Court of Justice EU, 22 September 2016, Microsoft Mobile Sales v SIAE

COPYRIGHT

Both questions are admissible

- **First question not hypothetical and relates to main proceedings**

That is not the situation in the present case, in so far as the first question referred to the Court, which concerns the interpretation of EU law, is in no way hypothetical, and relates to the actual facts of the case in the main proceedings, since that question concerns the interpretation of provisions of EU law that the referring court considers to be of crucial importance for the decision it will be required to make in the main proceedings, more particularly as regards the detailed rules governing exemption from payment of the private copying levy when media and devices are purchased for purposes clearly unrelated to private copying.

- **The second question being identical to a question that has already been subject to another preliminary ruling does not result in inadmissibility**

Such a plea of inadmissibility must be rejected. Even if the question raised is materially identical to a question which has already been the subject of a preliminary ruling in a similar case, that fact in no way prohibits a national court from referring a question to the Court for a preliminary ruling and does not result in the inadmissibility of the question raised (see, to that effect, judgments of 6 October 1982, Cilfit and Others, 283/81, EU:C:1982:335, paragraphs 13 and 15; 2 April 2009, Pedro IV Servicios, C‑260/07, EU:C:2009:215, paragraph 31, and 26 November 2014, Mascolo and Others, C‑22/13, C‑61/13 to C‑63/13 and C‑418/13, EU:C:2014:2401, paragraph 49).

Article 5(2)(b) of Directive 2001/29/EC precludes national legislation that depends on agreements between, on the one hand, an entity which has a legal monopoly on the representation of the interests of authors of works and, on the other hand, those liable to pay compensation or their trade associations where only the final user can request an unduly paid levy.

- **EU law, in particular, Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 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.**

Imposing a limitation on the principle of legal certainty by calling into question certain legal relationships, requires good faith and a risk of serious difficulties

60. It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely, that those concerned should have acted in good faith and that there should be a risk of serious difficulties (see, inter alia, judgments of 10 January 2006, Skov and Bilka, C‑402/03, EU:C:2006:6, paragraph 51; 3 June 2010, Kalinchev, C‑2/09, EU:C:2010:312, paragraph 50, and 27 February 2014, Transportes Jordi Besora, C‑82/12, EU:C:2014:108, paragraph 41).

- **CJEU already ruled on a similar situation in the Padawan judgment (IPPT20101021), so the SIAE cannot claim that the legislation in the main proceedings complied with EU law**

62. In the present case, as regards the first criterion, it must be noted that, in judgment of 21 October 2010, Padawan (C‑467/08, EU:C:2010:620, paragraph 53), the Court had already ruled on the compatibility of EU law of a system providing for the indiscriminate application of the private copying levy to all types of digital reproduction devices and media, including in the event that they are acquired by persons other than natural persons for purposes clearly unrelated to private copying. Under those circumstances, the SIAE may not claim that it was satisfied that the legislation at issue in the main proceedings complied with EU law because of the lack of objection on the part of the Commission as to the compatibility of that legislation with EU law.

- **The existence of serious difficulties has not been demonstrated**

In any event, as regards the second criterion, it must be noted that the SIAE has not demonstrated the existence of serious difficulties, having merely indicated that the compensation has already been distributed in full to the

recipients and that it 'was probably not in a position to recover such amounts'.

Source: curia.europa.eu

Court of Justice EU, 22 September 2016

(M. Ilešič (Rapporteur), C. Toader, A. Rosas, A. Prechal, E. Jarašiūnas)

JUDGMENT OF THE COURT (Second Chamber)

22 September 2016 (*)

(Reference for a preliminary ruling — Approximation of laws — Intellectual property — Copyright and related rights — Directive 2001/29/EC — Exclusive right of reproduction — Exceptions and limitations — Article 5(2)(b) — Private copying exception — Fair compensation — Conclusion of agreements governed by private law to determine the criteria for exemption from payment of fair compensation — Request for reimbursement of compensation confined to the final user)

In Case C‑110/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decision of 4 December 2014, received at the Court on 2 March 2015, in the proceedings

Microsoft Mobile Sales International Oy, formerly Nokia Italia SpA,

Hewlett-Packard Italiana Srl,

Telecom Italia SpA,

Samsung Electronics Italia SpA,

Dell SpA,

Fastweb SpA,

Sony Mobile Communications Italy SpA,

Wind Telecomunicazioni SpA,

v

Ministero per i beni e le attività culturali (MIBAC),

Società italiana degli autori ed editori (SIAE),

Istituto per la tutela dei diritti degli artisti interpreti esecutori (IMAIE), in liquidation,

Associazione nazionale industrie cinematografiche audiovisive e multimediali (ANICA),

Associazione produttori televisivi (APT),

interveners:

Assotelecomunicazioni (Asstel),

Vodafone Omnitel NV,

H3G SpA,

Movimento Difesa del Cittadino,

Assoutenti,

Adiconsum,

Cittadinanza Attiva,

Altroconsumo,

THE COURT (Second Chamber),

composed of M. Ilešič (Rapporteur), President of the Chamber, C. Toader, A. Rosas, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: N. Wahl,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 24 February 2016,

after considering the observations submitted on behalf of:

- Microsoft Mobile Sales International Oy, by G. Cuonzo and Vincenzo Cerulli Irelli, avvocati,
- Hewlett-Packard Italiana Srl, by A. Clarizia and M. Quattrone, avvocati,
- Telecom Italia SpA, by F. Lattanzi and E. Stajano, avvocati,
- Samsung Electronics Italia SpA, by S. Cassamagnaghi, P. Todaro and E. Raffaelli, avvocati,
- Dell SpA, by L. Mansani and F. Fusco, avvocati,
- Sony Mobile Communications Italy SpA, by G. Cuonzo and Vincenzo and Vittorio Cerulli Irelli, avvocati,
- Wind Telecomunicazioni SpA, by B. Caravita di Toritto, S. Fiorucci and R. Santi, avvocati,
- la Società italiana degli autori ed editori (SIAE), by M. Siragusa and M. Mandel, avvocati,
- Assotelecomunicazioni (Asstel), by M. Libertini, avvocato,
- Altroconsumo, by G. Scorza, D. Reccia and L. Salvati, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by A. Vitale and S. Fiorentino, avvocati dello Stato,
- the French Government, by D. Colas and D. Segoin, acting as Agents,
- the European Commission, by V. Di Bucci and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 May 2016,

gives the following

Judgment

1. This request for a preliminary ruling concerns the interpretation of Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

2. That request has been made in the context of several disputes between, on the one hand, companies which produce and sell, inter alia, personal computers, recorders, recording media, mobile telephones and cameras and, on the other hand, the Ministero per i beni e le attività culturali e del turismo (Italian Ministry of cultural assets and activities and tourism, 'the MIBAC'), the Società italiana degli autori ed editori (Italian society for authors and publishers, 'the SIAE'), the Istituto per la tutela dei diritti degli artisti interpreti esecutori (Institute for the protection of performing artists), in liquidation, l'Associazione nazionale industrie cinematografiche audiovisive e multimediali (National association of cinema, audiovisual and multimedia industries) and the Associazione produttori televisivi (Association of television producers) concerning the 'fair compensation' to be paid, through the SIAE, to the authors of intellectual works for private reproduction of those works for personal use.

Legal context

EU law

3. Recitals 31, 35 and 38 of Directive 2001/29 state the following:

'(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject matter must be safeguarded. ...

...

(35) In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. ...

...

(38) Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders. ...'

4. Article 2 of Directive 2001/29, entitled 'Reproduction right', provides as follows:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

(b) for performers, of fixations of their performances;

(c) for phonogram producers, of their phonograms;

(d) for the producers of the first fixations of films, of the original and copies of their films;

(e) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.'

5. Article 5(2)(b) of that directive, entitled 'Exceptions and limitations', provides as follows:

'Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

...

(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned;

...'

Italian law

6. Directive 2001/29 was transposed into Italian law by Legislative Decree No 68 - Implementation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (decreto legislativo n. 68 — Attuazione della direttiva 2001/29/CE sull'armonizzazione di taluni aspetti del diritto d'autore e dei diritti connessi nella società dell'informazione) of 9 April 2003 (Ordinary Supplement to GURI No 87 of 14 April 2003), which amended Law No 633 on the protection of copyright and other rights relating to its exercise (legge n. 633 — Protezione del diritto d'autore e di altri diritti connessi al suo esercizio) of 22 April 1941 ('the Law on copyright') by inserting Articles 71 sexies, 71 septies and 71 octies relating to 'private reproduction for personal use'.

7. Paragraph 1 of Article 71 sexies of the Law on copyright provides:

'Private copying of phonograms and videograms on any media carried out by natural persons for personal use only shall be permitted, provided that it is not for profit or ends that are neither directly nor indirectly commercial, in compliance with the technological measures referred to in Article 102 quater.

8. Article 71 septies of the Law on copyright provides:

'1. The authors and producers of phonograms, and the original producers of audiovisual works, the performers and producers of videograms, and their successors in title, shall be entitled to compensation for the private copying of phonograms and videograms referred to in Article 71 sexies. In respect of devices designed solely for the analogue or digital recording of phonograms or videograms, that compensation shall consist of a percentage of the price paid by the final purchaser to the retailer which, in respect of multipurpose devices, shall be calculated on the basis of the price of a device with characteristics equivalent to those of the internal component designed to record or, where that is not possible, of a fixed amount for each device. In respect of audio and video recording media, such as analogue media, digital media and internal or removable memory designed for recording phonograms or videograms, the compensation shall consist of a sum corresponding to the recording capacity provided by those media. In respect of remote video recording systems, the compensation referred to in the present paragraph shall be payable by the person who provides the service and shall correspond to the remuneration obtained for providing that service.

2. The compensation referred to in paragraph 1 shall be set, in accordance with [EU] law and having regard, in any event, to reproduction rights, by a decree of [MIBAC] adopted no later than 31 December 2009, on the basis of the opinion of the committee referred to in Article 190 and the associations which represent the majority of the manufacturers of the devices and media referred to in paragraph 1. In setting the compensation, account shall be taken of the application or non-application of the technological measures referred to in Article 102 quater and the different effect of digital copying in comparison with analogue copying. The decree shall be updated every three years.

3. The compensation shall be payable by any person who manufactures or imports into the territory of the State, for profit-making purposes, the devices and media referred to in paragraph 1. Those persons must submit to the [SIAE], every three months, a declaration indicating sales made and compensation due, which must be paid at the same time. Where no compensation

is paid, the distributor of the recording devices and media shall be jointly and severally liable for payment. …'

9. Article 71 octies of the Law on copyright provides as follows:

'1. The compensation referred to in Article 71 septies in respect of audio recording devices and media shall be paid to the [SIAE], which shall ensure, following deduction of its costs, payment of a 50% share to the authors and their successors in title, and a 50% share to the producers of phonograms, including through the intermediary of the most representative trade associations.

2. Producers of phonograms shall pay without delay, and in any event within six months, 50% of the compensation received under paragraph 1 to the performers concerned.

3. The compensation referred to in Article 71 septies in respect of video recording devices and media shall be paid to the [SIAE], which shall ensure, following deduction of its costs, payment of a 30% share of the compensation to the authors and the remaining 70% in equal shares to the original producer of audiovisual works, the producers of videograms and performers. 50% of the share paid to performers shall be allocated to the activities and objectives described in Article 7(2) of Law No 93 of 5 February 1992.'

10. Under Article 71 septies, paragraph 2 of the Law on copyright, on 30 December 2009, the MIBAC adopted the Decree on the determination of compensation for the private reproduction of phonograms and videograms (decreto relativo alla determinazione del compenso per la riproduzione privata di fonogrammi e di videogrammi, *'the decree of 30 December 2009'), which consists of a single article stating that 'the technical annex which is an integral part [of that] decree establishes the amount of compensation in respect of the private reproduction of phonograms and videograms by virtue of Article 71 septies of [the Law on copyright]'*.

11. Article 2 of the technical annex to the decree of 30 December 2009 ('the technical annex') sets out the amounts of compensation in respect of private copying and provides a list of 26 categories of products, each associated with the amount of that compensation.

12. Article 4 of the technical annex provides as follows:

'1. The [SIAE] shall promote protocols for more effective application of the present provisions, in particular for the purpose of providing objective and subjective exemptions, such as, for example, in the event of the professional use of devices and media or in respect of certain devices for video games. Those application protocols shall be adopted in agreement with the persons obliged to pay the compensation for private copying, or their trade associations.

2. Until the protocols referred to in paragraph 1 have been adopted, the agreements valid before the present provisions shall remain in force.'

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

13. The applicants in the main proceedings produce and sell inter alia personal computers, recorders, storage media, mobile telephones and cameras.

14. Those applicants brought actions before the Tribunale amministrativo regionale del Lazio (Lazio Regional Administrative Court, Italy) seeking annulment of the decree of 30 December 2009. In support of those actions, they maintained that the national legislation in question is contrary to EU law, inter alia on account of the private copying levy for persons acting for purposes clearly unrelated to private copying, in particular, legal persons and persons engaged in professional activities. They also claimed that the delegation of powers by MIBAC to the SIAE, which is the body in charge of the collective management of copyright in Italy, is discriminatory, since the Italian legislation empowers the SIAE to designate the persons who should be exempted from payment of the private copying levy and those entitled to benefit from the procedure for reimbursement of that levy, where it has been paid.

15. The Tribunale amministrativo regionale del Lazio (Lazio Regional Administrative Court) dismissed those actions.

16. The applicants in the main proceedings appealed against the decision dismissing those actions before the Consiglio di Stato (Council of State, Italy), which, entertaining doubts as to the proper construction, in that context, of Article 5(2)(b) of Directive 2001/29, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does EU law, and in particular recital 31 and Article 5(2)(b) of Directive 2001/29, preclude national legislation (specifically Article 71 sexies of the Law on copyright, read in conjunction with Article 4 of the technical annex) that, when media and devices are acquired for purposes clearly unrelated to private copying (that is to say, for professional use only), leaves the determination of the criteria for a ex ante exemption from the levy for private copying to the conclusion of agreements, or "free bargaining", governed by private law, in particular the "application protocols" referred to in Article 4, without any general provisions or guarantees of equal treatment between the SIAE and persons obliged to pay compensation, or their trade associations?

(2) Does EU law, and in particular recital 31 and Article 5(2)(b) of Directive 2001/29, preclude national legislation (specifically Article 71 sexies of the Italian Law on copyright, read in conjunction with the decree of 30 December 2009 and the instructions on reimbursement given by the SIAE) that provides that, when media and devices are acquired for purposes clearly unrelated to private copying (that is to say, for professional use only), reimbursement may be requested only by the final user and not by the manufacturer of the media and devices?'

Consideration of the questions referred

Admissibility

17. The SIAE considers that the first question is inadmissible, because it ought to have been answered by an interpretation of Italian law in accordance with EU law as meaning that recording and media devices acquired by persons other than natural persons for exclusively professional purposes are not subject to payment of the private copying levy.
18. It must be borne in mind in that regard that, according to the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (**see, in particular, judgments of 21 October 2010, Padawan, C‑467/08, EU:C:2010:620, paragraph 21**, and **12 November 2015, Hewlett-Packard Belgium, C‑572/13, EU:C:2015:750, paragraph 24**).
19. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, in particular, judgments of 16 June 2015, Gauweiler and Others, C‑62/14, EU:C:2015:400, paragraph 25, and 8 September 2015, Taricco and Others, C‑105/14, EU:C:2015:555, paragraph 30).
20. That is not the situation in the present case, in so far as the first question referred to the Court, which concerns the interpretation of EU law, is in no way hypothetical, and relates to the actual facts of the case in the main proceedings, since that question concerns the interpretation of provisions of EU law that the referring court considers to be of crucial importance for the decision it will be required to make in the main proceedings, more particularly as regards the detailed rules governing exemption from payment of the private copying levy when media and devices are purchased for purposes clearly unrelated to private copying.
21. The SIAE also submits that the second question is inadmissible, since it is identical to a question on which the Court has already ruled.
22. Such a plea of inadmissibility must be rejected. Even if the question raised is materially identical to a question which has already been the subject of a preliminary ruling in a similar case, that fact in no way prohibits a national court from referring a question to the Court for a preliminary ruling and does not result in the inadmissibility of the question raised (see, to that effect, judgments of 6 October 1982, Cilfit and Others, 283/81, EU:C:1982:335, paragraphs 13 and 15; 2 April 2009, Pedro IV Servicios, C‑260/07, EU:C:2009:215, paragraph 31, and 26 November 2014, Mascolo and Others, C‑22/13, C‑61/13 to C‑63/13 and C‑418/13, EU:C:2014:2401, paragraph 49).
23. It follows that the questions referred are admissible.

Substance

24. By its questions, which must be examined together, the referring court asks, in essence, whether 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, which, 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 the compensation, or their trade associations, and, on the other hand, provides that the reimbursement of such a levy, when it has been unduly paid, may be requested only by the final user of those devices and media.
25. It must be recalled, in the first place, that, in accordance with Article 5(2)(b) of Directive 2001/29, Member States may provide for an exception or limitation to the exclusive reproduction right provided for under Article 2 of that directive in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation taking into account the technological measures referred to in Article 6 of that directive.
26. As is apparent from recitals 35 and 38 of Directive 2001/29, Article 5(2)(b) of that directive reflects the EU legislature's intention of establishing a specific compensation scheme which is triggered by the existence of harm caused to rightholders, which gives rise, in principle, to the obligation to 'compensate' them (**judgment of 9 June 2016, EGEDA and Others, C‑470/14, EU:C:2016:418, paragraph 19** and the case-law cited).
27. Inasmuch as Directive 2001/29 does not expressly address the various elements of the fair compensation system, the Member States enjoy broad discretion in determining who is to pay that compensation. The same is true of the form, detailed arrangements and possible level of such compensation (see, to that effect, **judgment of 11 July 2013, Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515, point 20** and the case-law cited).
28. As is apparent from the case-law of the Court, in order to comply with Article 5(2)(b) of Directive 2001/29, fair compensation and, therefore, the system on which it is based, must be linked to the harm resulting for the rightholder from the making of copies for private use (see, to that effect, **judgment of 5 March 2015, Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 21 and the case-law cited**).

29. Accordingly, a system for financing fair compensation is compatible with the requirements of a 'fair balance', referred to in recital 31 of Directive 2001/29, between the rights and interests of authors, who are the recipients of the fair compensation, on the one hand, and those of users of protected subject matter, on the other, only if the digital reproduction equipment, devices and media concerned are liable to be used for private copying and, therefore, are likely to cause harm to the author of the protected work. There is therefore, having regard to those requirements, a necessary link between the application of the private copying levy to those digital reproduction devices and media and their use for private reproduction (**see, to that effect, judgment of 21 October 2010, Padawan, C‑467/08, EU:C:2010:620, paragraph 52**).

30. In the second place, it must be noted that the Court has held that, since the person who has caused harm to the holder of the exclusive right of reproduction is the person who, for his private use, reproduces a protected work without seeking prior authorisation from that rightholder, it is, in principle, for that person to make good the harm relating to that copying by financing the compensation to be paid to that rightholder (**judgments of 21 October 2010, Padawan, C‑467/08, EU:C:2010:620, paragraph 45; 16 June 2011, Stichting de Thuiskopie, C‑462/09, EU:C:2011:397, paragraph 26**, and **11 July 2013, Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515, paragraph 23**).

31. The Court has however accepted that, given the practical difficulties in identifying private users and obliging them to compensate the holders of the exclusive right of reproduction for the harm caused to them, it is open to the Member States to establish a 'private copying levy' for the purposes of financing fair compensation, chargeable not to the private persons concerned but to those who have the reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users. Under such a system, it is the persons having that equipment who must discharge the private copying levy (see, to that effect, **judgments of 21 October 2010, Padawan, C‑467/08, EU:C:2010:620, paragraph 46**; **16 June 2011, Stichting de Thuiskopie, C‑462/09, EU:C:2011:397, paragraph 27**, and **11 July 2013, Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515, paragraph 24**).

32. Accordingly, the Member States may, under certain conditions, apply the private copying levy indiscriminately with regard to recording media suitable for reproduction, including where the final use of such media does not meet the criteria set out in Article 5(2)(b) of Regulation No 2001/29 (see **judgment of 5 March 2015, Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 44**).

33. The Court has, further, pointed out that, since that system enables the persons responsible for payment to pass on the amount of the private copying levy in the price charged for making the reproduction equipment, devices and media available, or in the price for the copying service supplied, the burden of the levy will ultimately be borne by the private user who pays that price, in a way consistent with the 'fair balance', referred to in recital 31 of Directive 2001/29 between the interests of the holders of the exclusive right of reproduction and those of the users of the protected subject matter (see, to that effect, **judgments of 16 June 2011, Stichting de Thuiskopie, C‑462/09, EU:C:2011:397, paragraph 28**, and **11 July 2013, Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515, paragraph 25**).

34. Nonetheless, the Court has held that a system for the application of such a levy will be consistent with Article 5(2)(b) of Directive 2001/29 only if its introduction is justified by practical difficulties and if the persons responsible for payment have a right to reimbursement of the levy where it is not due (see, to that effect, **judgments of 11 July 2013, Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515, paragraph 31**, and **5 March 2015, Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 45**).

35. In that regard, a private copying levy system may be justified by, inter alia, the need to address the fact that it is impossible to identify the final users or the practical difficulties associated with identifying those users or other similar difficulties (**judgment of 5 March 2015, Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 46 and the case-law cited**).

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**).

37. Moreover, such a system must provide for a right to reimbursement of the private copying levy which is effective and does not make it excessively difficult to obtain repayment of the levy paid. In that regard, the scope, the effectiveness, the availability, the public awareness and simplicity of use of the right to reimbursement allow for the correction of any imbalances created by the private copying levy system, in order to respond to the practical difficulties observed (see, to that effect, **judgments of 11 July 2013, Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515, paragraph 36**, and **5 March 2015, Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 52**).

38. It is in the light of those two principles that the questions referred by the national court should be considered.

39. In the first place, it must be noted that the fair compensation system at issue in the main proceedings provides, as is apparent from paragraph 1 of Article 71

septies of the Law on copyright, that the private copying levy consists in part of the price paid by the final user to the retailer in respect of the devices and media in question, which is a fixed amount corresponding to their recording capacity. According to paragraph 3 of Article 71 septies of the Law on copyright, that levy is to be payable by any person who manufactures or imports such devices and media into the territory of the State for profit-making purposes.

40. It is settled case-law in that regard that the legislation at issue in the main proceedings contains no generally applicable provision exempting from payment of the private copying level producers and importers who show that the devices and media were acquired by persons other than natural persons, for purposes clearly unrelated to private copying.

41. It is apparent from the Court's case-law, referred to in paragraph 36 of the present judgment, that that levy must not be applied to the supply of such equipment.

42. As noted in paragraph 29 of the present judgment, a system for financing fair compensation is compatible with the requirements of a 'fair balance', referred to in recital 31 of Directive 2001/29, only if the digital reproduction devices and media concerned are liable to be used for private copying.

43. It is true that, as emphasised by the Italian Government, Article 4 of the technical annex provides that the SIAE is to 'promote' protocols inter alia 'for the purpose of providing objective and subjective exemptions, as, for example, in the event of the professional use of devices and media or in respect of certain devices for video games', which must be adopted in agreement with the persons obliged to pay the compensation for private copying, or their trade associations.

44. However, the Court has noted that the exceptions provided for in Article 5 of Directive 2001/29 must be applied in a manner consistent with the principle of equal treatment, affirmed in Article 20 of the Charter of Fundamental Rights of the European Union, which, according to the Court's established case-law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (**judgment of 5 March 2015, Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraphs 31 and 32 and the case-law cited**).

45. Member States may not therefore lay down detailed fair compensation rules that would discriminate, unjustifiably, between the different categories of economic operators marketing comparable goods covered by the private copying exception or between the different categories of users of protected subject matter (**judgment of 5 March 2015, Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 33 and the case-law cited**).

46. In the present case, it must be noted that the legislation at issue in the main proceedings does not make it possible to ensure equal treatment in every case between the producers and importers required to pay the private copying levy, who might be in comparable situations.

47. First, that legislation, which, as noted in paragraph 40 of the present judgment, does not contain any generally applicable provision exempting from payment of the private copying levy producers and importers who show that the devices and media were acquired by persons other than natural persons, for purposes clearly unrelated to private copying, merely imposes an obligation to use best endeavours on the SIAE, which is required only to 'promote' the conclusion of agreement protocols with persons required to pay the private copying levy. It follows that producers and importers in comparable situations may be treated differently, depending on whether or not they have concluded an agreement protocol with the SIAE.

48. Next, that legislation, in particular Article 4 of the technical annex, does not lay down objective and transparent criteria to be satisfied by persons required to pay fair compensation or by their trade associations for the purposes of concluding such agreement protocols, since it refers merely, by way of example, to the exemption 'in the event of the professional use of devices or media or in respect of certain devices for video games', while the exemptions applied in practice may, moreover, in accordance with the actual wording of that article, be objective or subjective in nature.

49. Finally, since the conclusion of those protocols is left to free bargaining between, on the one hand, the SIAE and, on the other, persons required to pay fair compensation, or their trade associations, the view must be taken, even if such protocols are concluded with all persons entitled to claim an exemption from payment of the private copying levy, that there is no guarantee that producers and importers in comparable situations will be treated equally, the terms of such agreements being the result of negotiation governed by private law.

50. Moreover, the points highlighted in paragraphs 47 to 49 of the present judgment do not permit the view that the national legislation at issue in the main proceedings is capable of ensuring that the requirement referred to in paragraph 44 of the present judgment is satisfied effectively and in accordance, in particular, with the principle of legal certainty.

51. In the second place, as is apparent from the wording of the second question referred and the observations made before the Court, the reimbursement procedure, which was drawn up by the SIAE and is included in the latter's 'instructions' available on the internet, provides that reimbursement may be requested only by a final user who is not a natural person. The reimbursement may not, however, be requested by a producer or importer of the media and devices.

52. In that regard, it suffices to note, **as the Advocate General observed in points 58 and 59 of his opinion**, that while it is true that the Court held in its **judgment of 5 March 2015, Copydan Båndkopi (C‑463/12**, EU:C:2015:144, paragraph 55) that EU law does not preclude a system of fair compensation which provides for a right to reimbursement of the private copying levy

for the final user of the devices or media subject to the levy, it observed that such a system is compatible with EU law only if the persons responsible for payment are exempt, in accordance with EU law, from payment of that levy if they establish that they have supplied the devices and media in question to persons other than natural persons for purposes clearly unrelated to private copying.

53. That is not the situation in the present case, as is apparent from the considerations set out in paragraphs 39 to 49 of the present judgment.

54. Moreover, it must be recalled that, as is apparent from recital 31 of Directive 2001/29, a fair balance must be safeguarded between the rightholders and the users of protected subject matter. According to the Court's case-law, a fair compensation system must, therefore, contain mechanisms, in particular for reimbursement, which are designed to correct any situation where 'overcompensation' occurs to the detriment of particular categories of users, which would not be compatible with the requirement set out in that recital (see, by analogy, **judgment of 12 November 2015, Hewlett-Packard Belgium, C‑572/13, EU:C:2015:750, paragraphs 85 and 86**).

55. In the present case, since the system of fair compensation at issue in the main proceedings does not provide for sufficient guarantees in respect of the exemption from payment of the levy of producers and importers who show that the devices and media were acquired for purposes clearly unrelated to private copying, that system should, in any event, as noted in paragraph 37 of the present judgment, provide for a right to reimbursement of the levy that is effective and does not make it excessively difficult to obtain repayment of the levy paid. The right to reimbursement provided for by the system of fair compensation at issue in the main proceedings cannot be regarded as effective, since it is common ground that it is not open to natural persons, even where they acquire devices and media for purposes clearly unrelated to private copying.

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.

The request that the effects of the present judgment should be limited in time

57. In its written observations, the SIAE requested that the Court limit the temporal effects of the present judgment in the event that it should find that Article 5(2)(b) of Directive 2001/29 precludes national legislation such as that at issue in the main proceedings.

58. In support of its request, SIAE draws the Court's attention, first, to the serious financial repercussions for the SIAE that a judgment containing such a finding would have, since, with the exception of the SIAE's deduction to cover the expenses arising from its collection activity, the compensation has already been paid to the recipients. Secondly, the SIAE claims that there is no doubt that it acted in good faith with the full conviction that the national legislation at issue in the main proceedings was fully compatible with EU law, a conviction reinforced by the fact that, despite application of that legislation over a long period, the Commission, which was fully aware of it, never made any objection as to its compatibility with EU law.

59. In that connection, it should be recalled that, according to settled case-law of the Court, the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the courts having jurisdiction are satisfied (see, inter alia, judgments of 17 February 2005, Linneweber and Akritidis, C‑453/02 and C‑462/02, EU:C:2005:92, paragraph 41; 6 March 2007, Meilicke and Others, C‑292/04, EU:C:2007:132, paragraph 34, and 27 February 2014, Transportes Jordi Besora, C‑82/12, EU:C:2014:108, paragraph 40).

60. It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely, that those concerned should have acted in good faith and that there should be a risk of serious difficulties (see, inter alia, judgments of 10 January 2006, Skov and Bilka, C‑402/03, EU:C:2006:6, paragraph 51; 3 June 2010, Kalinchev, C‑2/09, EU:C:2010:312, paragraph 50, and 27 February 2014, Transportes Jordi Besora, C‑82/12, EU:C:2014:108, paragraph 41).

61. More specifically, the Court has taken that step only in quite specific circumstances, notably where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with EU law by reason of objective, significant uncertainty

regarding the implications of European Union provisions, to which the conduct of other Member States or the European Commission may even have contributed (judgment of 27 February 2014, Transportes Jordi Besora, C‑82/12, EU:C:2014:108, paragraph 42 and the case-law cited).

62. In the present case, as regards the first criterion, it must be noted that, in **judgment of 21 October 2010, Padawan (C‑467/08, EU:C:2010:620, paragraph 53)**, the Court had already ruled on the compatibility of EU law of a system providing for the indiscriminate application of the private copying levy to all types of digital reproduction devices and media, including in the event that they are acquired by persons other than natural persons for purposes clearly unrelated to private copying. Under those circumstances, the SIAE may not claim that it was satisfied that the legislation at issue in the main proceedings complied with EU law because of the lack of objection on the part of the Commission as to the compatibility of that legislation with EU law.

63. In any event, as regards the second criterion, it must be noted that the SIAE has not demonstrated the existence of serious difficulties, having merely indicated that the compensation has already been distributed in full to the recipients and that it 'was probably not in a position to recover such amounts'.

64. It is therefore not appropriate to limit the temporal effects of the present judgment.

Costs

65. 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 (Second Chamber) hereby rules:

EU law, in particular, Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 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.

[Signatures]

OPINION OF ADVOCATE GENERAL WAHL

delivered on 4 May 2016 (1)

Case C‑110/15

Microsoft Mobile Sales International, formerly Nokia Italia SpA,
Hewlett-Packard Italiana Srl
Telecom Italia SpA
Samsung Electronics Italia SpA
Dell SpA
Fastweb SpA
Sony Mobile Communications Italy SpA
Wind Telecomunicazioni SpA
v
Società italiana degli autori ed editori (SIAE)
Istituto per la tutela dei diritti degli artisti interpreti esecutori (IMAIE), in liquidation
Associazione nazionale industrie cinematografiche audiovisive e multimediali (Anica)
Associazione produttori televisivi (Apt)
and
Ministero per i beni e le attività culturali (MiBAC)

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Intellectual property — Directive 2001/29/EC — Copyright and related rights — Article 5 — Exclusive right of reproduction — Exceptions and limitations — Fair compensation — Extent — Determination of the criteria for ex ante exemption from the levy by private negotiation — Request for reimbursement confined to the final user)

1. The present request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy) concerns the proper construction of Article 5(2)(b) of Directive 2001/29/EC. (2) In accordance with that provision, Member States may provide for an exception to the exclusive 'reproduction right' of rightholders in respect of private copying. Where a Member State has decided to limit the exclusive rights of rightholders in that way, the directive requires Member States to put in place a system that ensures that rightholders are compensated fairly for the use of the copyrighted material.

2. In Italy, where private copying is allowed, that compensation takes the form of a private copying levy for equipment, devices and media suitable for copying protected works and other material. The questions referred concern the compatibility of the Italian system of compensation with Directive 2001/29. More specifically, the case allows the Court to define the limits of the Member States' discretion in devising the details of the system for compensation for private copying and to provide further guidance on the interpretation of Article 5(2)(b) of Directive 2001/29.

I – Legal framework

A – EU law

3. Directive 2001/29 deals with the harmonisation of certain aspects of copyright and related rights.

4. Recital 31 of Directive 2001/29 explains that one of the objectives of the directive is to ensure that a fair balance of rights and interests is struck between the different categories of rightholders, as well as between the different categories of rightholders and users of protected material.

5. Recital 35 deals with exceptions and limitations. According to that recital, rightholders should in certain

cases receive fair compensation to compensate them adequately for the use made of their protected works or other material. When the form, detailed arrangements and possible level of such fair compensation are determined, account should be taken of the particular circumstances of each case. In the assessment of those circumstances, the possible harm to the rightholders resulting from the act in question is held to be of particular relevance.

6. Article 2 of Directive 2001/29 concerns the reproduction right. It provides:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

(b) for performers, of fixations of their performances;

(c) for phonogram producers, of their phonograms;

(d) for the producers of the first fixations of films, in respect of the original and copies of their films;

(e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.'

7. Article 5 of the directive deals with exceptions and limitations to the reproduction right. It states, inter alia:

'...

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

...

(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned;

...'

B – Italian law

8. The relevant provisions of Law No 633 on the protection of copyright and other rights relating to its exercise ('the Copyright Law') (3) are the following.

9. Article 71 sexies provides:

'The private reproduction of phonograms and videograms on any media made by natural persons for personal use only shall be permitted, provided that it is not for profit or ends that are directly or indirectly commercial, in compliance with the technical measures referred to in Article 102 quater.

...'

10. Article 71 septies states:

'1. The authors and manufacturers of phonograms, and the original manufacturer of audiovisual works, the performers and manufacturers of videograms, and their successors in title, shall be entitled to compensation for the private reproduction of phonograms and videograms referred to in Article 71 sexies. In respect of devices designed solely for the analogue or digital recording of phonograms or videograms, that compensation shall consist of a percentage of the price paid by the final purchaser to the retailer which, in respect of multipurpose devices and media, shall be calculated on the basis of devices and media with characteristics equivalent to those of the internal component designed to record or, where that is not possible, of a fixed amount for each item of devices and media. In respect of audio and video recording media, such as analogue media, digital media, internal or removable memory designed for recording phonograms or videograms, the compensation shall consist of a sum corresponding to the recording capacity provided by those media. In respect of remote video recording systems, the compensation referred to in this paragraph shall be due from the person who provides the service and correspond to the remuneration obtained for providing that service.

2. The compensation referred to in paragraph 1 shall be set, in accordance with Community law and having regard, in any event, to the reproduction rights, by the Decree of the Minister for Cultural Heritage and Activities [MiBAC] to be adopted by 31 December 2009, after consultation with ... the trade associations which represent the majority of the manufacturers of the devices and media and media referred to in paragraph 1. In setting the compensation, account shall be taken of the application or non-application of the technical measures referred to in Article 102 quater and the different effect of digital copying in comparison with analogue copying. This Decree shall be updated every three years.

3. The compensation shall be due from any person who manufactures or imports into the territory of the State for profit-making purposes devices and media and media as referred to in paragraph 1. ... Where no compensation is paid, the vendor of the recording devices and media or media shall be jointly and severally liable for payment.'

11. Article 71 octies provides:

'1. The compensation referred to in Article 71 septies for devices designed for recording phonograms is to be paid to the Società italiana degli autori ed editori (SIAE) which will ensure, following deduction of its costs, the payment in equal shares to the authors and to the manufacturers of phonograms, including through the intermediary of the most representative trade and professional associations.

2. The manufacturer of phonograms will pay without delay, and in any case within 6 months, 50% of the compensation they have received to the performers concerned.

3. The compensation referred to in Article 71 septies for devices designed for recording videograms is to be paid to the [SIAE], which will ensure, following deduction of its costs, the payment of a 30% share of the compensation to the authors and the remaining 70% in equal shares to the manufacturer of the first fixations of films, the manufacturer of videograms and performers. 50% of the compensation paid to performers will finance the activities and objectives

described in Article 7(2) of the Law No 93 of 5 February 1992.
…'
12. The MiBAC adopted a decree referred to in Article 71 septies, paragraph 2, of the Copyright Law on 30 December 2009 ('the contested decree').
13. Article 4 of the Technical Annex to that decree provides:
'1. [SIAE] shall promote protocols for more effective application of these provisions, and for example for the purpose of providing objective and subjective exemptions, as, for example, in case of the professional use of devices and media and media or in respect of certain devices and media for videogames. Those application protocols shall be adopted in agreement with the persons obliged to pay the compensation for private copying, or their trade associations.
…'

II – Facts, procedure and the questions referred

14. The applicants in the main proceedings are manufacturers and retailers of personal computers, compact discs, recording devices, mobile telephones and cameras.
15. The MiBAC adopted the contested decree and the attached Technical Annex on the basis of Article 71 septies, paragraph 2, of the Copyright Law. That annex lays down the rules for calculating the compensation for private copying of phonograms and videograms due to rightholders. More specifically for the present purposes, the contested decree extended the scope of fair compensation. As a result, devices and media such as mobile telephones, computers and other equipment too are now covered by the private copying levy, even though those devices are not designed specifically for the reproduction, recording and storage of content. By contrast, before the contested decree was adopted, only devices designed primarily or exclusively for the recording of phonograms and videograms were subject to the levy in question.
16. After the contested decree was adopted, the applicants in the main proceedings brought an action before the Tribunale amministrativo regionale del Lazio (Lazio Regional Administrative Court, Italy) seeking the annulment of the contested decree. They claimed that the contested decree was contrary to EU law. In their view, this was so in particular because natural or legal persons obviously not engaging in acts of private copying are subject to the levy in question too. In that context, the applicants also levelled criticism against the powers that the contested decree afforded the SIAE: given the discretion of the SIAE in administering the levy, equal treatment of persons liable to pay the levy cannot in their view be guaranteed.
17. The Tribunale amministrativo regionale del Lazio (Lazio Regional Administrative Court) rejected the applicants' claims.
18. Subsequently, the applicants in the main proceedings brought an appeal against that decision before the Consiglio di Stato (Council of State). Entertaining doubts as to the proper construction of Article 5(2)(b) of Directive 2001/29, that court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
'(1) Does EU law, and in particular recital 31 in the preamble to, and Article 5(2)(b), of [Directive 2001/29], preclude national rules, such as Article 71 sexies of [the Copyright Law] read in conjunction with Article 4 of the contested decree, that provide that in case of media and devices acquired for purposes clearly unrelated to private copying —that is to say, for professional use only — determination of the criteria for an ex ante exemption from the [private copying levy] is left to private negotiation, or "free bargaining", with particular regard to the "application protocols" referred to in Article 4 of the [annex to] the contested decree without any general provisions or guarantees of equal treatment between the SIAE and persons obliged to pay compensation, or their trade and professional associations?
(2) Does EU law, and in particular recital 31 in the Preamble to, and Article 5(2)(b), of [Directive 2001/29], preclude national rules such as Article 71 sexies of [the Copyright Law] in conjunction with the [contested decree] and the instructions on reimbursement given by the SIAE, that provide that, in the case of media and devices acquired for purposes clearly unrelated to private copying (that is to say for professional use only), reimbursement may be requested only by the final user rather than the manufacturer of the media and devices?'
19. Written observations were submitted by Assotelecommunicazioni-ASSTEL, Hewlett-Packard Italiana Srl ('HP'), Microsoft Mobile Sales International (formerly Nokia Italia SpA), Samsung Electronics Italia SpA, Sony Mobile Communications SpA, Telecom Italia SpA, Wind Telecomunicazioni SpA and the SIAE as well as the Italian Government and the Commission. Oral argument was presented at the hearing on 24 February 2016 by Altroconsumo, Hewlett-Packard Italiana, Microsoft Mobile Sales International, Sony Mobile Communications, Telecom Italia, Samsung Electronics Italia, Dell and the SIAE as well as the Italian and French Governments and the Commission.

III – Analysis

A – Introductory remarks

20. To begin with, Directive 2001/29 is intended to ensure, amongst other things, that a fair balance is struck between the conflicting interests of rightholders and users of copyrighted works and other material. On the one hand, to reach that aim and to safeguard the rights of rightholders, Article 2 of Directive 2001/29 provides that Member States are to grant the rightholders referred to in that provision an exclusive right to authorise or prohibit reproduction of their works. That right extends to direct as well as indirect, temporary as well as permanent copying that can be done by any means and take any form. The reproduction right offers equally extensive protection irrespective of whether a whole piece of copyrighted work or a part of it is concerned.

21. On the other hand, however, in order to cater for the legitimate interests of users of copyrighted material too, Member States may limit the exclusive reproduction right stemming from Article 2 of Directive 2001/29 on the basis of Article 5(2) of the same directive. In accordance with that provision, an exception to that right may be provided, inter alia, in respect of copying on any medium by a natural person in so far as that copying takes place for private use. Therefore, only copying, which is neither directly nor indirectly commercial, is permitted under that exception ('the private copying exception'). In addition, rightholders must receive fair compensation for the harm caused by such copying. Typically, as is the case in Italy, that compensation takes the form of a private copying levy.
22. As the case-law of the Court clearly illustrates, the issue of fair compensation — and in particular the form and the arrangements surrounding the collection thereof — constitutes a vexed question in today's digitalised world. (4) That is not surprising: the levy system was put in place because, in the 'offline world', levies were the only way to ensure that rightholders were compensated for copies made by end users. (5) That does not fully correspond to the digitalised online environment in which copyrighted material is used today.
23. In fact, in accordance with Article 5(2)(b) of Directive 2001/29, fair compensation is typically levied on devices and media suitable for private copying including, but not limited to, CDs, computers of different kinds, mobile phones, memory cards and USB-sticks. However, such a system of fair compensation necessarily resides on a fictio juris: it assumes that a person acquiring devices and media that are, as a matter of principle, suitable for private copying will use all possible functions inherent thereto, including those that make private copying possible. (6) To be sure, at the time of the adoption of Directive 2001/29, it was still commonplace to use such devices and media for private copying. Today, however, as is well-known, it seems that private copying has at least partly (if not largely) been substituted by various kinds of internet-based services that allow rightholders to control the use of copyrighted material through licensing arrangements. (7)
24. Despite those technological developments and the arguably declining practical importance of private copying, the private copying exception is still widely applied in the European Union. Member States have adopted divergent approaches to the private copying exception in more than one respect: amongst other divergences, not only do the methodologies for setting the private copying levies vary, so do the products subject to such levies. (8) In the present case, the Court is once again confronted with the scope of the discretion that Member States are to enjoy in devising such a system of fair compensation.
25. As I shall illustrate below, two different situations must be clearly distinguished from each other: on the one hand, circumstances in which Member States must ensure that equipment, devices and media are exempted, ex ante, from the private copying levy, and on the other hand, circumstances in which Member States must ensure that an effective ex post reimbursement system for unduly paid private copying levies exists.

B – Question 1: The requirement of an ex ante exemption from the private copying levy

26. The first question referred deals with (the absence of) an ex ante exemption from the private copying levy and the conditions for granting such an exemption under Italian law. In that regard, the referring court expresses doubts as to the compatibility of the Italian system of fair compensation with Article 5(2)(b) of Directive 2001/29 and the principle of equal treatment.
27. The doubts of the referring court are explained by the fact that, firstly, the levy in question falls to be applied, as a matter of principle, to all equipment, devices and media covered by the contested decree without distinction. No legislative provision exists that would lay down an exemption from that levy where such equipment is acquired for professional use. Secondly, another particularity of the Italian system resides in the way in which manufacturers and importers of equipment, devices and media suitable for private copying (that are responsible for the payment of the private copying levy) may be exempted from the payment of the levy in question.
28. More specifically, even though the private copying levy is applied indiscriminately to certain categories of equipment, devices and media suitable for private copying, an exemption from the obligation to pay that levy may be negotiated between the SIAE and the manufacturers and importers of the devices and media subject to the levy (or the associations thereof). In that respect, the SIAE appears to enjoy considerable discretion in negotiating and, in the final analysis, delimiting the parameters regarding a possible exemption from the levy.
29. At the outset, I would point out that the overarching feature of the systems of fair compensation scrutinised by the Court thus far is that the obligation to pay the levy applies, as a matter of principle, indiscriminately to certain types of equipment, devices and media suitable for reproduction. (9) That is so here too.
30. There is nothing in the wording of Article 5(2)(b) of Directive 2001/29 that would suggest that such indiscriminate application of a levy would be contrary to EU law. In fact, that provision states that Member States may allow a private copying exception to be applicable to reproductions on any medium made by a natural person for private use, provided that fair compensation for rightholders is secured.
31. However, undoubtedly to ensure that a fair balance is struck between the conflicting interests involved, as required by recital 31 of the directive, the Court has formulated certain provisos in its case-law regarding the reach of Article 5(2)(b) of Directive 2001/29. Those provisos are highly relevant here.
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. (10) 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.

33. In Copydan Båndkopi, the Court clarified further the scope of Article 5(2)(b) of Directive 2001/29. It held that a private copying levy cannot, in the first place, lawfully fall to be applied to the supply of devices and media where it can be established that the person liable to pay compensation has supplied those devices and media to persons other than natural persons for purposes clearly unrelated to copying for private use. (11) To my mind, it is clear that, as a result of that statement, the direct supply of equipment, devices and media a priori suitable for private copying to business customers and public entities must fall outside the scope of Article 5(2)(b) of the directive. (12) Or, to employ the language of the Court, that equipment must be exempted (ex ante) from the private copying levy.

34. In that regard, suffice it to note that in Italy there is no statutory exemption for equipment, devices and media acquired by legal persons for purposes clearly unrelated to private copying. Instead, the decision to grant (or not to grant) ex ante exemptions is left to the discretion of the SIAE in accordance with Article 71 sexies of the Copyright Law, read in conjunction with Article 4 of the Technical Annex to the contested decree. During oral argument, it was further explained that not only are the exemptions granted by the SIAE few and limited in scope, they are also accompanied by strict conditions related, amongst other things, to compliance with a code of conduct by the entity acquiring the devices and media in question. Put simply, the Italian system allows the SIAE to apply exemptions to the persons obliged to pay compensation, as it sees fit.

35. Yet, as already explained, manufacturers and importers must be exempted ex ante from the payment of the levy where they can show that they have supplied devices and media for use clearly unrelated to private copying. (13) That would be the case of direct sales by the persons liable to pay compensation to business customers or public entities, irrespective of whether those entities are registered with the organisation responsible for administering the levy. (14)

36. In any event, an ex ante exemption should not be made conditional on the successful negotiation and conclusion of an agreement with the organisation administering the levy. For the right to an ex ante exemption to be effective, it must fall to be applied generally and without distinction to manufacturers and importers of devices and media suitable for private copying that are able to show that the devices and media in question have been supplied to persons other than natural persons for purposes unrelated to private copying. Otherwise, overcompensation can hardly be avoided. That would run counter to the requirement of a fair balance set out in recital 31 of the directive.

37. On that point, it is clear to me that the Italian rules fall foul of Article 5(2)(b) of Directive 2001/29.

38. Additionally, however, the referring court has identified further problems with the Italian rules regarding the (absence of a generally applicable) ex ante exemption.

39. As already noted, in the Italian system, the criteria for securing (a potential) ex ante exemption from the payment of the levy are determined in private negotiation (or so-called free bargaining). The negotiations take place between the manufacturers and importers of equipment, devices and media subject to the levy (or the associations thereof), on the one hand, and the SIAE, on the other. In that respect, the referring court is unsure whether that is compatible with the requirement of fair compensation in Article 5(2)(b) of Directive 2001/29, the principle of equal treatment and the principle of fair balance referred to in recital 31 to the directive.

40. At the outset, a point that should not be overlooked is that the Court has placed particular importance on the principle of equal treatment in the application of the exceptions provided in Article 5 of Directive 2001/29. (15) In the context of fair compensation, that means that Member States may not discriminate — without justification — between different categories of manufacturers and importers of comparable devices and media covered by the private copying exception.

41. That statement has a manifest bearing on the present case.

42. Admittedly, the parties are in disagreement regarding the extent to which the SIAE has discretion in negotiating exemptions from the private copying levy. Nevertheless, it transpires from the order for reference with sufficient clarity that the criteria and application protocols for an exemption from the levy are in fact negotiated between the SIAE and the manufacturers and importers of the devices and media concerned (or by associations representing them). That fact alone casts doubt on the compatibility of the Italian rules with the principle of equal treatment. That is so because Article 4 of the Technical Annex to the contested decree allows the SIAE to conclude exemption agreements separately with specific entities and associations, thereby failing to ensure that the right to be exempted from payment is consistently, generally and universally applied to the supply for professional use of devices and media suitable for private copying. As I see it, the conclusion of individual and separate agreements will lead, by way of necessity, to dissimilar treatment of manufacturers and importers that might otherwise be in a comparable situation.

43. Lastly, with regard to the requirement of fair compensation laid down in Article 5(2)(b) of Directive 2001/29, I would recall at the outset that the concept of ‘fair compensation’ constitutes an autonomous concept of EU law. Although the exact meaning of what constitutes fair compensation cannot be defined without some difficulty, the concept must nevertheless be interpreted uniformly across all Member States that

have decided to make use of the private copying exception. (16)

44. The concept of fair compensation is based on the idea that private copying is deemed to cause harm to the copyright holder and, in order for that harm to be compensated, the rightholder must receive fair compensation. (17) Thus, a necessary link is presumed to exist between the compensation paid and the harm, or potential harm, suffered by the rightholder as a result of private copying. (18) In the case of devices and media supplied to consumers, it is accepted that this link is sufficiently strong to justify the payment of compensation.

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)

47. In the Italian system, the possibility that the persons liable to pay compensation may benefit from an ex ante exemption hinges upon private negotiation even where it can be shown that the equipment, devices and media in question are intended for professional use. I have difficulty in accepting that such a system could be consistent with the requirement of fair compensation based on the harm caused to the rightholder. Indeed, compensation is thus detached from the harm presumably caused by private copying. Quite simply, we are no longer dealing with copying that falls within the scope of the private copying exception.

48. On that basis, the answer to the first question referred must be that Article 5(2)(b) of Directive 2001/29 precludes a system of fair compensation under which a private copying levy is charged even on equipment, devices and media acquired for purposes clearly unrelated to private copying and where a possible exemption from that levy is left to negotiation between the organisation administering the levy and the persons obliged to pay compensation.

49. That having been said, there are, nevertheless, circumstances in which the levy can be charged indiscriminately, irrespective of whether the final use of the devices and media in question is private or professional. As I shall explain further in the context of the second question, that is, however, only so where practical difficulties related to the identification of the final user justify such an approach. In systems in which manufacturers and importers are responsible for the payment of compensation, an ex post system of reimbursement appears to be a quasi-mandatory component of a system of fair compensation.

C – Question 2: The ex post reimbursement of the private copying levy

50. The second question referred turns on the ex post reimbursement of unduly paid private copying levies. The referring court is unsure whether the Italian system of fair compensation is compatible with Article 5(2)(b) of Directive 2001/29 given that — as in the situation described above in relation to the absence of legislative provisions on an ex ante exception — ex post reimbursement is also left to the discretion of the SIAE without express legislative provisions on the issue. In accordance with the instructions and guidelines of that organisation, a request for reimbursement of a levy — that has been unduly paid for equipment, devices and media acquired for professional use — may be made only by the final user.

51. From the outset, I must stress that no levy should, in the first place, be charged where the professional use of the equipment, devices and media in question can be identified beforehand by the person liable to pay compensation. Those situations should be covered by an ex ante exemption from the payment of the levy, as explained above.

52. Account taken of that fact, in what circumstances should a Member State provide for a system of ex post reimbursement?

1. The conditions for the indiscriminate application of a private copying levy

53. As the SIAE and the Italian Government point out, Member States enjoy considerable discretion in devising the details of a system for a private copying levy at the national level. Given that leeway, the Court accepted in Amazon.com International Sales and Others that Member States may take as a starting-point a rebuttable presumption that the devices and media are intended for private use. (20) However, such a presumption is compatible with Directive 2001/29 only under strict conditions. Firstly, practical difficulties must exist in determining whether the final use of the media at issue is private or professional. Secondly, such a presumption is acceptable only in relation to products marketed to natural persons. (21)

54. Here, it is useful to note that in the cases dealt with by the Court thus far, the starting-point appears to have been that the levy is charged when the devices and media subject to the private copying levy are placed on the market. (22) In light of the explanations of the parties at the hearing, I take that as my starting-point here too.

55. Practical difficulties can justify the indiscriminate application of a private copying levy where — as in Copydan Båndkopi — manufacturers and importers responsible for payment of the levy employ retailers to distribute their products. In such circumstances, the

persons responsible for payment cannot identify the final user without considerable difficulty. (23)

56. By contrast, where a person liable to pay compensation sells its equipment, devices and media directly to business customers (or public entities, such as hospitals, for example) without intermediaries, practical difficulties may not, in my view, be relied upon as justification for extending the application of the levy to such circumstances. Although the language employed in the case-law admittedly leaves room for interpretation, it must be understood that such cases simply fall beyond the scope of Article 5(2)(b) of Directive 2001/29.

57. Therefore, as I see it, a private copying levy can be applied indiscriminately to equipment, devices and media suitable for private copying in the context of retail sale, irrespective of whether the final use is professional or private. That is so presuming that manufacturers and importers are to pay compensation. In that case, a system of ex post reimbursement must be put in place for unduly paid levies.

2. The scope of the right to seek reimbursement and its effectiveness

58. At first sight, one might be led to think, mistakenly, that Member States may freely choose to confine ex post reimbursement to final users. Indeed, the Court held in Copydan Båndkopi that Article 5(2)(b) of Directive 2001/29 does not preclude a system of fair compensation under which reimbursement may be requested only by final users. Crucially, however, the Court formulated an important proviso in that regard. It observed that such a system is compatible with EU law provided that the persons responsible for payment are exempt from the levy if they can establish that they have supplied the devices in question to persons other than natural persons for purposes clearly unrelated to private copying. (24) Indeed, the need for such an ex ante exemption follows neatly from the Court's statement in Amazon.com International Sales and Others, that an indiscriminate application of a private copying levy can be justified only where the products in question are marketed to natural persons. (25)

59. Put another way, a system of fair compensation under which ex post reimbursement may be requested only by the final user is compatible with Article 5(2)(b) of Directive 2001/29 only in so far as that system also includes an ex ante exemption for equipment, devices and media acquired for purposes clearly unrelated to private copying (that is, for professional use).

60. Bearing that in mind, the Italian system of ex post reimbursement confining the right to request reimbursement to final users can be compatible with EU law only if an ex ante exemption related to professional use is provided for in the relevant provisions of national law.

61. However, as was established above, no generally applicable ex ante exemption for equipment, devices and media supplied for professional use exists in Italy. In those circumstances, an approximate, albeit unsatisfactory, balance between the interests involved seems achievable only if the persons obliged to pay compensation can also seek reimbursement.

62. As pointed out by the French Government, it is true that extending a system of reimbursement in that way entails a risk of overcompensation in the other direction: a request for reimbursement could be made twice, by both those responsible for the payment of the levy, and the final user. However, in so far as no generally applicable ex ante exemption exists for equipment, devices and media acquired for professional use, I see no other way of reconciling the interests involved. In any event, given that as a result of subsequent sales, the manufacturers and importers responsible for payment cannot in most cases know (or can only find out with some difficulty) who the final user will be, that solution remains unsatisfactory.

63. To open a brief parenthesis, the theoretical starting-point of the case-law of the Court is that the persons responsible for payment of the levy can pass on the amount of that levy in the sale price of the devices and media concerned. (26) While that may constitute an accurate assumption in relation to certain types of equipment, devices and media, it is not systematically the case. The extent to which it proves to be profit-maximising to pass on a levy hinges upon several variables that may differ across markets. Interestingly, a study suggests that it is possible to determine a pan-European retail price point for several consumer devices, irrespective of levy schemes. (27) Thus, passing on does not necessarily take place and the levy might in fact be absorbed by the persons responsible for the payment of compensation. Bearing that in mind, in circumstances such as those underlying the present case (where no generally applicable ex ante exemption exists), confining a system of ex post reimbursement to final users would in fact penalise the persons responsible for payment in more than just one respect.

64. Now, even assuming that a generally applicable ex ante exemption existed in Italy, I would nevertheless have doubts regarding the compatibility with EU law of the Italian system of reimbursement.

65. The Court's case-law requires a system of reimbursement to be effective. In that context, Member States must ensure, in particular, that it is not excessively difficult to obtain reimbursement of the levy unduly paid. (28) In assessing the effectiveness of the system of reimbursement, factors such as the scope, availability, public awareness and simplicity of use of the right to reimbursement assume a key role. (29)

66. To my mind, and subject to verification by the referring court, a system of reimbursement, such as the one described in the order for reference, fails to respect the fair balance sought by Directive 2001/29 for at least four interlocking reasons. Firstly, the implementation of that system is left to the discretion of the SIAE without express legislative provisions detailing the rules governing reimbursement. As suggested by Altroconsumo, that clearly limits availability and public awareness as regards the possibility of obtaining reimbursement. Secondly, under the rules applied by the SIAE, natural persons are excluded from the

personal sphere of those having the right to request reimbursement. This is so even where those persons are able to show that they have acquired the equipment, devices or media in question for professional use. I see no reason why natural persons (such as the self-employed) should not be able to request reimbursement if they can prove that they have acquired the equipment covered by the private copying levy for professional purposes. Thirdly, the reimbursement of an unduly paid levy requires the legal persons in question to apply a code of conduct regarding the use of the devices and media concerned, carry out special checks to enforce that code of conduct, and request reimbursement within a prescribed time-limit (90 days from the date of the invoice). Clearly, such additional conditions for reimbursement — which may change over time in light of the discretion afforded to the SIAE in that respect — will discourage persons concerned from seeking reimbursement. Fourthly, and more generally, it seems highly problematic that the procedure for obtaining reimbursement is based on the instructions on reimbursement given by the SIAE, which it can freely modify.

67. Fundamentally, therefore, it seems to me that the system of reimbursement applied in Italy falls short of the requirement of effectiveness, in particular, as laid down in the Court's case-law. Where a levy has been charged for equipment, devices or media acquired for professional use through a retailer, it must be genuinely possible for the final user to obtain reimbursement. That possibility must be actual and real so as to ensure that the compensation paid does not exceed what is necessary to offset the harm potentially caused by private copying.

68. That leads me to conclude that the answer to the second question referred must be that — in circumstances such as those underlying the present case where no generally applicable ex ante exemption exists for equipment, devices and media acquired for purposes clearly unrelated to private copying — Article 5(2)(b) of Directive 2001/29 precludes a system of fair compensation under which reimbursement for an unduly paid private copying levy can only be requested by the final user.

IV – Conclusion

69. In light of the arguments presented, I propose that the Court should answer the questions referred by the Consiglio di Stato (Council of State) as follows:

(1) Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society precludes a system of fair compensation under which a private copying levy is charged even on equipment, devices and media acquired for purposes clearly unrelated to private copying and where a possible exemption from that levy is left to negotiation between the organisation administering the levy and the persons obliged to pay compensation.

(2) In circumstances such as those underlying the present case where no generally applicable ex ante exemption exists for equipment, devices and media acquired for purposes clearly unrelated to private copying, Article 5(2)(b) of Directive 2001/29 precludes a system of fair compensation under which reimbursement for an unduly paid private copying levy may be requested only by the final user.

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1 – Original language: English.

2 – Directive of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

3 – Legge No 633 sulla protezione del diritto d'autore e di altri diritti connessi al suo esercizio of 22 April 1941, GURI No 166, of 16 July 1941, as amended by Decreto Legislativo No 68 of 9 April 2003, GURI No 87, of 14 April 2003.

4 – See, for an overview of the problems and challenges involved in putting in place a system of fair compensation for private copying, Latreille, A., 'La copie privée dans la jurisprudence de la CJUE', Propriété intellectuelles, no 55, 2015.

5 – Vitorino, A., 'Recommendations resulting from mediation on private copying and reprography levies', Brussels, 2013, p. 7. Available at: http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf

6 – See Opinion of Advocate General Szpunar in EGEDA and Others, C‑470/14, EU:C:2016:24, in particular point 44.

7 – Seen in that light, it is also interesting to note that the amount of fair compensation is typically calculated on the basis of the storage capacity of the device or medium concerned. It is therefore somewhat paradoxical that, as the Commission observed at the hearing, while private copying has been at least partly replaced by other forms of use, the storage capacity of devices and media suitable for such copying has increased exponentially during the last decade.

8 – For a proposal to align the private copying exception with current technological reality across the European Union, see Vitorino, op. cit., p. 19 et seq.

9 – See, in particular, judgments of 21 October 2010 in Padawan, C‑467/08, EU:C:2010:620, paragraph 59, and 11 July 2013 in Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515, paragraph 37. See also to that effect judgment of 5 March 2015 in Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 44.

10 – Judgment of 21 October 2010, C‑467/08, EU:C:2010:620, paragraph 53.

11 – Judgment of 5 March 2015, C‑463/12, EU:C:2015:144, paragraphs 47 and 50. See, in a similar vein, judgment of 11 July 2013 in Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515, paragraph 28.

12 – Contrary to what HP argued at the hearing, the relevant criterion for an ex ante exemption must

therefore be the supply of equipment to business customers or public entities, rather than whether a particular device belongs to the professional or consumer product range of a given manufacturer, for example.

13 – Judgment of 5 March 2015 in Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 47 and the case-law cited.

14 – Judgment of 5 March 2015 in Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 55.

15 – Judgment of 5 March 2015 in Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 31 and the case-law cited.

16 – Judgment of 21 October 2010 in Padawan, C‑467/08, EU:C:2010:620, paragraph 37.

17 – Judgments of 21 October 2010 in Padawan, C‑467/08, EU:C:2010:620, paragraph 40; 27 June 2013 in VG Wort and Others, C‑457/11 to C‑460/11, EU:C:2013:426, paragraphs 31, 49 and 75; 11 July 2013 in Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515, paragraph 47; and 10 April 2014 in ACI Adam and Others, C‑435/12, EU:C:2014:254, paragraph 50.

18 – To my knowledge, the precise legal character of the private copying levy remains unresolved. Indeed, although it constitutes an exception to the general rule of licencing, it nevertheless seems to bear certain resemblance not only to a licence but also to a tax.

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.

20 – Judgment of 11 July 2013, C‑521/11, EU:C:2013:515, paragraph 43.

21 – Judgment of 11 July 2013 in Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515, paragraph 45.

22 – See, to that effect, judgments of 21 October 2010 in Padawan, C‑467/08, EU:C:2010:620, paragraphs 15, 17 and 56; 11 July 2013 in Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515, paragraphs 26 and 39; and 5 March 2015 in Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 50.

23 – Judgment of 5 March 2015 in Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraphs 42 and 46.

24 – Judgment of 5 March 2015 in Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 55.

25 – Judgment of 11 July 2013, C‑521/11, EU:C:2013:515, paragraph 45.

26 – That assumption is clearly articulated in judgments of 11 July 2013 in Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515, paragraph 27; 10 April 2014 in ACI Adam and Others, C‑435/12, EU:C:2014:254, paragraph 52; and 5 March 2015 in Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 53.

27 – According to that study, that was so except in Scandinavia where, apparently due to lack of sufficient competition, consumers had to pay more. See Kretschmer, M., ‘Private Copying and Fair Compensation: An empirical study of copyright levies in Europe’, Intellectual Property Office, 2011/9, p. 57. Available at: http://ssrn.com/abstract= 2063809

28 – Judgments of 5 March 2015 in Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 48, and 11 July 2013 in Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515, paragraphs 31 and 34.

29 – Judgments of 5 March 2015 in Copydan Båndkopi, C‑463/12, EU:C:2015:144, paragraph 52, and 11 July 2013 in Amazon.com International Sales and Others, C‑521/11, EU:C:2013:515, paragraph 36.