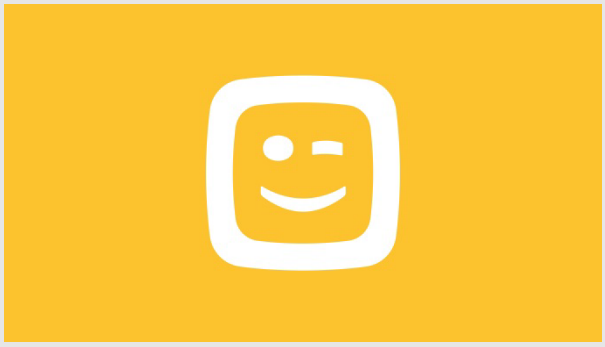
Court of Justice EU, 28 July 2016, United Video Properties v Telenet



LITIGATION

Directive 2004/48 allows national legislation providing that the court takes specific circumstances of the case into account whilst ordering the unsuccessful party to pay the legal costs incurred by the successful party, as well as flat rates, if reasonable, for legal costs incurred

- **In the light of all the foregoing, the answer to the first question is that Article 14 of Directive 2004/48 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which provides that the unsuccessful party is to be ordered to pay the legal costs incurred by the successful party, offers the courts responsible for making that order the possibility of taking into account features specific to the case before it, and provides for a flat-rate scheme for the reimbursement of costs for the assistance of a lawyer, subject to the condition that those rates ensure that the costs to be borne by the unsuccessful party are reasonable, which it is for the referring court to determine.**

The proportionality principle provides that at the very least a significant and appropriate part of the reasonable costs of the successful party are borne by the unsuccessful party

- **However, Article 14 of that directive precludes national legislation providing flat-rates which, owing to the maximum amounts that it contains being too low, do not ensure that, at the very least, that a significant and appropriate part of the reasonable costs incurred by the successful party are borne by the unsuccessful party.**

The directive precludes legislation which provides that a technical advisor should only be reimbursed in the event of fault of the losing party when these costs are linked to a judicial action concerning the upholding of intellectual property rights

- **In those circumstances, the answer to the second question is that Article 14 of Directive 2004/48 must be interpreted as precluding national rules providing that reimbursement of the costs of a technical adviser are provided for only in the event of fault on the part of the unsuccessful party, given that those costs are directly and closely linked to a judicial action seeking to have such an intellectual property right upheld.**

Source: **curia.europa.eu**

Court of Justice EU, 28 July 2016
(J.L. da Cruz Vilaca, F. Biltgen, A Borg Barthet, E Levtis, M. Berger (Rapporteur)
Chamber, F. Biltgen, A. Borg Barthet,
E. Levits and M. Berger (Rapporteur), Judges,
Advocate General: M. Campos Sánchez-Bordona,
Registrar: V. Tourrès, Administrator,
having regard to the written procedure and further to the hearing on 14 January 2016,
after considering the observations submitted on behalf of:
– United Video Properties Inc., by B. Vandermeulen, avocat, and D. Op de Beeck,
advocaat,
– Telenet NV, by S. Debaene, advocaat, and H. Haouideg, avocat,
– the Belgian Government, by J.-C. Halleux and J. Van Holm, acting as Agents, assisted
by E. Jacubowitz, avocat,
– the Netherlands Government, by M. Bulterman and M. de Ree, acting as Agents,
– the Polish Government, by B. Majczyna, acting as Agent,
– the European Commission, by F. Wilman, acting as Agent,
after hearing **the Opinion of the Advocate General** at the sitting on 5 April 2016, gives the following
Judgment
1 This request for a preliminary ruling concerns the interpretation of Article 14 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum OJ 2004 L 195, p. 16).
2 The request has been made in proceedings between United Video Properties Inc. and Telenet NV concerning legal costs that United Video Properties Inc. must reimburse to] Telenet after discontinuing an action brought against the latter in relation to patents.
Legal context
EU Law
3 Recitals 10, 17 and 26 to Directive 2004/48 state as follows:
'(10) The objective of this directive is to approximate [the legislative systems of the Member States] so as to ensure a high, equivalent and homogeneous level of protection in the internal market.
...
(17) The measures, procedures and remedies provided for in this directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific features of each intellectual property right and, where

appropriate, the intentional or unintentional character of the infringement.

…

(26) With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the rightholder should take account of all appropriate aspects, such as loss of earnings incurred by the rightholder, or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the rightholder. … The aim is not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses incurred by the rightholder, such as the costs of identification and research.'

4 Article 3 of that directive, entitled 'General obligation', provides:

'1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.'

5 Under Article 13 of that directive, entitled 'Damages':

'1. Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement.

…

2. Where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established.'

6 Article 14 of Directive 2004/48, entitled 'Legal costs', provides:

'Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this.'

Belgian law

7 Pursuant to Article 827(1) of the Gerechtelijk Wetboek (Judicial Code), any discontinuance of an action entails an obligation to pay the legal costs incurred, imposed on the discontinuing party.

8 Article 1017(1) of the Judicial Code provides that:

'Every final decision, even of the court's own motion, shall order the unsuccessful party to pay the costs … '

9 Under Article 1018 of the Judicial Code:

'The costs shall comprise:

…

6° the procedural cost indemnity, as provided for in Article 1022;

… '

10 Article 1022 of the Judicial Code provides:

'The procedural cost indemnity shall be a flat-rate contribution towards the costs and fees of the successful party's lawyer.

[T]he King shall, by way of a decree adopted after consultation in the Council of Ministers, establish the basic, minimum and maximum amounts of the procedural cost indemnity, inter alia in the light of the nature of the case and the significance of the dispute.

Upon application by one of the parties and by means of a decision stating special reasons, the court may either reduce or increase the indemnity, without exceeding the maximum and minimum amounts set by the King. …

No party may be required to pay an indemnity for the involvement of the lawyer of another party which exceeds the amount of the procedural cost indemnity.'

11 The Royal Decree of 26 October 2007 establishing a scale of standard reimbursements of legal costs mentioned in Article 1022 of the Judicial Code and fixing the date for the entry into force of Articles 1 to 13 of the Law of 21 April 2007 on the recoverability of fees and costs of legal representation (Belgisch Staatsblad, 9 November 2007, p. 56834) establishes the basic, minimum, and maximum amounts of the procedural cost indemnity mentioned in Article 1022 of the Judicial Code. Article 2 of that royal decree establishes, for actions relating to claims of which the subject can be evaluated in monetary terms, a staggered scale for the amounts of procedural cost indemnity ranging from EUR 75, the minimum amount, applicable to actions where the subject has a value of up to EUR 250, to EUR 30 000, the maximum amount, which is applicable to actions the object of which, evaluated in monetary terms, is worth more than EUR 1 000 000.01.

12 Moreover, as regards actions in which the object cannot be evaluated in monetary terms, Article 3 of the Royal Decree of 26 October 2007 provides, with regard to the procedural cost indemnity, a basic amount of EUR 1 200, a minimum amount of EUR 75, and a maximum amount of EUR 10 000.

13 Finally, Article 8 of the Royal Decree of 26 October 2007 provides that the basic, minimum, and maximum amounts of the procedural cost indemnity are linked to the consumer price index, every rise or fall of the index by 10 points leading to an increase or reduction by 10% to the sums referred to in Articles 2 to 4 of that decree.

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 United Video Properties, which was a patent holder, brought an action against Telnet in Belgium seeking, in essence, a finding of an infringement by Telnet of that

patent, an injunction requiring Telnet to cease that infringement and an order for Telnet to pay the costs.

15 By judgment of 3 April 2012, the rechtbank van koophandel te Antwerpen (Commercial Court, Antwerp, Belgium) dismissed that action and declared the patent at issue to be invalid. By that judgment, it ordered United Video Properties to pay Telnet a procedural cost indemnity relating to the proceedings at first instance of EUR 11 000, the maximum amount provided for under Article 3 of the Royal Decree of 26 October 2007 after its amendment pursuant to Article 8 of that decree. United Video Properties lodged an appeal against that judgment before the hof van beroep te Antwerpen (Court of Appeal, Antwerp).

16 United Video Properties decided however to discontinue its appeal. After that discontinuance, Telnet requested, inter alia, that United Video Properties be ordered to reimburse it EUR 185 462.55 in respect of lawyers' fees and EUR 44 400 in respect of the assistance provided by an agent specialised in the field of patents.

17 It is clear from the decision to refer that the proceedings before the hof van beroep te Antwerpen (Court of Appeal, Antwerp) now concern only the costs that United Video Properties must reimburse to Telnet. Under the Belgian legislation at issue, Telnet can request only reimbursement of the maximum amount of EUR 11 000 for the proceedings at each instance in respect of the fees paid to its lawyer. As regards the fees paid to an agent specialised in the field of patents, in accordance with the case-law of the Hof van Cassatie (Court of Cassation, Belgium), Telnet is not entitled to recover those costs from United Video Properties, unless it can show that United Video Properties was at fault in bringing its action or in the continuance of the proceedings, and that the costs of that agent are a necessary consequence thereof.

18 However, Telnet submits that it incurred costs much greater than EUR 11 000 for the proceedings at each instance. In particular, it takes the view that the Belgian legislation at issue in the main proceedings is contrary to Article 14 of Directive 2004/48, for that article does not authorise Member States to introduce either a reimbursement ceiling for lawyers' fees — of EUR 11 000 for the proceedings at each instance — or a requirement of fault for the reimbursement of other expenses incurred by the successful party.

19 In those circumstances, the hof van beroep te Antwerpen (Court of Appeal, Antwerp) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Do the terms "reasonable and proportionate legal costs and other expenses" in Article 14 of Directive 2004/48 preclude the Belgian legislation which offers courts the possibility of taking into account certain well-defined features specific to the case
and which provides for a system of varying flat rates in respect of costs for the assistance of a lawyer?
(2) Do the terms "reasonable and proportionate legal costs" and "other expenses" in Article 14 of Directive 2004/48 preclude the case-law which states that the costs of a technical adviser are recoverable only in the event of fault (contractual or extracontractual)?'

Consideration of the questions referred

The first question

20 By its first question, the referring court asks, in essence, whether Article 14 of Directive 2004/48 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that the unsuccessful party is to be ordered to pay the legal costs incurred by the successful party, which offers the courts responsible for making that order the possibility of taking into account features specific to the case before it, and which provides for a flat-rate scheme setting out an absolute reimbursement ceiling in respect of costs for the assistance of a lawyer.

21 As a preliminary point, it should be noted that Article 14 of Directive 2004/48 affirms the principle that reasonable and proportionate legal costs incurred by the successful party are, as a general rule, to be borne by the unsuccessful party, unless equity does not allow this.

22 As regards, first, the concept of 'legal costs' to be reimbursed by the unsuccessful party appearing in Article 14 of Directive 2004/48, it must be observed that that concept includes, amongst others, the lawyer's fees, that directive containing no element allowing the conclusion to be reached that those fees, which constitute generally a substantial part of the costs incurred in the context of proceedings aimed at ensuring the enforcement of an intellectual property right, are excluded from the scope of that article.

23 Second, recital 17 to Directive 2004/48 indicates that the measures, procedures and remedies set out in that directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case. That objective could, admittedly, militate against a flat-rate assessment of the reimbursement of legal costs as such, in that that assessment would ensure neither the reimbursement of the costs actually incurred in a specific case by the successful party, nor, in a more general sense, take into account of all the specific characteristics of the present case.

24 However, Article 14 of Directive 2004/48 requires Member States to ensure the reimbursement only of 'reasonable' legal costs. Furthermore, Article 3(1) of that directive provides, inter alia, that the procedures laid down by the Member States must not be unnecessarily costly.

25 Consequently, legislation providing for a flat-rate of reimbursement of a lawyer's fees could, in principle, be justified, provided that it is intended to ensure the reasonableness of the costs to be reimbursed, taking into account factors such as the subject matter of the proceedings, the sum involved, or the work to be carried out to represent the client concerned. This may be the case, in particular, if that legislation is intended to exclude the reimbursement of excessive costs due to unusually high fees agreed between the successful party and its lawyer or due to the provision, by the lawyer, of services that are not considered necessary in

order to ensure the enforcement of the intellectual property rights concerned.
26 On the other hand, the requirement that the unsuccessful party must bear 'reasonable' legal costs cannot justify, for the purposes of the implementation of Article 14 of Directive 2004/48 in a Member State, legislation imposing a flat-rate significantly below the average rate actually charged for the services of a lawyer in that Member State.
27 Such legislation would be incompatible with Article 3(2) of Directive 2004/48, which states that the procedures and remedies provided for by that directive must be dissuasive. However, the dissuasive effect of an action for infringement would be seriously diminished if the infringer could be ordered only to reimburse a small part of the reasonable lawyer's fees incurred by the injured rightholder. Thus, such legislation compromises the principal aim pursued by Directive 2004/48, of ensuring a high level of protection of intellectual property rights in the internal market, an aim expressly mentioned in recital 10 to that directive, in accordance with Article 17(2) of the Charter of Fundamental Rights of the European Union.
28 As regards, third, the requirement that account be taken the specific features of the present case, it is apparent from the very wording of the first question that the national legislation at issue in the main proceedings offers the courts, in principle, the possibility of taking account of those features.
29 However, fourth, it must be stated that Article 14 of Directive 2004/48 provides that the legal costs to be supported by the unsuccessful party must be 'proportionate'. The question of whether those costs are proportionate cannot be assessed independently of the costs that the successful party actually incurred in respect of the assistance of a lawyer, provided they are reasonable within the meaning of paragraph 25 above. If the requirement of proportionality does not imply that the unsuccessful party must necessarily reimburse the entirety of the costs incurred by the other party, it does however mean that the successful party should have the right to reimbursement of, at the very least, a significant and appropriate part of the reasonable costs actually incurred by that party.
30 Therefore, national legislation that lays down an absolute limit in respect of costs attached to the assistance of a lawyer, such as that at issue in the main proceedings, must ensure, on the one hand, that that limit reflects the reality of the rates charged for the services of a lawyer in the field of intellectual property, and, on the other, that, at the very least, a significant and appropriate part of the reasonable costs actually incurred by the successful party are borne by the unsuccessful party. It is not possible for such legislation, particularly in a situation in which that limit is too low, to prevent the amount of those costs vastly exceeding the limited provided for, so that the reimbursement which the successful party may claim becomes disproportionate or even, where applicable, insignificant, thus depriving
Article 14 of Directive 2004/48 of its practical effect.
31 The conclusion in the preceding paragraph cannot be called into question by the fact that Article 14 of Directive 2004/48 excludes from its scope situations in which equity does not allow the legal costs to be borne by the unsuccessful party. That exclusion covers national rules allowing courts, in a specific case in which the application of the general scheme regarding legal costs would lead to a result considered unfair, to disregard that scheme by way of exception. On the other hand, equity, by its very nature, cannot justify a general unconditional exclusion of reimbursement of costs exceeding a specified ceiling.
32 In the light of all the foregoing, the answer to the first question is that Article 14 of Directive 2004/48 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which provides that the unsuccessful party is to be ordered to pay the legal costs incurred by the successful party, offers the courts responsible for making that order the possibility of taking into account features specific to the case before it, and provides for a flat-rate scheme for the reimbursement of costs for the assistance of a lawyer, subject to the condition that those rates ensure that the costs to be borne by the unsuccessful party are reasonable, which it is for the referring court to determine. However, Article 14 of that directive precludes national legislation providing flat-rates which, owing to the maximum amounts that it contains being too low, do not ensure that, at the very least, that a significant and appropriate part of the reasonable costs incurred by the successful party are borne by the unsuccessful party.
The second question
33 By its second question the referring court asks, in essence, whether Article 14 of Directive 2004/48 must be interpreted as precluding national rules providing that reimbursement of the costs of a technical adviser is provided for only in the case of fault on the part of the unsuccessful party.
34 In order to answer that question, the wording of Article 14 of Directive 2004/48 must first be borne in mind, according to which the Member States are to ensure that reasonable and proportionate legal costs 'and other expenses incurred by the successful party' are, as a general rule, to be borne by the unsuccessful party, unless equity does not allow this. Given that no provision of that directive contains a definition of the concept of 'other expenses' that would exclude, from the scope of Article 14, the costs incurred for the services of a technical adviser, that concept also includes, in principle, costs of that kind.
35 However, second, as the Advocate General observed in paragraph 79 of his Opinion, Directive 2004/48 mentions, in recital 26, the 'costs of identification and research', often
linked to the services of a technical adviser, incurred by the intellectual property rightholder. That recital makes express reference to situations of 'prejudice suffered as a result of an infringement committed by an infringer who engaged in an activity in the knowledge, or with reasonable grounds for knowing', and concerns

therefore, in particular, the damages to be paid in the case where there has been fault on the part of the infringer. Damages are the subject matter of a provision of Directive 2004/48, namely Article 13(1) of that directive. It follows that the 'costs of identification and research', incurred, often before judicial proceedings, do not necessarily fall within the scope of Article 14 of that directive.

36 Third, it must be stated that a wide interpretation of Article 14 of Directive 2004/48, to the effect that the latter provides that the unsuccessful party must bear, as a general rule, the 'other expenses' incurred by the successful party, without going into any detail about those costs, risks conferring excessive scope on that article and thus depriving Article 13 of its practical effect. It is therefore necessary to interpret that concept narrowly and to take the view that only those costs that are directly and closely related to the judicial proceedings
concerned fall under 'other expenses', within the meaning of Article 14.

37 Fourth, it must be held that Article 14 of Directive 2004/48 does not contain any element from which it may be concluded that the Member States may subject the reimbursement of 'other expenses', or legal costs in general, in the context of proceedings seeking to ensure the enforcement of an intellectual property right, to a condition of fault on the part of the unsuccessful party.

38 In light of the foregoing, the question whether a national rule may subject the reimbursement of the costs of a technical adviser to the condition that the unsuccessful party has committed a fault depends on the link between those costs and the judicial procedure concerned, those costs falling within, as 'other expenses', Article 14 of Directive 2004/48, if such a link is direct and close.

39 Thus, the costs of research and identification incurred in the context of actions covering, inter alia, a general observation of the market, carried out by a technical adviser, and the detection by the latter of possible infringements of intellectual property law, attributable to unknown infringers at that stage, do not appear to show such a close direct link. On the other hand, to the extent that the services, regardless of their nature, of a technical adviser are essential in order for a legal action to be usefully brought seeking, in a specific case, to have such a right upheld, the costs linked to the assistance of that adviser fall within 'other expenses' that must, pursuant to Article 14 of Directive 2004/48, be borne by the unsuccessful party.

40 In those circumstances, the answer to the second question is that Article 14 of Directive 2004/48 must be interpreted as precluding national rules providing that reimbursement of the costs of a technical adviser are provided for only in the event of fault on the part of the unsuccessful party, given that those costs are directly and closely linked to a judicial action seeking to have such an intellectual property right upheld.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable. On those grounds, the Court (Fifth Chamber) hereby rules:

1. Article 14 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which provides that the unsuccessful party is to be ordered to pay the legal costs incurred by the successful party, which offers the courts responsible for making that order the possibility of taking into account features specific to the case before it, and provides for a flat-rate scheme for the reimbursement of costs for the assistance of a lawyer, subject to the condition that those rates ensure that the costs to be borne by the unsuccessful party are reasonable, which it is for the referring court to determine. However, Article 14 of that directive precludes national legislation providing flat-rates which, owing to the maximum amounts that it contains being too low, do not ensure that, at the very least, that a significant and appropriate part of the reasonable costs incurred by the successful party are borne by the unsuccessful party.

2. Article 14 of Directive 2004/48 must be interpreted as precluding national rules providing that reimbursement of the costs of a technical adviser are provided for only in the event of fault on the part of the unsuccessful party, given that those costs are directly and closely linked to a judicial action seeking to have such an intellectual property right upheld.

[Signatures]

OPINION OF ADVOCATE GENERAL CAMPOS SÁNCHEZ-BORDONA

delivered on 5 April 2016 (1)

Case C-57/15

United Video Properties, Inc.

v

Telenet NV

(Request for a preliminary ruling from the Hof Van Beroep te Antwerpen (Court of Appeal, Antwerp, Belgium))

(Intellectual property rights — Directive 2004/48/EC — Article 14 — Legal costs — Reimbursement of lawyers' and experts' fees — Maximum limit for lawyers' fees)

1. The questions referred by the Hof Van Beroep te Antwerpen (Court of Appeal, Antwerp) in this reference for a preliminary ruling appear to be limited in scope but, in fact, raise delicate legal problems. Although, in principle, the questions are concerned solely with the compatibility with EU law of national (in this case, Belgian) rules concerning the reimbursement by the unsuccessful party of certain costs related to legal proceedings, they give rise to broader considerations regarding the effect of EU

legislation on the civil procedure laws of the Member States.

2. The referring court's uncertainties have arisen in relation to the application of the Belgian system (law and case-law of the Court of Cassation) to costs in respect of lawyers' fees and to experts' fees in the context of judicial proceedings for the protection of intellectual property rights. Given that there is a specific provision governing legal costs in Directive 2004/48/CE, (2) the procedural rules of each Member State must, in principle, comply with that provision. The difficulty is how — if possible — to bring the civil procedure code and the case-law of the Belgian Court of Cassation, which are both applicable to all types of proceedings in general, into line with a 'sectoral' provision of EU law relating specifically to intellectual property disputes.

3. In some directives — including the Directive, which is the act legitimising the jurisdiction of the Court of Justice over a matter which would otherwise fall exclusively within the competence of the Member States — the aim of harmonising certain procedural rules of the Member States is clearly discernible. The scope of those directives is, logically, limited to one or more specific sectors (for example, intellectual property, the protection of competition, the environment, consumer protection, among others). The increase in 'sectoral' procedural rules — which are not always consistent with one another — requiring transposition into national legal systems can lead to the unintended consequence of the fragmentation of procedural law in those countries which, after many years and commendable efforts in relation to codification, have succeeded in enacting general procedural laws precisely to replace the many previous procedures and reduce these to one common procedure.

4. The main proceedings are aimed at establishing, first, the sums which the unsuccessful party in a lawsuit must be required to pay in respect of the successful party's lawyers' fees, in the light of the Belgian legislation which provides for an upper limit in that regard. Second, as concerns experts' fees, the difficulty relates not to the quantification of those fees but to the incurrence of liability to pay, in the light of the case-law of the Belgian Court of Cassation in that area. The question is whether the setting of that limit and the rule derived from case-law are compatible with Article 14 of the Directive.

5. The reference for a preliminary ruling will make it possible to ascertain whether the Member States have a margin of legislative discretion such that they may establish a system for reimbursement of legal costs by the unsuccessful party which either restricts those costs to a ceiling or upper limit or prohibits their recovery, when, in both situations, the disputes concerned fall within the scope of the Directive.

I – Legal framework

A – EU law

The Directive

6. According to recitals 4, 5, 10 and 26:

'(4) At international level, all Member States, as well as the Community itself as regards matters within its competence, are bound by the Agreement on trade-related aspects of intellectual property (the TRIPS Agreement), approved, as part of the multilateral negotiations of the Uruguay Round, by Council Decision 94/800/EC ... and concluded in the framework of the World Trade Organisation.

(5) The TRIPS Agreement contains, in particular, provisions on the means of enforcing intellectual property rights, which are common standards applicable at international level and implemented in all Member States. This Directive should not affect Member States' international obligations, including those under the TRIPS Agreement.

...

(10) The objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the internal market.

...

(26) With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the rightholder should take account of all appropriate aspects, such as loss of earnings incurred by the rightholder, or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the rightholder. ... The aim is not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses incurred by the rightholder, such as the costs of identification and research.'

7. Article 1 provides:

'This Directive concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights. For the purposes of this Directive, the term "intellectual property rights" includes industrial property rights.'

8. As regards the 'general obligation' of Member States in relation to the 'measures, procedures and remedies' governed by Chapter II, Article 3 provides:

'1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.'

9. Section 6 of Chapter II, which covers 'damages' and 'legal costs', includes Articles 13 and 14 which are worded as follows:

'Article 13

...

1. Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement.

When the judicial authorities set the damages:

(a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement; or

(b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

2. Where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established.

Article 14

...

Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this.'

B – National law

10. Pursuant to Article 827(1) of the Belgian Judicial Code of 10 October 1967 (Gerechtelijk Wetboek), any discontinuance of an action entails an obligation to pay the legal costs incurred, which is imposed on the discontinuing party.

11. According to Article 1017 of the Judicial Code, a final judgment is to include an order that the unsuccessful party must pay the costs, unless special laws provide otherwise and without prejudice to any agreement between the parties, on which, where appropriate, a decision will be given in the judgment.

12. Article 1018(4) and (6) of the Judicial Code provides that costs are to include:

– the costs of all measures of inquiry, particularly the expenses of witnesses and experts;

– the procedural cost indemnity, as provided for in Article 1022 of the Judicial Code.

13. In accordance with Article 1022 of the Judicial Code, the procedural cost indemnity consists of a flat-rate amount of the costs and fees of the successful party's lawyer. The maximum and minimum amounts of the procedural cost indemnity are to be established by decree adopted within the Council of Ministers, inter alia in the light of the nature and significance of the dispute. On application by one of the parties and by means of a decision stating special reasons, the court may either reduce or increase the indemnity, but it may not be more than the maximum or less than the minimum amounts laid down in the decree. When adopting its decision, the court must take account of:

– the financial means of the unsuccessful party, in order to reduce the amount of the indemnity;

– the complexity of the case;

– the indemnities agreed contractually by the successful party; and

– the manifestly unreasonable character of the forms of order sought.

No party may be required to pay an indemnity for the involvement of the lawyer of another party which exceeds the amount of the procedural cost indemnity.

14. The scale for calculating the minimum and maximum amounts of the procedural cost indemnities provided for in Article 1022 of the Judicial Code was established by the Royal Decree of 26 October 2007 ('the Royal Decree').

According to Article 2 of the Royal Decree, with the exception of the matters referred to in Article 4 thereof, the procedural cost indemnity for actions involving claims to which a monetary value can be assigned is as follows:

	Reference sum	Minimum amount	Maximum amount
Up to 250.0	150.00	75.00	300.00
From 250.01 to 750.00	200.00	125.00	500.00
From 750.01 to 2500.00	400.00	200.00	1000.00
From 2500.01 to 5000.00	650.00	375.00	1500.00
From 5000.01 to 10 000.00	900.00	500.0	2000.00
From 10 000.01 to 20 000.00	1100.00	625.00	2500.00
From 20 000.01 to 40 000.00	2 000.00	1000.00	4000.00
From 40 000.01 to 60 000.00	2500.00	1000.00	5000.00
From 60 000.01 To 100 000.00	3 000.00	1000.00	6000.00
From 100 000.01 to 250 000.00	5 000.00	1 000.00	10 000.00
From 250 000.01 to 500 000.00	7 000.00	1 000.00	14 000.00
From 500	10 000.00	1 000.00	20 000.00

000.01 to 1 000 000.00			
Above 1 000 000.01	15 000.00	1 000.00	30 000.00

According to Article 3 of the Royal Decree, in relation to actions concerning matters to which no monetary value can be assigned, the reference sum for the setting of the procedural cost indemnity is EUR 1 200, while the minimum amount is EUR 75 and the maximum amount EUR 10 000.

Article 8 of the Royal Decree lays down the system for updating the above amounts.

II – The facts of the main proceedings and the reference for a preliminary ruling

15. United Video Properties, Inc. ('UVP') was the holder of European patent No EP 1327209, granted on 27 March 2008, for providing storage of data on servers in an ondemand media delivery system. Since it took the view that Telenet NV ('Telenet') had infringed its rights in relation to that patent, UVP brought an action against Telenet on 7 June 2011. By its action, UVP sought, essentially, a declaration that Telenet had infringed its rights in relation to the patent and an injunction requiring Telenet to cease direct and indirect infringements of the patent. UVP also requested that Telenet be ordered to pay the costs.

16. By decision of 3 April 2012 of the acting president of the Rechtbank van Koophandel te Antwerpen (Commercial Court, Antwerp), following a counterclaim by Telenet, the Belgian part of European patent No EP 1327209 was revoked for failure to meet the condition of novelty, and UVP was ordered to pay the costs of the proceedings in the total amount of EUR 11 000. UVP lodged an appeal against that decision on 27 August 2012 before the Hof Van Beroep te Antwerpen (Court of Appeal, Antwerp).

17. UVP had brought parallel proceedings against Virgin Media (not a party to the main proceedings) in relation to the United Kingdom part of the same patent. On 14 July 2014, the High Court of Justice, London, ruled that the patent was invalid on the ground that there was no inventive step. In view of the decisions of the High Court of Justice, London, and the president of the Rechtbank van Koophandel te Antwerpen (Commercial Court, Antwerp), UVP decided to discontinue its appeal by letter of 14 August 2014, which was confirmed by a further letter of 24 October 2014.

18. In the light of UVP's discontinuance of its appeal, Telenet requested the Hof Van Beroep te Antwerpen (Court of Appeal, Antwerp) to agree and declare that:

– the Law of 21 April 2007 on the recovery of fees and costs of legal representation and the Royal Decree establishing a scale for the procedural costs indemnity are contrary to Article 14 of the Directive;

– the case-law of the Hof van Cassatie (Court of Cassation) which provides that fees and costs for the assistance of a technical expert may be recovered from the unsuccessful party to the proceedings only in the event of fault also infringes Article 14 of the Directive;

– finally, Telenet requested that UVP be ordered to pay Telenet the sum of EUR 185 462.55 in respect of lawyers' fees and the sum of EUR 44 400 in respect of the assistance of a technical expert (patent agent).

19. According to Telenet's submissions on the legal costs payable to it — the only mattes still in contention in the main proceedings — the rule in Belgian law is that the unsuccessful party is responsible for payment. However, for the purposes of specifically fixing the lawyers' fees which may be recovered from the unsuccessful party in the proceedings, the Royal Decree stipulates maximum amounts which cannot be exceeded, from which it follows — in Telenet's view — that there is a conflict with Article 14 of the Directive.

20. Further, in relation to the costs of assistance by a technical expert, which do not fall within the scope of the Law of 21 April 2007 and the Royal Decree, Telenet submits that,

according to the case-law of the Hof van Cassatie (Court of Cassation), those costs can by

recovered only where there is found to be fault on the part of the unsuccessful party, which is also incompatible with Article 14 of the Directive.

21. In those circumstances, by order of 26 January 2015, the Hof Van Beroep te Antwerpen (Court of Appeal, Antwerp) referred the following questions for a preliminary ruling:

'(1) Do the terms "reasonable and proportionate legal costs and other expenses" in Article 14 of the ... Directive preclude the Belgian legislation which offers courts the possibility of taking into account certain well-defined features specific to the case

and which provides for a system of varying flat rates in respect of costs for the assistance of a lawyer?

(2) Do the terms "reasonable and proportionate legal costs and other expenses" in Article 14 of the ... Directive preclude the case-law which states that the costs of a technical adviser are recoverable only in the event of fault (contractual or extracontractual)?'

III – Summary of the parties' positions

A – The first question

22. UVP does not adopt a position on the reference for a preliminary ruling, having stated that it concerns a dispute between the Commission and the Belgian Government relating to the correct transposition of the Directive.

23. Telenet contends that, since it is the successful party in an action brought within the scope of the Directive, Article 14 of the Directive is applicable which means that it is entitled to reimbursement of the reasonable and proportionate legal costs incurred in the main proceedings, which have to be paid in full by the unsuccessful party.

24. Telenet submits that 'reasonable and proportionate legal costs' and 'equity' are autonomous concepts of EU law and must be interpreted uniformly throughout the territory of the Union. A contrary view would conflict with the objective of the Directive, as stated in the case-law laid down in Realchemie Nederland. (3)

25. Telenet argues that the fundamental aim of the Directive is not achieved if holders of intellectual property rights are not sufficiently protected by jurisdictions, like the Belgian jurisdiction, where the successful party in an action cannot recover from the unsuccessful party more than a small proportion of the legal fees.
26. To explain why it is unlawful to set a financial limit where the Directive does not do so, Telenet seeks support, by analogy, in the case-law of the Court, relying on the judgment in McDonagh. (4) Telenet submits that it is impossible for a fixed ceiling of EUR 11 000 to satisfy the concepts — which are, by their nature, relative — of reasonableness, proportionality and equity. Accordingly, Article 14 of the Directive precludes the amount recoverable by the successful party from being subject to a ceiling.
27. In support of the contention that the case-law of the Court precludes national laws drafted in absolute terms, or terms of principle, which do not allow account to be taken of the circumstances of the case, where there is no such rigidity in directives, Telenet cites the judgments in Marshall and VTB-VAB and Galatea. (5)
28. According to the Commission, Article 14 of the Directive is worded in very general terms. Not only is the provision itself lacking in detail but it lays down a rule which is open to exceptions based on criteria of equity, which means that the Member States have a broad discretion for the purposes of transposing it into their national law.
29. The Commission submits that Article 14 must be examined in the light of the general purpose of the Directive (recital 10) and the judgment in Realchemie Nederland, (6) the aim being to ensure the effective protection of intellectual property. (7) In addition, the following points should be taken into account:
– the specific objective of Article 14 of the Directive is to avoid the situation in which an injured party is deterred from bringing legal proceedings in order to protect his intellectual property rights; (8)
– the costs associated with such proceedings can, in practice, be a significant impediment to bringing proceedings, and the differences between the procedural rules of the Member States are considerable, not only before but also after the transposition of the Directive into national law; (9)
– in the context of Article 14 of the Directive, it may be noted that Article 3 thereof provides that the measures, procedures and remedies provided for therein should not be unnecessarily complicated or costly and must also be effective, proportionate and dissuasive.
30. The Commission submits that Article 14 of the Directive does not preclude a system, like the Belgian system, of fixing lawyers' fees at a flat rate. The discretion afforded to the Member States makes it possible to adopt such a system, since there is nothing to indicate that Article 14, or any other article of the Directive, precludes that right. The Commission argues that that system has advantages for the proper administration of justice and, in particular, legal certainty and foreseeability. Uncertainty regarding the costs to be paid, or recovered, in an action can be an obstacle to bringing legal proceedings. The deterrent effect might also affect holders of intellectual property rights. If the rule were that costs could be recovered in full, the parties might find themselves at risk of very onerous financial consequences if they are unsuccessful. That possibility could equally deter them from commencing proceedings.
31. After setting out the objectives of the Directive according to recitals 10 and 11 thereof, the Belgian Government states that the essential purpose of the Directive is to enable more straightforward access to justice in order to ensure better enforcement of intellectual property law. That is also the aim pursued by the Law of 21 April 2007 on the recovery of fees and costs of legal representation, (10) according to the preamble thereto. The right of access to justice is, moreover, derived directly from Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
32. The Belgian Government observes that the combined system adopted by the Belgian legislature has the benefit of ensuring a degree of predictability regarding the financial risks in the event of losing an action, which not only favours access to justice but also protects a party when the opposing party has incurred costs which are not reasonable or proportionate. Further, the Belgian Government contends that the national legislation concerned was adopted following consultation with, and the favourable opinion of, the Belgian bar associations, which are best placed to have information about the average fees in contentious proceedings, including proceedings relating to intellectual property.
33. The Netherlands Government, relying on the fact that the Commission's original proposal (11) referred expressly to lawyers' fees while the final version did not, submits that the Directive grants the Member States freedom to decide whether lawyers' fees should be included in the costs recoverable from the unsuccessful party to an action. In support of that contention, the Netherlands Government also refers to Article 45(2) of the TRIPS
Agreement, on which the Directive is based. (12)
34. The Netherlands Government refers to the freedom to choose the method for determining which legal costs may be reimbursed and to the fact that, in accordance with settled case-law, in the absence of any stipulation, the Member States have a broad discretion to choose the means of securing the full effect of a provision.
35. The Netherlands Government also points out that that broad discretion is not accidental and was deliberately granted by the Directive. That assertion is supported, first, by the general, flexible wording of Article 14 and, second, by the difference between the terms used in the proposal for a directive (13) and the final wording, in particular the addition of the term 'as a general rule' and the deletion of the express reference to 'lawyer's fees'. Those amendments, the Netherlands Government's argument continues, were made in the light of the major divergences between the different

national rules, and with regard to the fact that, in principle, the Member States have autonomy in the area of procedural law.

36. Therefore, according to the Netherlands Government, the Member States are free to determine what is reasonable and proportionate in relation to lawyers' fees and their reimbursement, either by fixing flat-rate amounts or by other means, provided they ensure that full effect is given to Article 14 of the Directive.

37. Article 14 seeks to ensure that the parties are not deterred from exercising their rights. Lawyers' fees are the most significant and least predictable item of costs and, in that respect, may impede access to justice. The flat-rate system contributes to the predictability and transparency of the financial risk, thereby removing an important impediment to access to justice. That system also satisfies the general requirement, laid down in Article 3 of the Directive, that measures, procedures and remedies for the protection of intellectual property must not be unnecessarily complicated or costly. A flat rate scale of costs makes it possible to express in concrete terms the maximum level above which costs do not satisfy those characteristics.

38. Lastly, citing recital 17 of the Directive, the Netherlands Government maintains that the examination of reasonableness and proportionality must be carried out in the light of the specific circumstances of each case. Provided that the scale of charges may be used to calculate reasonable and proportionate legal costs, Article 14 of the Directive does not preclude the mandatory limitation of lawyers' fees up to a maximum amount.

39. In summary, the Netherlands Government submits that Article 14 of the Directive does not preclude a system of flat-rate charges, fixed by law or in any other manner, according to which the amount of reimbursable lawyers' fees is calculated, if those charges reflect costs that are reasonable and proportionate in the light of the characteristics of the case.

40. The Polish Government submits that Article 14 of the Directive does not require the unsuccessful party to cover all the successful party's legal costs, only those which are reasonable and proportionate. The setting of flat-rate charges actually means that an order for payment of costs may be regarded as reasonable.

41. According to the Polish Government, the Belgian system enables the unsuccessful party to be required to bear the other party's costs under acceptable socio-economic conditions. Furthermore, that system prevents the successful party from including spurious or unjustified costs, either by using financial means which are out of all proportion to the financial resources of the other party, or acting in bad faith, in order to impute to the unsuccessful party not only the negative consequences of the dismissal of his claims but also spurious costs.

42. The Polish Government maintains that the aim of Article 14 of the Directive is to ensure that the injured party is not deterred from bringing legal proceedings to protect his intellectual property rights. Under the Belgian system, that party is able to calculate in advance the costs which will be reimbursed to him or which he will have to pay. The scale of charges therefore makes the costs predictable and contributes to ensuring that the parties have the power to choose when it comes to protecting their rights.

B – The second question

43. Neither UVP nor the Polish Government submitted observations on the second question.

44. Telenet argues that the rule laid down in the Belgian case-law (pursuant to which there must be fault in order to recover an expert's costs from the unsuccessful party) is contrary to Article 14 of the Directive. That provision does not refer to the criterion of fault, while the reference to equity is simply a corrective mechanism for the general rule that all reasonable and proportionate costs must be reimbursed, not the starting point for that rule.

45. The Commission submits that the costs of assistance by a technical expert come within the concept of legal costs in Article 14 and may be reimbursed. The requirement of fault as a prerequisite for reimbursement is not compatible with that article for the following reasons:

– the wording of Article 14 does not include that criterion and is not a basis for finding that experts' costs must be treated differently from other costs;

– the criterion of fault is a serious obstacle to recovery by the successful party of the costs incurred in adducing expert evidence in the proceedings;

– the case-law of the Court, albeit in other subject areas but referring to imposition of the obligation to pay damages, has ruled out the requirement of fault as an additional factor leading to liability. (14)

46. According to the Belgian Government, costs corresponding to experts' fees do not fall within the scope of the Law of 21 April 2007. The Belgian Hof van Cassatie (Court of Cassation) has recognised the principle of recoverability of those costs under certain conditions: it is necessary to establish the existence of fault which led to the damage consisting of payment of experts' expenses and fees; in addition, there must be a causal link between those expenses and fees and the fault and the need for technical advice.

47. In the Belgian Government's submission, that case-law allows for the full recovery of experts' costs in so far as these are part of the damage for which the unsuccessful party has to pay compensation on the basis of contractual or extra-contractual fault. The system is, therefore, compatible with Article 14 of the Directive.

48. The Netherlands Government contends that, where experts' costs are reasonable and proportionate, those costs must be reimbursed by the unsuccessful party. Article 14 affords no latitude for a strict interpretation whereby experts' costs are recoverable only in the event of fault on the part of the unsuccessful party.

IV – Analysis

A – The first question.

49. Article 14 of the Directive uses two legal concepts (‘legal costs’ and ‘other expenses incurred by the successful party’) which it will not be necessary to analyse in detail for the purpose of answering the first question referred for a preliminary ruling, since lawyers’ fees fit without difficulty into the concept of legal costs. Lawyers’ fees are, by definition, included in ‘legal costs’ (15) and that occurs in the Belgian legislation, (16) other legal systems and the Rules of Procedure of the Court of Justice. (17)
50. When the successful party’s lawyers’ fees are ‘reasonable and proportionate’, Article 14 provides, as a general rule, that those fees must be paid by the unsuccessful party ‘unless equity does not allow this’. The provision lays down a general rule which is open to a number of exceptions, including where the effects of that rule are contrary to equity in a particular action.
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51. The qualifiers ‘reasonable and proportionate’ (18) are therefore key to the determination of whether a party’s lawyer’s fees must be borne by the party who has been ordered to pay the costs. Both qualifiers must be satisfied in order for the rule in Article 14 to be applicable, a proposition consistent with Article 3 of the Directive, pursuant to which the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights must be ‘fair, equitable and proportionate’.
52. The determination of whether the fees are ‘reasonable’ must take account, first, of the notion of ‘reasonably payable’ which the German version of Article 14 of the Directive suggests. (19) National law could, perhaps, regard the reimbursement of lawyers’ fees as unreasonable where, for example, a lawyer’s involvement in a particular action was superfluous, among other situations. The costs whose reimbursement is claimed from the unsuccessful party may, therefore, be restricted to ‘expenses necessarily incurred’ by the successful party. (20)
53. Second, it is necessary to analyse whether the lawyer’s fees are ‘proportionate’; that is, whether they are in due proportion to a number of variables which, again, it is for national law or the national court to stipulate. Factors such as the subject matter of the proceedings, the sum involved, the complexity of the legal issues arising, the work carried out to represent the client, the financial means of the party against whom the order for costs is made, and other factors of a similar nature may be assessed to determine the appropriateness (proportionality) of the lawyer’s fees which the party who has been awarded costs seeks to obtain from the unsuccessful party in an action concerning the protection of intellectual property rights.
54. In the instant case, the referring court has not expressed a view on whether the fees of the lawyer representing Telenet are reasonable and proportionate. That assessment falls exclusively within the referring court’s jurisdiction and the Court of Justice cannot take its place in that regard. The reply to the reference for a preliminary ruling must, therefore, not impinge on the national court’s power of assessment to determine whether the sum of EUR 185 462.55, sought by Telenet by way of lawyers’ fees, is reasonable and proportionate to the circumstances of the case on which it has adjudicated. If the national court decides that those fees are reasonable and proportionate, it will still need to consider whether reimbursement of that sum satisfies the requirements of equity, which confers on it an undeniable margin of discretion. None of those assessments are in any way conditional on the decision, from the perspective of EU law, concerning the validity of the maximum limit, to which I shall refer below.
55. Neither the Directive as a whole, nor Article 14 thereof, is open to an interpretation which does not reflect the values and principles underlying the European Union legal order, including the principle of legal certainty and the right to an effective remedy in the context of the right of access to justice.
56. Although some of the observations — particularly those of the Belgian Government — have invoked the procedural autonomy of the Member States, the interpretation of Article 14 of the Directive cannot disregard the teleological criterion: the objective of the Directive is to approximate the legislation of the Member States so as to ensure a high, equivalent and homogeneous level of protection in the internal market. In line with that aim, the Member States must provide for the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights, but they must do so within the legislative framework defined by the Directive itself.
57. In the context of that legislative framework, one feature stands out, the importance of which cannot be ignored: the procedures and remedies which the Member States are to provide for in that field must not be ‘unnecessarily complicated or costly’ (Article 3(1) of the Directive). Accordingly, the ‘expenses’ of any associated proceedings cannot involve an excessively onerous burden (21) for the parties.
58. From the point of view of its scheme, the Directive includes ‘damages’ and ‘legal costs’ in the same section (Section 6). Even though recital 26 of the Directive, which concerns compensation for the prejudice suffered, does not refer to legal costs, it could be argued that the inclusion of the latter in the same section allows them to be categorised as= another element for which the Directive provides with a view to ensuring that holders of intellectual property rights are indemnified. However, it does so by adopting a mere ‘general rule’, which is open to exceptions, and by making its application conditional on factors distinct from those which form the rules for payment of damages.
59. The Court ruled on the legal costs incurred in proceedings concerning the protection of intellectual property rights in Realchemie Nederland (22) and Diageo Brands. (23) A reading of those judgments, particularly paragraph 49 of the judgment in Realchemie Nederland, (24) leads to the view, outlined above, that Article 14 of the Directive is an additional element aimed at ensuring that full compensation is

paid for the harm suffered by a holder of intellectual property rights. The Court also draws attention to the fact that Article 14 of the Directive seeks to strengthen the level of protection of intellectual property, by avoiding the situation in which an injured party is deterred from bringing legal proceedings in order to protect his rights.

60. However, in Realchemie Nederland, the Court did not rule on the issue of the reasonableness and proportionality of the legal costs, since that was not necessary for the purposes of that reference for a preliminary ruling. (25) There has, therefore, not yet been a dispute concerning the interpretation and scope of Article 14, but that is precisely what is at
issue in the present reference for a preliminary ruling.

61. The principle of legal certainty, consistently confirmed by the case-law, is linked to the principle of the foreseeability of the judicial response. The Court has repeatedly held that '… Community legislation must be certain and its application foreseeable by those subject to it. That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them'. (26)

62. A corollary of that principle, which may usefully serve in the proper interpretation of Article 14 of the Directive, is that the Member States must promote mechanisms which facilitate the foreseeability or predictability of legal costs. In the judgment in Commission v United Kingdom, (27) the Court, upon analysing English law relating to 'protective costs orders', held that it was necessary to ensure reasonable predictability both in relation to the obligation to pay the costs of the judicial proceedings and as regards their amount.

63. It is therefore no surprise that some of the parties which have submitted written observations have drawn attention to the counterpoint of predictability and legal certainty, as key elements for the quantification of legal costs. One of the decisive factors when faced with proceedings is their financial cost and the foreseeable financial effort which those concerned have to make.

64. Seen in that light, I cannot agree with an interpretation of Article 14 of the Directive which leads to all the lawyers' fees incurred by the successful party being necessarily included in the legal costs. I propose, by contrast, that: (a) the recoverable costs in that regard are only those which are reasonable and proportionate in each case and (b) Member States may, owing specifically to requirements of predictability, determine 'objectively' and in general terms the maximum amount recoverable, within a scale of the kind in the disputed

Belgian legislation.

65. The lawyer-client relationship should not be confused with the relationship which gives rise to the obligation to reimburse legal costs. The first is a contractual relationship relating to services, in which both parties freely fix the financial consideration paid by the client to his lawyer. The second is a procedural-law relationship which is intended to compensate the successful party, at the expense of the unsuccessful party, for the costs of bringing proceedings.

66. The different nature of the two relationships is fundamental because in the former (the contractual relationship), subjective considerations have a decisive role and acceptance of the lawyer's financial terms depends entirely on the choice of his client, who may simply seek another lawyer to represent him. In the procedural relationship, that freedom of choice does not exist and, therefore, it is logical that objective criteria should apply, (28) which are aimed at specifying and possibly reducing the amount of fees which may be recovered from someone who had no involvement in selecting the opposing party's lawyer.

67. The objective criteria may be adjusted on the basis of standard costs of legal assistance: that also helps to promote the equality of the parties to the proceedings and avoids one party — the one in the best financial position — from imposing the weight of his choice on the opposing party. If it were possible to recover the full amount of a lawyer's fee note from the opposing party, an applicant with greater available financial resources could exercise his choice in a quasi-coercive way. Faced with the risk of having to pay the very high legal fees of the opposing party, the person concerned might decide that it is not worth fighting and that it is safer to waive his right to litigate. The principle of the equality of litigants and the right of access to justice, with which this whole dispute is inextricably interlinked, (29) could be undermined.

68. According to Article 3(2) of the Directive, the procedures and remedies in the field concerned must be 'effective, proportionate and dissuasive'. Dissuasion may, however, operate in two respects: (i) that of excess, in that a person may be discouraged from bringing proceedings because, if he loses, he will be faced with very high costs; and (ii) that of a shortfall, because if he wins, he will recover only a small proportion of the costs incurred. In my view, the 'dissuasive' effect of this kind of procedure is achieved, as far as legal costs are concerned, if those costs are calculated by reference to predictable guidelines which are set in advance and in objectively reasonable and proportionate terms. The amount of lawyers' fees recoverable from the unsuccessful party could entail a significant impediment to access to justice (that is, a factor that is excessively 'dissuasive', to the point of being 'costly', which is prohibited by Article 3 of the Directive) if specification of the amount of such fees were entrusted exclusively to the party entitled to recover them, without any external review of the amount.

69. Does a system like the Belgian system, which sets an upper limit for the lawyers' fees
recoverable from the party ordered to bear the costs, satisfy those criteria? None of the participants in these preliminary-ruling proceedings (including Telenet) have argued that, in the abstract, absolute limits constitute, per se, an infringement of Article 14 of the Directive, (30) and I agree with that stance. (31) The

Commission expressly acknowledges that that provision does not preclude flat-rate systems, which are possible because of the discretion of the Member States. The same view is set out in the observations of the Netherlands: the terms 'reasonable and proportionate' and the reference to 'equity' in Article 14 of the Directive are broad enough to confer that freedom of choice on the Member States.

70. The Kingdom of Belgium submits that the principle of the procedural autonomy of the Member States is applicable. However, as I stated above, my view is that, given the presence of a specific provision in the Directive aimed at 'homogenising' the treatment of costs in a particular category of proceedings (those relating to intellectual property), the rules governing procedural instruments are, undoubtedly, the responsibility of the Member States, but within the margins of the Directive. (32)

71. The Belgian system of taxation of legal fees, based on the rule that the successful party may recover his costs (the unsuccessful party to the proceedings pays the lawyers' fees of the successful party), sets maximum and minimum limits on the right to claim costs based on the sum involved in the dispute. (33) It is for the court seised of the case to specify the exact amount which may be recovered and it will do so in the light of the circumstances of the case and within those limits.

72. In the main proceedings, the court quantified the costs in respect of lawyers' fees at first instance as EUR 11 000, the maximum amount for claims involving an unspecified sum, pursuant to Article 3 of the Royal Decree. The amount granted is, therefore, much lower than that claimed by the successful party in respect of costs (more than EUR 185 000). Despite appearances, that fact is not particularly significant because, first, it is not for the Court of Justice but the referring court to decide whether those fees are reasonable and proportionate, and, second, the information provided does not make it possible to determine what a suitable balance would be.

73. To my mind, the answer must involve an assessment of the Belgian system as a whole, taking account of the usual standards governing lawyers' fees which are applicable in that country. While Article 14 of the Directive was intended to homogenise the legal systems relating to the costs applicable to intellectual property proceedings in all the Member States, it was not aimed at creating parity or narrowing the gap between the lawyers' fees of the Member States, which are markedly different from one other. The Royal Decree was adopted specifically in the light of the favourable opinion of the Belgian professional organisations (bar associations) and therefore, in principle, it must be assumed that the maximum figures laid down therein are consonant with the average standards applicable in Belgium. Those organisations are well placed to suggest the standards of 'objective reasonableness' above which, in Belgium, no one should be required to pay the opposing party's lawyer's fees.

74. Also in support of the system created by the Belgian legislature is the fact that it ensures that the amount of legal costs which the parties are at risk of having to pay is predictable from the very start of the proceedings. As I pointed out above, the protection of legal certainty requires the availability of definite (fixed or percentage-based) data which can be used to calculate the financial risk of litigating, whether as an applicant or a defendant.

75. Based on those criteria, I am of the view that Article 14 of the Directive does not provide a basis for the Court to 'correct' the will of the Belgian legislature, embodied in the two national provisions referred to above, concerning the maximum limit of fees above which the party against whom an order for costs is made is not obliged to reimburse the fees payable to the other party's lawyer. I believe that the Belgian authorities have — as is clear from the procedure followed in the drafting of those provisions — the information required to create a system of maximum lawyers' fees (to be paid by the unsuccessful party in a legal action) in accordance with its own standards of costs, in the light of the specific situation applicable to legal representation in that country, amongst other factors. (34)

76. The fact that, within that system, the ceilings were fixed in such a way that, in actions involving a specific sum, the fees recoverable cannot exceed EUR 30 000 at each instance, and, in actions involving an unspecified sum, those fees cannot exceed EUR 11 000 at each instance, may be criticised to varying degrees from other points of view but not so far as the system's compliance with Article 14 of the Directive is concerned. There is no doubt that that system could be improved (for example, by allowing specific derogations in exceptional circumstances) but it does not, in the form it takes, breach Article 14, the wording of which, as I have reiterated, lays down a 'general rule' which is open to exceptions, by reference to criteria of reasonableness and proportionality which afford the Member States a broad legislative discretion. The national legislature may, in my opinion, determine for itself, taking account of the legal culture and situation regarding legal representation in Belgium, among other factors, the ceiling above which the lawyers' fees recoverable from the unsuccessful party cease to be reasonable.

B – The second question

77. The reply to the second question must be approached by reference to the terms which the national court uses to describe national law. Its proposition is that '[Belgian] case-law … states that the costs of a technical adviser are recoverable only in the event of fault (contractual or extra-contractual)'. There is unanimous agreement that reimbursement of experts' expenses (including those of technical experts or advisers) are not subject to the rules applicable to the recovery of lawyers' fees.

78. The referring court questions whether the Belgian case-law on the reimbursement of such costs is compatible with Article 14 of the Directive. The

written observations lodged by the participants in the proceedings which have expressed a view on the subject, with the exception of the Belgian Government, all argue that it is not compatible.

79. Before I give my opinion on the answer, I must make two points. The first is that the concept of costs payable for the work of technical experts or advisers may cover different situations, some of which do not necessarily come within the category of 'legal costs'. That term does not include any expense to a greater or lesser extent 'related' to the bringing of the action or paid 'on account' of it but rather costs which arise immediately and directly from the action itself. A natural or legal person may take preliminary steps, including having prior consultations with certain advisers or experts, without the associated cost having to be part of the 'legal costs'. According to recital 26 of the Directive, the 'costs of identification and research' carried out in the sphere of protection of intellectual property come under the heading of damages (Article 13) rather than legal costs (Article 14).

80. The second point is the fact that the Belgian Judicial Code (Article 1018(4)) includes within the legal costs which the unsuccessful party must pay — that is, under the general rule that the successful party is awarded costs — the costs of 'witnesses and experts' who have been involved in the proceedings as a result of the adoption of the 'measures of inquiry' decided upon. So far as those experts' costs are concerned, the (subjective) criterion of fault to which the referring court refers does not seem to be applicable but rather the (objective) rule that the successful party is awarded costs.

81. It is therefore necessary to clarify which experts' costs the Belgian case-law is referring to when it links their reimbursement to the requirement that the damage giving rise to the duty of reimbursement must be the result of fault. (35) There may be two types of expenditure incurred in respect of evidence of a technical nature: (a) expenditure incurred as a result of the involvement of experts in the proceedings, provided for in Article 1018(4) of the Judicial Code, and (b) expenditure incurred outside the proceedings, as support for the claim or defence. The case-law referred to by the referring court and by the Belgian Government itself is concerned only with the latter.

82. Subject to all those reservations, there are two sides to the reply I propose for the second question. In my view, the national case-law mentioned by the referring court does not conflict with Article 14 of the Directive where the costs claimed in respect of technical assistance cannot be included in the concept of 'legal costs' as a result of their specific features, for example, the fact that they are merely preliminary in nature or other factors, some of which I have dealt with above. In that situation, recovery of those costs may be feasible in the light of Article 13 of the Directive, a provision which allows account to be taken of facts linked to the notion of fault ('… the infringer who knowingly or with reasonable grounds to know, engaged in an infringing activity' must be ordered to pay damages).

83. However, on the other side of that proposition, expenses incurred as a result of the involvement of an expert in proceedings for the protection of intellectual property rights, which are directly and immediately connected to the pursuit of the action, must be reimbursed to the successful party pursuant to Article 14 of the Directive (that is, if they are reasonable, proportionate and not contrary to equity), without an additional condition, such as the existence of fault, being required.

84. If I am proposing for the second question a reply which differs from the one suggested for the first question, that is because the national rule (derived from case-law), which supposedly applies to experts' costs, may preclude the total or partial recovery of such costs in disputes relating to intellectual property, specifically as a result of the concept of fault, which does not occur in the case of lawyers' fees. The general exclusion of those 'legal costs' (where they may actually be characterised as such), which could arise as a result of the national case-law applicable to that type of action, would not even permit an assessment in an individual case of whether the costs are proportionate and reasonable, which, to my mind, is not compatible with the wording or the purpose of Article 14 of the Directive.

V – Conclusion

85. In the light of the foregoing considerations, I propose that the Court should reply as follows to the questions referred for a preliminary ruling:

(1) Article 14 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights does not preclude national legislation, such as that at issue in this reference for a preliminary ruling, which sets a maximum limit for the recovery of the successful party's lawyer's fees from the party ordered to pay the costs, in all types of proceedings, including those relating to the protection of intellectual property rights.

(2) Article 14 of Directive 2004/48 precludes a requirement that fault must exist as a necessary condition for ordering the unsuccessful party to reimburse the reasonable, proportionate and equitable experts' costs incurred by the successful party, provided that those costs are directly and immediately connected to the pursuit of proceedings for the protection of intellectual property rights.

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1 – Original language: Spanish.

2 – Directive of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45; 'the Directive').

3 – Judgment in Realchemie Nederland, C-406/09, EU:C:2011:668, paragraphs 47 and 48.

4 – Judgment in McDonagh, C-12/11, EU:C:2013:43, paragraphs 40 and 42.

5 – Judgments in Marshall, C-271/91, EU:C:1993:335, and VTB-VAB and Galatea, C-261/07 and C-299/07, EU:C:2009:244.

6 – C-406/09, EU:C:2011:668. According to that judgment, the general objective of the Directive is to approximate the legislative systems of the Member States so as to ensure a high, equivalent and homogeneous level of intellectual property protection.

7 – Judgment in L'Oréal and Others, C-324/09, EU:C:2011:474, paragraph 131.

8 – Judgment in Realchemie Nederland, C-406/09, EU:C:2011:668, paragraph 48.

9 - http://ec.europa.eu/internal_market/consultations/docs/2012/intellectual-propertyrights/summary-of-responses_en.pdf.

10 – The Belgian Government points out that, in judgment No 182/2008 of 18 September 2008, given in an action to declare the Law of 21 April 2007 unconstitutional, the Belgian Constitutional Court acknowledged that the legislature was concerned with guaranteeing legal certainty, responding to the development of case-law on the subject of reimbursement of legal costs and safeguarding access to justice for all litigants.

11 – http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52003PC0046&from=EN.

12 – The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees (http://www.wipo.int/treaties/en/text.jsp?file_id=305906).

13 – http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52003PC0046&from=EN.

14 – Judgments in Dekker, C-177/88, EU:C:1990:383; Draehmpaehl, C-180/95, EU:C:1997:208; and Strabag and Others, C-314/09, EU:C:2010:567.

15 – I do not consider it to be relevant that, in the course of the procedure for drafting the Directive, the express reference to lawyers' fees was removed from Article 14, since, whether or not they are mentioned explicitly, lawyers' fees are one of the most typical items of legal costs.

16 – See Article 1018(6) of the Belgian Judicial Code.

17 – Article 144(b) of the Rules of Procedure. The Court frequently relies on the concepts of reasonability, proportionality and equitable assessment to establish the legal costs payable by the parties to proceedings. In that connection, see, inter alia, the orders in Deoleo v Aceites del Sur- Coosur, C-498/07 P-DEP, EU:C:2013:302, paragraph 35; Zafra Marroquineros v Calvin Klein Trademark Trust, C-254/09 P-DEP, EU:C:2012:628, paragraph 31; Internationaler Hilfsfonds v Commission, C-208/11 P-DEP, EU:C:2012:76, paragraph 30; Germany and Others v Commission, C-75/05 P and C-80/05 P, EU:C:2005:614, paragraph 48; CPVO v Schräder, C-38/09 P-DEP, EU:C:2013:679, paragraph 36; Elf Aquitaine v Commission, C-521/09 P-DEP, EU:C:2013:644, paragraph 28; and Wedl & Hofmann v Reber Holding, C-141/13 P-DEP, EU:C:2015:133, paragraph 28.

18 – A number of language versions of the Directive apply both qualifiers to legal costs and to other expenses associated with proceedings. Others, however (the French, Spanish and Italian versions), apply those qualifiers only to legal costs. The sense of the provision warrants their application to both categories, as occurs in the English, German, Portuguese and Dutch versions.

19 – The German version of Article 14 of the Directive refers to the 'Prozesskosten und sonstigen Kosten … soweit sind zumutbar und angemessen' (no italics in the original).

20 – The expression 'expenses necessarily incurred' appears verbatim in Article 144(b) of the Rules of Procedure of the Court, under the headin 'recoverable costs'. Such expenses include, in particular, 'the travel and subsistence expenses and the remuneration of agents, advisers or lawyers'.

21 – The same concern is visible in Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17). Articles 10a, fifth paragraph, and 15a, fifth paragraph, respectively, of the latter two directives provide that court proceedings must not be prohibitively expensive.

22 – Judgment in Realchemie Nederland, C-406/09, EU:C:2011:668, paragraphs 48 and 49.

23 – Judgment in Diageo Brands, C-681/13, EU:C:2015:471, paragraph 72.

24 – C-406/09, EU:C:2011:668. The author of the infringement of the intellectual property rights must generally bear all the financial consequences of his conduct.

25 – Judgment in Realchemie Nederland, C-406/09, EU:C:2011:668. The Court confined itself to examining whether the costs relating to an exequatur procedure brought in a Member State, in the course of which the recognition and enforcement was sought of a judgment given in another Member State in proceedings seeking to enforce an intellectual property right, fell within the scope of Article 14 of the Directive.

26 – Judgment in Ireland v Commission, 325/85, EU:C:1987:546, paragraph 18.

27 – C-530/11, EU:C:2014:67, paragraph 52 et seq. The national rules favoured the limitation at the outset of the amount of costs which might be payable at the end of the proceedings.

28 – The Court used the concept of 'objective reasonableness' in the judgment in Edwards and Pallikaropoulos, C-260/11, EU:C:2013:221, holding at paragraph 40 thereof, when weighing up the balance between the appellant's personal interest and the general interest (in that case, the

protection of the environment), that 'that assessment cannot … be carried out solely on the basis of the financial situation of the person concerned but must also be based on an objective analysis of the amount of the costs … To that extent, the cost of proceedings must not appear, in certain cases, to be objectively unreasonable. Thus, the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable'.

29 – This is inevitable as the right to an effective remedy is enshrined in Article 47 of the Charter of Fundamental Rights of the European Union. Reference to that right is relevant because the subject matter of the proceedings falls within the scope of EU law (Article 51 of the Charter).

30 – Some have referred, in support of their contentions, to the Agreement on a Unified Patent Court (OJ 2013 C 175, p. 1), which provides not only for the application of the criteria of reasonableness and proportionality but also for an upper limit for costs in the following terms:

'Reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity requires otherwise, up to a ceiling set in accordance with the Rules of Procedure' (no italics in the original).

31 – Telenet's representative admitted at the hearing that it would have no objection to the application of the ceiling fixed by the Royal Decree if the amount thereof were higher.

32 – In the judgment in Diageo Brands, C-681/13, EU:C:2015:471, paragraph 73, the Court held that the provisions of the Directive are not intended to govern all aspects of intellectual property rights, but only those aspects inherent, first, in the enforcement of those rights and, secondly, in infringement of them, by requiring that there must be effective legal remedies designed to prevent, terminate or rectify any infringement of an existing intellectual property right.

33 – The table setting out the maximum amounts, by reference to the sum at issue in the proceedings, is included at point 14 of this Opinion. Where the sum at issue is unspecified, the scale is from EUR 82.50 to EUR 11 000. Those sums are payable at each stage of proceedings, that is, at each instance.

34 – The Belgian Constitutional Court observed in its judgment No 182/2008 that the Law of 21 April 2007, and the Royal Decree which implemented it, provided for a limitation of the sum which the successful party in proceedings may recover from the unsuccessful party, owing to 'the desire of the legislature to maintain access to justice for less-privileged persons and the wish to prevent or limit "proceedings within proceedings", concerning the amount of fees which may be recovered'.

35 – Neither the written observations nor the oral argument established with sufficient certainty whether there is general, settled and uniform case-law on that subject. Several judgments of the Belgian Hof van Cassatie (Court of Cassation) have accepted that the costs of technical assistance must be reimbursed to the party who suffered the damage, specifically as compensation for that damage, where those costs were essential for the purposes of quantifying the damage (for example, in relation to expropriation).