides an overview of the CJEU's mandatory requirements that "ex-ante" exemptions and "ex post" reimbursement schemes for business/professional use must have to be compatible with EU law. The effects of these schemes have been analysed in business models that are present in the industry to identify the shortcomings of the existing national schemes (where they exist) in the light of commercial reality.

This assessment evidences that there is a general and pervasive incompatibility between national schemes and the jurisprudence of the CJEU. Over time, this incompatibility has been expanding. Numerous CJEU rulings clarifying the application of EU law to the Member States' national private copying regimes have been, for the most part, ignored. As the guardian of the Treaties, the European Commission ("EC") must seek an implementation of national schemes in the Member States that are coherent, practical and compatible with EU law as interpreted by the CJEU.

In this context, Annex I provides an overview of the disparities of "ex-ante" exemption and "ex-post" reimbursement schemes between the EU Member States where such schemes have been implemented. As evident in Annex I, there is a high diversity of national situations between the Member States including:

- Neither an "ex-ante" exemption scheme or an "ex-post" reimbursement scheme is available (e.g. in Greece, Poland and Czech Republic);

- No "ex ante" exemption schemes but only ineffective "ex-post" reimbursement schemes are available (e.g. in Belgium, Estonia and Lithuania);

- "Ex ante" exemption schemes are available only for very narrowly defined categories of users but not for professional users in general (e.g. in Austria, Latvia, Portugal, Slovakia, Slovenia and Romania[2]); and,

- "Ex ante" exemption schemes are available but subject to prior registration with the relevant collecting society, either in the form of a prior certification (e.g. in Spain) or by requiring entering into a prior agreement (e.g. in France, Italy, Germany, The Netherlands, Denmark, Sweden and Croatia).

Moreover, in some Member States (e.g. in The Netherlands and Sweden) there is an attempt, in spite of the national law, to shift liability for payment of levies from manufacturers / importers to the last point of sale by means of a series of contractual agreements. However, these contractual

[1] This paper does not address legal issues concerning private copying levies that arise from the free movement of goods articles contained in the Treaty on the Functioning of the European Union (Articles 34 - 36).
[2] Romania has a very particular regime, as no "ex post" reimbursement system seems to be available.

DIGITALEUROPE
Rue de la Science, 14 - 1040 Brussels [Belgium]
T. +32 (0) 2 609 53 10 F. +32 (0) 2 431 04 89
www.digitaleurope.org | info@digitaleurope.org | @DIGITALEUROPE
Transparency register member for the Commission: 64270747023-20

arrangements are "workarounds" which are administratively burdensome and the statutory liability still remains with the manufacturers / importers.

In fact, the ideal resolution to the issues concerning exoneration of levies for business / professional use and/or exports is EU legislation shifting the liability of levy payment from the manufacturer / importer to the last point of sale, as recommended by the European Mediator Mr. Antonio Vitorino.[3] However, at a minimum, the EC must ensure that simple, clear, predictable and effective "ex-ante" exemption schemes are implemented by the Member States, in accordance with settled case-law of the CJEU and are complemented with effective ex-post reimbursement schemes.

2. "Ex-ante" exemptions and "ex-post" reimbursement schemes

2.1. Main principles in the jurisprudence of the CJEU

In the *Padawan* case[4], the CJEU held that:

- **There must be a necessary link between the application of private copying levies to devices and their use for private copying**, and

- **The indiscriminate application of private copying levies to all devices does not comply with Article 5(2) of Directive 2001/29.**

Further elaborating on these principles ("the *Padawan* principles"), the CJEU has clarified through its case-law that:

- **Where the devices are made available to (1) natural persons (2) for private purposes (in other words, when made available to "consumers"[5]), there is a presumption established that such devices will be used for private copying.**

  Judgment of 21 October 2010, Padawan, C 467/08, EU:C:2010:620, paragraphs 54-56:

  > 54 On the other hand, where the equipment at issue has been made available to natural persons for private purposes it is unnecessary to show that they have in fact made private copies with the help of that equipment and have therefore actually caused harm to the author of the protected work.
  >
  > 55 Those natural persons are rightly presumed to benefit fully from the making available of

[3] "*Recommendations resulting from the Mediation on Private Copying and Reprography Levies*" by Antonio Vitorino (31 January 2013), available at:

http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf

[4] Judgment of 21 October 2010, Padawan, C 467/08, EU:C:2010:620, paragraphs 52-53 and 54-57.

[5] The legal definition of "*consumer*" under EU law is equivalent to the concept of the beneficiaries of the private copying exception ("*natural person for private use and for ends that are neither directly nor indirectly commercial*"), which excludes legal persons and natural persons acting as professionals. See for example Article 2.1 of Directive 2011/83/EU on consumer rights, amending Directive 93/13/EEC and Directive 1999/44/EC and repealing Directive 85/577/EEC and Directive 97/7/EC, which defines consumer as "*any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession*", or article 4.1.d of Directive 2013/11/EU on alternative dispute resolution for consumer disputes, which provides a similar definition.

that equipment, that is to say that they are deemed to take full advantage of the functions associated with that equipment, including copying.

56 It follows that the fact that that equipment or devices are able to make copies is sufficient in itself to justify the application of the private copying levy, provided that the equipment or devices have been made available to natural persons as private users.

- **Subsequently, the CJEU has emphasised that the above presumption is only justified for natural persons and that it is rebuttable. However, no presumption of private copying is justified when devices are not made available to natural persons.**

Judgment of 11 July 2013, Amazon.com International Sales and Others, C 521/11, EU:C:2013:515, paragraph 43, 44, and 45:

43 Given the practical difficulties connected with the determination of the private purpose of the use of a recording medium suitable for reproduction, the establishment of a rebuttable presumption of such use when that medium is made available to a natural person is, in principle, justified and reflects the 'fair balance' to be struck between the interests of the holders of the exclusive right of reproduction and those of the users of the protected subject-matter.

44 It is for the national court to verify, in the light of the particular circumstances of each national system and the limits imposed by Directive 2001/29, whether the practical difficulties involved in determining whether the purpose of the use of the media at issue is private justify the establishment of such a presumption and, in any event, whether the presumption established results in the imposition of the private copying levy in cases where the final use of those media clearly does not fall within the case referred to in Article 5(2)(b) of Directive 2001/29.

45 In those circumstances, the answer to the second question is that Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that, in the context of a system of financing of fair compensation under that provision by means of a private copying levy to be borne by persons who first place recording media suitable for reproduction on the market in the territory of the Member State concerned for commercial purposes and for consideration, that provision does not preclude the establishment by that Member State of a rebuttable presumption of private use of such media where they are marketed to natural persons, where the practical difficulties of determining whether the purpose of the use of the media in question is private justify the establishment of such a presumption and provided that the presumption established does not result in the imposition of the private copying levy in cases where the final use of those media clearly does not fall within the case referred to in that provision.

There can be no presumption of private copying when devices are acquired by legal persons and in no event can legal persons be made ultimately liable for payment of private copying levies to fund fair compensation payments.

Judgment of 9 June 2016, EGEDA, C-470/14, EU:C:2016:418, paragraphs 30, 31 and 36:

30 It follows that, unlike natural persons who fall within the private copying exception

under the conditions specified by Directive 2001/29, legal persons are in any case excluded from benefiting from that exception and thus they are not entitled to make private copies without receiving prior authorization from the rightholders of the protected works or subject matter concerned.

36 It follows from that line of case-law that, as EU law currently stands, although Member States are indeed free to establish a scheme under which legal persons are, under certain conditions, liable to pay the levy intended to finance the fair compensation referred to in Article 5(2)(b) of Directive 2001/29, such legal persons should not in any event be the persons ultimately actually liable for payment of that burden.

Judgment of 5 March 2015, Copydan Båndkopi, C 463/12, EU:C:2015:144, paragraphs 47 and 50:

47 However, it is apparent from the Court's case-law that, in any event, that levy cannot be applied to the supply of reproduction equipment, devices and media to persons other than natural persons for purposes clearly unrelated to private copying (see, to that effect, judgments in Padawan, EU:C:2010:620, paragraph 52, and Amazon.com International Sales and Others, EU:C:2013:515, paragraph 28).

50 It is apparent from the considerations set out at paragraph 47 above that the placing on the market of such cards must be exempt from the levy in question, inter alia, where the producer or importer concerned establishes that he has supplied those cards to persons other than natural persons for purposes clearly unrelated to copying for private use.

Judgment of 22 September 2016, Microsoft Mobile, C-110/15, EU:C:2016:717, paragraph 36:

36 However, it is apparent from the Court's case-law that, in any event, that levy must not be applied to the supply of reproduction equipment, devices and media to persons other than natural persons for purposes clearly unrelated to private copying (Judgment of 5 March 2015, Copydan Båndkopi, C 463/12, EU:C:2015:144, paragraph 47 and the case-law cited).

- **In addition, no prior registration (in the form of a mere registration, a prior certification, execution of an agreement or otherwise) may be required by a collecting society in order to be eligible for an "ex ante" exemption.**

Judgment of 5 March 2015, Copydan Båndkopi, C 463/12, EU:C:2015:144, paragraphs 47 and 51:

51 Furthermore, it should be noted that the practical difficulties associated with the identification of the final users and the collection of the levy in issue cannot justify restricting the application of that exemption to the supply of mobile telephone memory cards to business customers registered with the organisation responsible for administering the private copying levy. Such a restriction would give rise to different treatment among the various groups of economic operators, since, in so far as concerns the private copying levy, those groups are all in a comparable situation,

irrespective of whether they are registered with that organisation.

Judgment of 22 September 2016, Microsoft Mobile, C-110/15, EU:C:2016:717, paragraph 36, and in particular, paragraph 56:

56 Having regard to all the above considerations, the answer to the questions referred is that EU law, in particular, Article 5(2)(b) of Directive 2001/29, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, that, on the one hand, subjects exemption from payment of the private copying levy for producers and importers of devices and media intended for use clearly unrelated to private copying to the conclusion of agreements between an entity which has a legal monopoly on the representation of the interests of authors of works, and those liable to pay compensation, or their trade associations, and, on the other hand, provides that the reimbursement of such a levy, where it has been unduly paid, may be requested only by the final user of those devices and media.

2.2. A misleading point about the requirement(s) to be eligible for exoneration

In order to exonerate the application of the levy to legal persons, the jurisprudence of the CJEU does not require proof of both conditions of (1) being a legal person, and (2) using the devices for purposes clearly unrelated to private copying. The second condition is automatically met by legal persons, given that legal persons *"are in any case excluded from benefiting from that* [private copying] *exception"*[6].

The references contained in the jurisprudence of the CJEU referring either to "*acquired by persons other than natural persons for purposes clearly unrelated to private copying*"[7], "*persons other than natural persons for purposes clearly unrelated to copying for private use*"[8], or, the like, cannot be interpreted as requiring that there are two conditions to be met. The second part of this statement is the automatic consequence of not being a natural person. In fact, the reference point for the second part of this statement derives from the literal formulation of the prejudicial question that was originally referred by the Court of Appeal of Barcelona to the CJEU in the *Padawan* case[9]:

4. If a Member State adopts a private copying "levy" system, is the indiscriminate application of that "levy" to undertakings and professional persons who clearly purchase digital reproduction devices and media for purposes other than private copying compatible with the concept of "fair compensation"?

[6] Judgment of 9 June 2016, EGEDA, C-470/14, EU:C:2016:418, paragraphs 30.

[7] Judgment of 21 October 2010, Padawan, C 467/08, EU:C:2010:620, paragraph 53.

[8] Judgment of 5 March 2015, Copydan Båndkopi, C 463/12, EU:C:2015:144, paragraph 50.

[9] The decision of the Court of Appeal of Barcelona of 2 of March 2011 resolving the litigation that was the object of the prejudicial proceedings is very clear in this point, when the Court provides in paragraphs 16 and 18 that "*(…) the imposition of the levy is only justified on digital media sold or made available to private individuals, presumably to be dedicated to private purposes, and not to a professional activity. It makes no sense to charge the financial burden of the "fair compensation" for private copying on a company or a professional person, since they acquire digital media for their business or professional activity"* and "3º *Therefore, in the matter at hand, SGAE is entitled to apply a levy, whose tariffs must keep the fair balance among of the interests concerned, to the digital media sold to private individuals, but not to companies and professional persons."*

There is no link between private copying and acquisition of devices by legal persons and professionals who are inherently (by the fact of not being a natural person acting in private capacity) acquiring such devices "for purposes clearly unrelated to private copying" as explained by Advocate General (AG) Wahl in his Opinion delivered on 4 May 2016, Microsoft Mobile, C-110/15, EU:C:2016:326, paragraphs 45 and 46:

> 45 No such link exists where the devices and media are intended for use clearly unrelated to private copying. Indeed, if the devices and media in question are supplied for professional use, no harm (related to private copying) occurs. While it may seem counterintuitive, that is so also where natural persons can use equipment, devices and media supplied to business customers or public entities to make copies for private purposes.
>
> *46* As explained, the Court's interpretation of Article 5(2)(b) of Directive 2001/29 leaves media acquired by businesses and public entities outside the scope of that provision. Therefore, that a natural person (as an employee) takes copies for private purposes on such media is beside the point. Given that the equipment has been acquired for professional use, we no longer remain in the sphere of private copying. Quite simply, those situations fall beyond the scope of the private copying exception. Instead, they are covered by the general rule of licencing. Any copy made without express permission in such a context would be illegal. (19)
>
> (19) The SIAE pointed out at the hearing that a by no means negligible part of equipment, devices and media acquired by businesses and public entities are used for both professional and private purposes (mixed use). In its view, that justifies the application of the levy also in relation to equipment acquired by business customers and public entities. However, for reasons just explained, that argument is quite simply stillborn.

Therefore, in the absence of a link to a natural person purchasing devices for private use (such as private consumers purchasing in a retail store or online), the devices should be exempted from levies. Otherwise, the national private copying regime cannot be compatible with EU Law, as the CJEU stressed in the abovementioned case-law.

2.3. Schemes for exoneration of business / professional users

The CJEU has established that when a Member State's legislation or regulations impose indiscriminate application of private copying levies upon the importation of devices on its national territory, there are two complementary "correction" systems that the Member States must implement in order to be compatible with EU law in their national levy regimes.[10]

1) **"Ex-ante" exemption schemes**: When devices are purchased by legal entities, public bodies, or professional persons, private copying levies are not applicable and no payment obligation to a

[10] See the CJEU's rulings, Copydan Båndkopi (C-463/12, EU:C:2015:144) at paragraph 55, and Microsoft Mobile (C-110/15, EU:C:2016:717) at paragraph 52.

national collecting society can be imposed. To avoid repetition, we refer to the case-law cited above[11].

Furthermore, AG Wahl has indicated that certain devices which are clearly designed for only commercial use should be exempted without the need to confirm the purchaser's identity due to the nature of these devices' technical specifications which makes their private use impractical, uneconomical, or not feasible.[12]

2) **"Ex-post" reimbursement schemes**: Member States must have an effective "ex post" reimbursement schemes in order to have a complete system of remedies available. For instance, when, in spite of the implementation of an "ex ante" exemption scheme in a Member State, a private copying levy has been paid upon the sale of a device and the payer is a legal entity or a professional person, the Member State's collecting society must be required to refund the amount of the applicable private copying levy to the payer upon proof of payment. If an "ex ante" exemption scheme is properly implemented and functioning through the distribution system in a Member State (exempting intermediate resellers of devices in addition to importers / manufacturers), then "ex post" reimbursements should be limited to when the final purchaser is legal person or professional entity (for instance, when a legal entity or professional person purchases a device in a retail store which is which not equipped to recognize an "ex ante" exemption at the point of sale), and, when the final purchaser is a natural person who can prove that the device was not used for private copying (such as using a device for storage private photos), and, in an "export exoneration" situation as discussed below in section 2.5.

2.4. CJEU's preference for "Ex-ante" exemption over "Ex-post" reimbursement schemes

The CJEU has provided clear instructions as to how these schemes should be deployed nationally. In *Amazon*[13], the CJEU provided that national private copy regimes where levies are applied indiscriminately are prohibited (because no *ex ante* exemption scheme exists) and will be only become compliant with Directive 2001/29/EC when certain critical conditions are met:

(i) First, it is substantiated that the lack of an "ex-ante" exemption scheme "*is warranted by sufficient practical difficulties in all cases*"[14]. In that context, there must be an analysis by the

[11] Judgment of 9 June 2016, EGEDA, C-470/14, EU:C:2016:418, paragraphs 30 and 36; Judgment of 5 March 2015, Copydan Båndkopi, C-463/12, EU:C:2015:144, paragraphs 47 and 50; and Judgment of 22 September 2016, Microsoft Mobile, C-110/15, EU:C:2016:717, paragraph 36.

[12] AG Wahl stated in his Microsoft Mobile Opinion,delivered on 4 May 2016, Microsoft Mobile, C-110/15, EU:C:2016:326, paragraph 32: "In *Padawan*, the Court held that the indiscriminate application of the private copying levy to digital reproduction devices and media acquired for purposes clearly unrelated to private copying does not comply with Article 5(2) of Directive 2001/92. To my mind, that statement excludes, from the outset, from the sphere of the private copying exception equipment, devices and media that are clearly designed for professional use." In such regard, the presence of certain capabilities or specifications in the devices may serve as appropriate criteria to determine when a product has been "clearly" designed for professional use such as pre-loaded professional operative systems (e.g. Windows Pro editions) for PCs or the specifications of multifunction printers (e.g. printers designed for enterprise use with high copying speeds, weight, etc.).

[13] Judgment of 11 July 2013, Amazon, C-521/11, EU:C:2013:515, paragraphs 33-37 and 41-45.

[14] Judgment of 11 July 2013, Amazon, C-521/11, EU:C:2013:515, paragraph 35. See also Judgment of 5 March 2015, Copydan Båndkopi, C 463/12, EU:C:2015:144, paragraphs 45-51.

national court that demonstrates that sufficient practical difficulties exist to prevent implementation of such "ex ante" exemptions in all (not some) scenarios[15].

(ii) Second, in addition to "ex ante" exemptions, there must be a right to reimbursement, which is effective and does not make any repayment of levies excessively difficult, in the event that final user is a legal entity, or, a natural person acting in a professional capacity, or, a natural person acting in a private capacity but is able to prove that a device was not used for private copying.

In practical terms, an effective "ex ante" exemption scheme should exonerate payment of levies for the vast majority of devices that would qualify for exoneration. The remaining devices qualified for levy exoneration that are not captured for an "ex ante" exemption should be subsequently redeemed by an "ex post" reimbursement of paid levies. In other words, it is extremely important to have a complete system of remedies with a simple and effective "ex post" reimbursement scheme to exonerate devices from levies in transactions that could not be effectively exempted from levy payment by means of an "ex ante" exemption. Failure to adhere to these conditions, as well as the *Padawan* principles detailed above, renders a national levy scheme incompatible with EU law.

In addition, the CJEU in *Amazon*[16] also clarified that *"account must be taken of the scope, the effectiveness, the availability, the publication and the simplicity of use of the ex-ante exemption"*. Moreover, if sufficient practical difficulties warrant the absence of an "ex-ante" exemption for specific scenarios, then *"the scope, the effectiveness, the availability, the publication and the simplicity of use of the right of reimbursement"* must be also assessed in order to determine whether such a right of reimbursement is effective and does not make repayment difficult.[17]

As will be examined below, only the "ex-ante" exemption schemes that are broad, effective, widely available, publicly known and simple to use can mitigate the inefficiencies and economic waste that results from private copying levy systems.

2.5. Export exoneration

In addition to levy exonerations for business / professional use, and apart from the obligations that may result from the provisions of the Treaty on the Functioning of the European Union (TFEU) that concern the free movement of goods (Articles 34–36), the jurisprudence of the CJEU also provides that devices that are subject to levies in a Member State but are subsequently exported to a second Member State should be exonerated from the application of levies in the first Member State of import.

> Judgment of 11 July 2013, Amazon.com International Sales and Others, C 521/11, EU:C:2013:515, paragraph 43:

[15] For example, it was shown in the CJEU's Copydan ruling (see paragraph 51) that the "practical difficulties" in the Danish private copying regime did not justify private copying levies imposed upon importers who could be denied an "ex ante" exemption by the collecting society on subjective conditions, and, who could not (due the complexities of their national distribution systems for the sales of their devices) identify the final users of their imported devices which prevented them from claiming a "ex post" reimbursement of the private copying levies that they had paid upon importation.

[16] Judgment of 11 July 2013, Amazon, C-521/11, EU:C:2013:515, paragraphs 35-36.

[17] As explained in footnote 15 discussing the CJEU's Copydan ruling.

63 Article 5(2)(b) of Directive 2001/29 provides for fair compensation, not for the placing on the market of recording media suitable for reproduction, but 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. There is no such reproduction in the case of a transfer from one Member State to another Member State of recording media suitable for reproduction.

64 Given that a Member State which has introduced the private copying exception into its national law and in which the final users who privately reproduce a protected work live must ensure, in accordance with its territorial competence, the effective recovery of the fair compensation for the harm suffered by those entitled, the fact that a levy intended to finance that compensation has already been paid in another Member State cannot be relied on to exclude the payment in the first Member State of such compensation or of the levy intended to finance it.

65 However, a person who has previously paid that levy in a Member State which does not have territorial competence may request its repayment in accordance with its national law.

Therefore, if an "ex ante" exemption is not existing and levies have been paid upon importation, then an "ex post" reimbursement scheme also must be established for devices that are exported from a Member State given that such devices have caused no harm within the exporting Member State that could justify the imposition of a private copying levy.

3. Business models and implications of levy regimes

3.1. Description and complexity

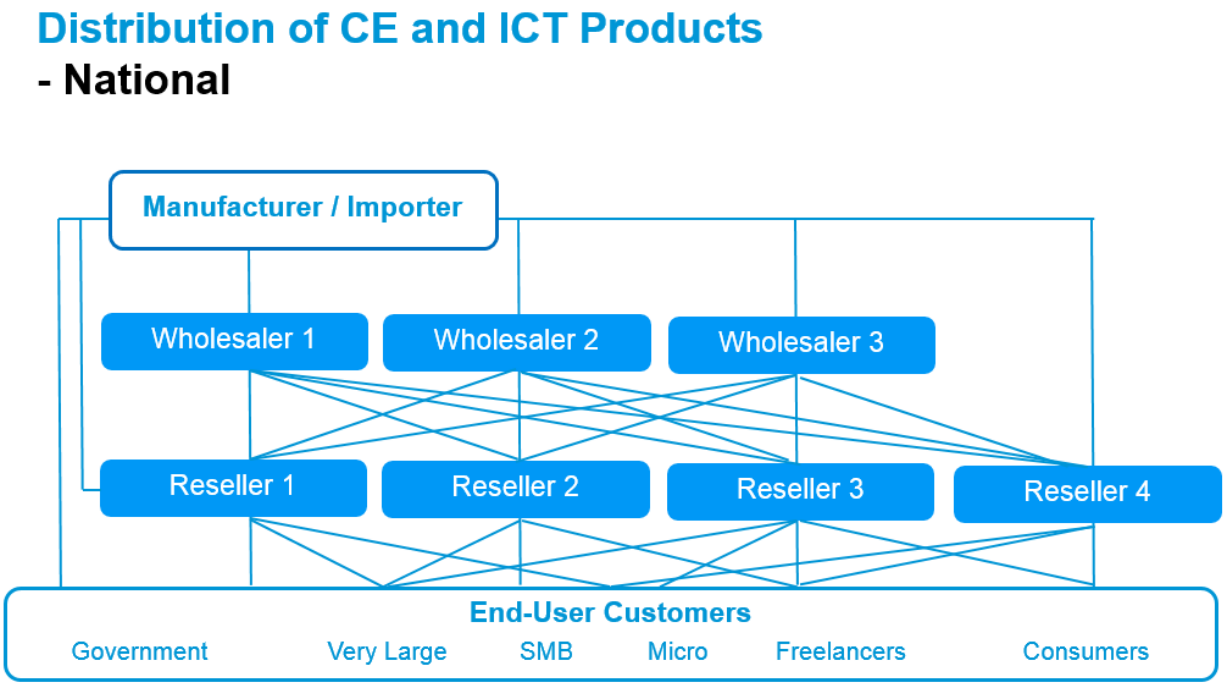
Today's business environment for the distribution of consumer electronic ("CE") and Information and Communication Technology ("ICT") products is complex and diverse with free movement of trade across the EU. In that regard, in order to ensure that the products reach relevant customers, distribution and supply chain models are characterized in most instances by being multi-channel, multi-tier and/or multi-national.

CE and ICT vendors have blended distribution models and sell to end users directly and/or via complex channels, through brick & mortar premises, online or combining both channels in hybrid models. These channels include differing layers of intermediaries in parallel, such as wholesalers, commercial resellers, Original Equipment Manufacturers ("OEMs"), consumer resellers (retailers), online resellers, etc. as well as selling directly to businesses and consumers. Such an "omni-channel" approach is designed and aimed at reaching out to every end user, with products sold directly or indirectly, often competing with one another, redounding in greater competition to the benefit of customers and consumers.

In addition, supply chains are not confined to national borders or designed to just provide efficiency to the national resellers and retailers. On the contrary, supply chains are designed to ensure optimization of international logistical flows, reducing inventory costs, with savings materializing in increased price competitiveness that enable companies to price aggressively.

In the graphics below are some examples of these business models to illustrate the complexity and diversity of distribution of digital products. The complexity of this scheme is multiplied when considering the international perspective.

Graphic 1: National Multi-tier distribution of CE and ICT products

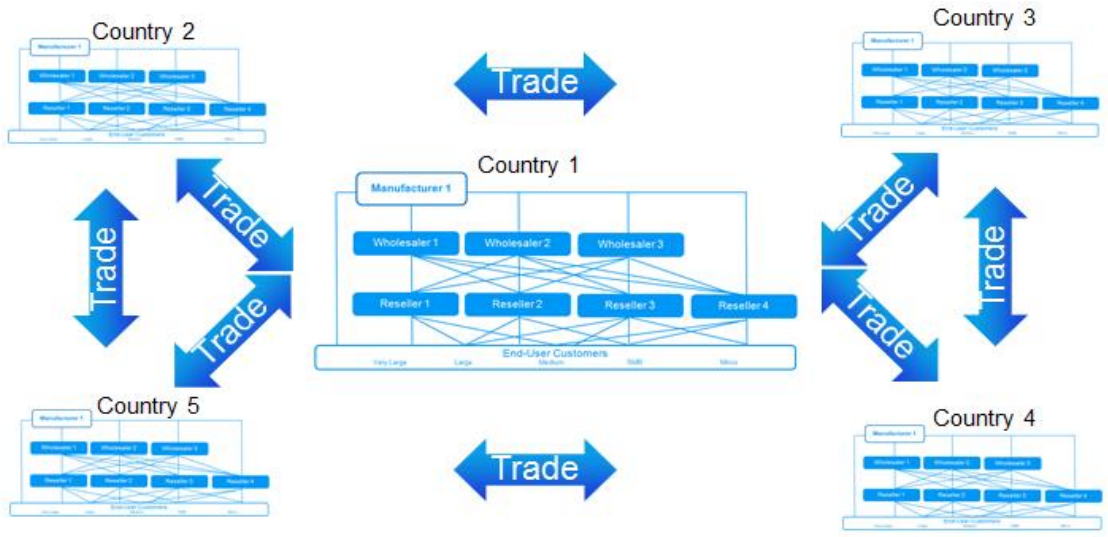


As can be inferred from these graphics, the application of indiscriminate private copying levies affects the entire distribution chain, creating enormous practical difficulties for manufacturers, wholesalers, resellers and professional end users. This situation is aggravated by multinational imports through several major European ports used by manufacturers as primary hubs to import into other Member States.

Vendors of professional digital products engage in sales transactions with end users, and, in addition, an increasingly part of their revenues is generated through the provision of devices "as a service" to professional end users (for example, managed print services, where user pays for each printed page, not for hardware on the one hand and supplies on the other hand). In those transactions, no purchase may necessarily take place either at the beginning or at the expiration of the services contract. While these transactions should be exempted in reference to the above case-law, "ex-ante" exemptions schemes generally refer only to purchases or acquisition of devices, hence excluding these types of commercial transactions. A similar situation can be found in leasing contracts by financial entities, which acquire the devices from manufacturers or importers to make them available to the professional end users.

Graphic 2: Multi-national distribution of CE and ICT products

Distribution of CE and ICT Products - International



To add more complexity, a substantial portion of these commercial transactions are made without knowledge of the final destination or user of the devices (particularly in the case of multi-level distribution). This asymmetric information flow creates uncertainty as to the party ultimately liable for paying private copying levies and many times results in unjustified duplicate payments that are unrecoverable due to the cross-border nature of many of these transactions and the burdensome administrative procedures for claiming "ex post" reimbursements (if they, in fact, even exist).

3.2. "Ex-ante" exemption schemes are a necessary step towards compliant levy regimes

Simple "ex-ante" exemption schemes work efficiently in the case of direct commercial transactions, where the manufacturer / importer is making a direct sale to the final end user or can provide traceability as to the final end user. However, as illustrated in the graphics above, the reality present in the market for distribution of digital products is that most of the commercial transactions take place indirectly, with more than one company being part of the distribution chain and rather often, the identity of the end user is unknown when the product is first placed on the market by the manufacturer or the importer, thus making it impossible for the latter to claim an "ex-ante" exemption if it is conditioned upon knowing the identity of the end user (which was the case in Denmark as discussed in the CJEU's Copydan ruling).

This issue is mitigated when an "ex ante" exemption is applied throughout the distribution chain (including not only importer / manufacturers but also all intermediate resellers) on the presentation of objective and simple criteria such as proof that the sale was made to a legal entity on the basis of a

VAT number or Chamber of Commerce registration. It can also be mitigated if devices clearly designed for professional use are exempted, as indicated by AG Wahl in his Microsoft Opinion.[18]

Presently, levy regimes in place in several Member States require that, in order to be eligible for an "ex ante" exemption, sellers or end-users must register with the Collecting Society and be granted with a prior certification to benefit from such exemption, or even signing a prior agreement with the collecting society forcing it to accept other conditions that may be onerous. These requirements are not only in contravention of the CJEU's case-law[19] but also of the conditions set forth in *Amazon*, as discussed above which require an effective and simple "ex-ante" exemption scheme.

3.3. Sole reliance on "Ex-post" reimbursement schemes do not practically work

Many Member States have only implemented "ex-post" reimbursement schemes which exacerbate the problem with seeking levy exoneration for qualified devices:

- First, reliance on only an "ex post" reimbursement system represents a clear administrative burden for end-users attempting to seek any reimbursement (and for collecting societies to process it) resulting in direct and indirect costs that will usually exceed the levy amount to be refunded.

- Second, the imposition of the levy system affects each point of a product's route to market through the entire distribution chain and in its wake, each layer of distribution carries the additional heavy administrative burden. This burden is severely aggravated when taking into account that under the above multi-tier distribution system, where the levy may not be itemized on each invoice, the chain of evidence required to seek an "ex post" reimbursement is frequently impossible to meet.

- Third, all "ex-post" reimbursement schemes require that the full levy is paid when the product is first put on the market; however, this levy cannot always be passed on to the end user either in full or partially. Independent research has demonstrated this latter point in particular where products are subject to strong competition and/or where the retailers' purchasing power is concentrated.[20]

- Fourth, relying on only "ex post" reimbursement schemes has a debilitating effect on cross-border trade because importers must finance the payment of the levy until reimbursement is made. For instance, when levied products are imported and then exported (assuming a refund scheme is available), the importer pays the levy upon importation and must wait for the reimbursement of the levy paid after exportation for long periods of time. This difficult financial position is exacerbated further when the exporter may also be required to pay a further levy on the same product in the second Member State into which they are importing. This pre-financing is financially crippling for many companies, who have to wait for long periods (over 12 months in many cases) prior to reimbursement without interest. It becomes an administrative nightmare when the importer who paid the levy is not the exporter of the

[18] See footnote 12.

[19] Judgment C-463/12, Copydan, paragraph 55; see also Opinion of AG Wahl on C-110/15, Microsoft, paragraph 35.

[20] See report produced by Professor Martin Kretschmer for the UK Intellectual Property Office, available at http://www.cippm.org.uk/publications/comparative-study-of-copyright-levies-in-europe.html

device attempting to claim reimbursement and all levy payments in the distribution chain must be evidenced.

- Fifth, because of the inherent administrative burdens to seek reimbursement in "ex post" reimbursement schemes, they result in unfair enrichment of the collecting societies by facilitating the collection of levies in their accounts that cannot be simply or effectively reclaimed by justified payers. This windfall of unjustified collections does not encourage or incentivize the collecting societies to simplify their processes and work efficiently to reimburse levies since these reimbursements directly reduce the amounts they can distribute to their members. Frequently, no claim for reimbursement of levies is filed due to the fact that the administrative steps required to obtain reimbursement are too onerous or disproportionately expensive and to encourage such claims. Additionally, in many cases, the right to apply for reimbursement is simply unknown. This fact partially explains why a significant portion of collected amounts that should be reimbursed are wrongfully retained by the collecting societies without a legal basis.[21] However, unjust enrichment can also be a problem when the coverage of an "ex ante" exemption scheme is too restricted in its scope and is not simple or objective to invoke.

- Finally, in Member States such as Spain, the tax authorities[22] require that the levy is included in the tax base along with the price to calculate the amount subject to VAT. If further down the distribution chain, an end user claims the reimbursement of the levy paid, the end user's seller is required to make a write-off of the invoice and issue a new invoice to rectify the VAT tax base in case end-user seeks a refund of VAT paid over the amount of the levy unduly paid. This situation has become worse for companies that are required to use e-reporting for all invoices to the tax authorities on the same day they are issued. This is the case in Spain with the recently created electronic VAT Reporting System which has increased considerably the compliance costs. Moreover, it is uncertain which company, and under which administrative procedure, is entitled to recover the VAT paid in excess to the tax authorities.

4. Conclusion

For a private copying levy system to be in conformity with EU law, the following points must be observed:

1) Legal persons must be exonerated from levies in any case; no presumption of use for private copying purposes can exist.

2) Natural persons may be subject to payment of private copying levies, unless evidence is provided that they are acting for professional purposes.

3) Simple and effective "ex-ante" exemption and "ex post" reimbursement schemes are mandatory if the levy system of a Member State imposes indiscriminate application of the levies upon the importation of devices.

[21] In France, we can find a clear example of the financial consequences of having only an ineffective "ex post" reimbursement scheme, as shown in the report prepared by the French National Assembly Member Marcel Rogemont, showing that the reimbursement for 2014 corresponding to professional users should have been 58 million euros but in fact it was only 375,805 euros (0.65% of the total that should have been reimbursed) resulting in a staggering overpayment to Copie France of 57.6 Million euros.

[22] See Spanish Directorate-General for Taxation, tax consultation nº V3269-17.

4) Exoneration of levies by "ex ante" exemption and "ex post" reimbursement schemes cannot be subject to any prior registration with a collecting society by manufacturers / importers, intermediate resellers, or end-users.

Even though the law is clear that the obligation for the levy payment should rest with the private user, all Member State levy systems impose indiscriminate application of levies at importation. This unjustified levy burden affects the efficiency of the device's entire distribution chain (which, when all affected devices are combined, is a significant portion of the Internal Market), and is something which can be substantially mitigated by requiring uniform, simple, and effective "ex ante" exemption schemes in the Member States. Currently, the heavy reliance of Member States on "ex post" reimbursement schemes have led to severe disadvantages to all concerned stakeholders. Alone, "ex post" reimbursement schemes are not effective in the commercial reality of today's multi-channel, multi-tier and multi-national business environment.

Thus, against the gaps and discrepancies of "ex-ante" exemption and "ex-post" reimbursement schemes among Member States that are outlined in Annex I, this paper calls on the EC to fix the shortcomings of national systems and establish a coherent, practical and conformant application of levy regimes within the EU. Otherwise, not only are these disparate and divergent national private copying levy regimes incompatible with EU law as mandated by the CJEU, but they are also a significant barrier to the free movement of goods and, thus, inhibit the cohesion of the Digital Internal Market which was the primary reason for the adoption of Directive 2001/29/EC.

In order to resolve the issues identified in this paper, the simplest solution would be the one recommended by mediator Antonio Vitorino: Levies should be firstly and only paid at the last point of sale, so that goods flow freely in the market (and across Member States) without levies and the levy payment obligation is only incurred when devices are actually sold to end users. At this final distribution stage, it is possible to identify whether the purchasing end-user is a natural person acting for private ends or not. This solution, however, requires an overall simplification of the current levy systems operating in the Member States in order not to impose unreasonable administrative burdens upon retailers.

This solution would alleviate the unjustified need for manufacturers, importers, and intermediate resellers to pay private copying levies which also would alleviate the unnecessary administrative burdens imposed upon them for making these payments and, subsequently, seeking reimbursement of the same payments (when, in fact, only natural persons making private copies should be liable for such payments).

It should be noted that if such necessary changes to the existing irrational and antiquated private copying regimes cannot be obtained through EU legislation, then it is incumbent upon the European Commission to render its own recommendation to the Member States and/or to take enforcement actions for the establishment of simple, clear, predictable and effective "ex-ante" exemption schemes which should be complemented with residual "ex post" reimbursement schemes.