

Court of Justice EU, 14 november 2024, Reprobel v Copaco



COPYRIGHT LAW

Provisions on fair compensation for reprography and private copying (Article 5 (2)(a) and (b) of the Copyright Directive) have direct effect

- Allowing individuals, in the event of and incorrect transposition, to rely directly on that provision to prevent the application of national rules requiring them to pay remuneration by way of fair compensation that is contrary to it
- And may be relied on against an entity entrusted with the collection and distribution of fair compensation where, for the performance of that task in the public interest, the entity enjoys special powers, in particular powers to obtain information, going beyond those applicable in relations between private parties.

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Court of Justice EU, 14 november 2024

(T. von Danwitz, A. Arabadjiev and I. Ziemele,)
JUDGMENT OF THE COURT (First Chamber)
14 November 2024 (*)

(Reference for a preliminary ruling – Approximation of laws – Harmonisation of certain aspects of copyright and related rights in the information society – Directive 2001/29/EC – Article 2 – Reproduction right – Article 5(2)(a) and (b) – Exceptions and limitations – Fair compensation – Direct effect – Entity entrusted by the State with collecting and distributing fair compensation – Special powers)

In Case C-230/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the ondernemingsrechtbank Gent, afdeling Gent (Ghent Business Court, Ghent Division, Belgium), made by decision of 16 February 2023, received at the Court on 13 April 2023, in the proceedings

Reprobel CV,

v

Copaco Belgium NV,

THE COURT (First Chamber),
composed of T. von Danwitz, Vice-President of the Court, acting as President of the First Chamber, A. Arabadjiev and I. Ziemele (Rapporteur), Judges, Advocate General: M. Szpunar,
Registrar: A. Lamote, Administrator,
having regard to the written procedure and further to the hearing on 6 March 2024,

after considering the observations submitted on behalf of:

– Reprobel CV, by A. Lambert and J.-F. Puyraimond, advocaten,

– Copaco Belgium NV, by T. van Innis, advocaat,

– the Belgian Government, by P. Cottin and C. Pochet, acting as Agents, and by S. Depré, G. Ryelandt and J. Van Vyve, avocats,

– the French Government, by E. Timmermans, acting as Agent,

– the European Commission, by F. Ronkes Agerbeek, J. Samnadda and P.J.O. Van Nuffel, acting as Agents, after hearing [the Opinion of the Advocate General](#) at the sitting on 6 June 2024,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5(2)(a) and (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 The request has been made in proceedings between Reprobel CV, a copyright collecting society entrusted by the Belgian State to collect and distribute the remuneration to which authors and publishers are entitled as fair compensation for reprography activities, and Copaco Belgium NV ('Copaco'), a public limited company, concerning the latter's refusal to pay Reprobel sums allegedly owed by way of such remuneration.

Legal context

European Union law

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

'(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. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.

(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 audiovisual 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 that directive, headed 'Reproduction right', 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.'

5 Article 5 of that directive, headed 'Exceptions and limitations', provides, in paragraph 2:

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

- (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;
- (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 right holders 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;

Belgian law

6 Article 59 of the wet betreffende het auteursrecht en de naburige rechten (Law on copyright and related rights) of 30 June 1994 (*Belgisch Staatsblad* of 27 July 1994, p. 19297), in the version applicable to the dispute in the main proceedings ('the LCRR'), provided:

'The authors and publishers of works fixed on a graphic or similar medium shall be entitled to remuneration for the reproduction of such works, including under the conditions laid down in Article 22(1)(4) and (4bis) ... The remuneration shall be paid by the manufacturer, importer or intra-Community acquirer of devices enabling protected works to be copied, at the time when such devices are put into circulation on national territory.'

7 Article 60 of the LCRR provided:

'Furthermore, proportional remuneration, determined by reference to the number of copies made, shall be owed by natural or legal persons who make copies of works or, where appropriate, on behalf of such persons, by those who, for consideration or free of charge, make a reproduction device available to others.'

8 Article 60bis of the LCRR was worded as follows:

'The rights management society designated by the King under this chapter may obtain the information necessary for the performance of its task in compliance with Article 78, from:

– the Customs and Excise Authority, under Article 320 of the General law on customs and excise of 18 July 1977, replaced by the Law of 27 December 1993;

– the [value added tax (VAT)] authority, under Article 93bis of the VAT Code of 3 July 1969;

– and the National Office for Social Security, in accordance with the Law on the establishment and organisation of a central social security database of 15 January 1990.

Without prejudice to Article 78 of the present law, the designated rights management society may, on request by them, disclose information to the customs and VAT authorities. Without prejudice to Article 78 of the present law, the designated rights management society may disclose information to and receive information from:

– the Monitoring and Mediation Service of the [Federal Public Service, Economy];

– and rights management societies performing a similar activity abroad, subject to reciprocity.'

9 According to Article 61 of the LCRR:

'The King shall fix the amount of the remuneration referred to in Articles 59 and 60 by decree deliberated in the Council of Ministers. The remuneration referred to in Article 60 may be adjusted depending on the sectors concerned.

He shall specify the detailed arrangements for collecting, distributing and verifying such remuneration and [the time at which] it is payable.

Subject to international conventions, the remuneration provided for in Articles 59 and 60 shall be allocated in equal parts to authors and publishers.

Subject to the conditions and detailed arrangements which He shall specify, the King shall entrust a society that is representative of all the rights management societies with the task of ensuring that remuneration is collected and distributed.'

10 The amounts of the flat-rate remuneration and of the proportional remuneration, referred to in Articles 59 and 60 of the LCRR respectively, were set by the Koninklijk besluit betreffende de vergoeding verschuldigd aan auteurs en uitgevers voor het kopiëren voor privé-gebruik of didactisch gebruik van werken die op grafische of op soortgelijke wijze zijn vastgelegd (Royal Decree on the remuneration of authors and publishers for the copying for private or didactic purposes of works fixed on a graphic or similar medium) of 30 October 1997 (*Belgisch Staatsblad* of 7 November 1997, p. 29874).

11 Article 7 of that royal decree provides:

'(1) The persons liable for payment shall send a declaration to the rights management society each month before the 20th day following the month to which it relates.

(2) The declaration referred to in paragraph 1 shall include, first, information serving to identify the person liable for payment and, second, the number of devices put into circulation on national territory in the period covered by the declaration and the characteristics of those devices necessary in order to determine the amount of the flat-rate remuneration.

...

12 Article 1 of the Koninklijk besluit tot het belasten van een vennootschap met de inning en de verdeling van de vergoeding voor het kopiëren van werken die op grafische of soortgelijke wijze zijn vastgelegd (Royal Decree entrusting a society to collect and distribute the remuneration for the copying of works fixed on a graphic or similar medium) of 15 October 1997 (*Belgisch Staatsblad* of 7 November 1997, p. 29873), provides:

'The civil law partnership in the form of a limited liability cooperative known as "Reprobel" ... shall be entrusted with the task of collecting and distributing the remuneration provided for in Articles 59 to 61 of the [LCRR].'

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

13 As a distributor of IT products for businesses and consumers, Copaco also distributes reproduction devices such as photocopiers and scanners. Until the end of 2016, it was, for that reason, liable to pay Reprobel flat-rate remuneration for the reproduction of works protected by copyright or related rights ('remuneration by way of fair compensation').

14 Claiming that, by its [judgment of 12 November 2015, Hewlett-Packard Belgium \(C-572/13, EU:C:2015:750\)](#), the Court had held that Article 5(2)(a) and (b) of Directive 2001/29 precluded the 'flat-rate' portion of the remuneration system laid down by the Belgian legislation on remuneration by way of fair compensation, Copaco suspended payment of the invoices issued by Reprobel relating to that remuneration for the period from November 2015 to January 2017, invoking the direct effect of that provision and stating that the payment in question would remain suspended until the provisions of that legislation were aligned with those of Directive 2001/29.

15 In March 2017, a new regime for remuneration by way of fair compensation entered into force.

16 On 16 December 2020, Reprobel brought proceedings against Copaco before the ondernemingsrechtbank Gent, afdeling Dendermonde (Ghent Business Court, Dendermonde Division, Belgium), which, in an interim judgment of 4 March 2022, for reasons of territorial jurisdiction referred the case to the ondernemingsrechtbank Gent, afdeling Gent (Ghent Business Court, Ghent Division), which is the referring court.

17 The referring court notes that it is apparent from the [judgment of 12 November 2015, Hewlett-Packard Belgium \(C-572/13, EU:C:2015:750\)](#), that the detailed arrangements laid down by the Belgian regime for remuneration by way of fair compensation, at issue in the case which gave rise to that judgment, were, in part at least, incompatible with Directive 2001/29, since the fair compensation provided for in Article 5(2)(b) of that directive had not been reflected in that regime which, until 29 December 2016, provided for the application of flat-rate remuneration which had no objective quantitative correlation with the effective use of the reproduction devices, meaning that that remuneration

presented a risk of being more than purely compensatory.

18 The referring court states that, [in the judgment of 12 November 2015, Hewlett-Packard Belgium \(C-572/13, EU:C:2015:750\)](#), the Court interpreted the exceptions and limitations for which a Member State may provide in its national legislation under Article 5(2)(a) and (b) of Directive 2001/29, which had not been included in the Belgian regime for remuneration by way of fair compensation in force until 29 December 2016. The Court found, inter alia, that that regime did not comply with Article 5(2)(a) and (b). In that regard, the Court noted that under the regime in question the amount of the flat-rate remuneration depended solely on the number of copies per minute that could be produced using the photocopiers at issue; that it provided for that remuneration to be calculated, in part at least, by reference to the harm which the unlawful reproductions could cause to the authors concerned; that it allocated the remuneration, in part or otherwise, to persons other than the authors; that remuneration was payable by persons making photocopiers available to identifiable users; and that it established a system likely to lead to the overcompensation of the beneficiaries of remuneration by charging both flat-rate remuneration and proportional remuneration, with no mechanisms for reimbursement.

19 The referring court also states that, where no interpretation of the directive in conformity with EU law is possible, the national provisions must give way to those of the directive at issue. However, it notes that the parties to the dispute before it disagree as regards the conditions to be satisfied for that to be so.

20 According to Copaco, Article 5(2)(a) and (b) of Directive 2001/29 has direct effect and may be relied on against Reprobel, which must be regarded as being a State entity by reason of the task, conferred on it by the State, of collecting and distributing remuneration by way of fair compensation.

21 By contrast, Reprobel disputes that Article 5(2)(a) and (b) of Directive 2001/29 is unconditional, clear and precise, since it is open to the Member States to provide for the exceptions and limitations referred to in that provision as they see fit, and since it is for those States to define the fairness of the compensation provided for in Article 5(2) of that directive.

22 Reprobel submits, furthermore, that Directive 2001/29 cannot be relied on against it, because it is an association governed by private law.

23 In those circumstances the ondernemingsrechtbank Gent, afdeling Gent (Ghent Business Court, Ghent Division) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is an entity such as Reprobel, in so far as it has been entrusted by the State, by means of a royal mandate, to collect and distribute the fair compensation, set by the State, within the meaning of Article 5(2)(a) and (b) of Directive 2001/29, and over which the State exercises control, an entity against which an individual may rely, in his or her defence, on the incompatibility with EU law

of a national provision which that entity seeks to impose on that individual?

(2) Is it relevant to the answer to that question that the control exercised by the State over that entity includes:

– The obligation for that entity to always forward to the competent minister a copy of the requests for data it sends to the persons liable to pay the remuneration, required both for the collection and distribution of the remuneration for reprography, in such a way that the minister is in a position to know how the entity exercises the right of supervision and decide whether it is advisable to stipulate, by means of a ministerial decree, the content, number and frequency of the requests for data in such a way as not to impede, more than is necessary, the activities of the persons receiving those requests;

– The obligation for the entity to call upon the minister's representative to send a request for data, required for the collection of the proportional remuneration for reprography, to the persons liable to pay the remuneration, the dealers, whether wholesalers or retailers, the leasing companies or equipment maintenance companies if the person liable to pay the remuneration has not cooperated in the collection, on the understanding that the entity also has the obligation to send a copy of this request to the competent minister in such a way that the latter can determine that the content, number and frequency of the requests do not impede, more than is necessary, the activities of the persons receiving those requests;

– The obligation for the entity to submit to the competent minister for approval the rules for the distribution of reprography remuneration and any amendment it makes to them;

– The obligation for the entity to submit the declaration form it has prepared to the competent minister for approval, without which it cannot be issued[?]

(3) Is it also relevant to the answer to the question referred that the entity has the following powers:

– The power to request all data necessary for collecting the remuneration for reprography from all persons who are liable to pay the remuneration, liable to pay a contribution, dealers, whether wholesalers or retailers, leasing companies and equipment maintenance companies. Every request must always state the criminal penalties applicable in the event of failure to comply with the time limit set or provision of incomplete or inaccurate information;

– The power to require all persons liable to pay remuneration to provide all data relating to copied works necessary for the distribution of the remuneration for reprography;

– The power to obtain all information necessary for the performance of its task from the *Administratie der Douane en Accijnzen* (Belgian Customs and Excise), the *Administratie van de btw* (Belgian VAT Administration) and the *Rijksdienst voor Sociale Zekerheid* (Belgian National Office for Social Security)?

(4) Does Article 5(2)(a) and (b) of Directive 2001/29 have direct effect?

(5) Is a national court required, on the application of an individual, to disapply a national provision where that provision, imposed by the State, contravenes Article 5(2)(a) and (b) of Directive 2001/29, referred to above, in particular because that provision, contrary to the aforementioned article, obliges that individual to pay charges?'

Consideration of the questions referred

The first, second and third questions

24 By its first, second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 5(2)(a) and (b) of Directive 2001/29 must be interpreted as meaning that an individual may rely, before a national court, against an entity entrusted by a Member State with collecting and distributing the fair compensation established under that provision, on the fact that the national legislation laying down that compensation contravenes EU law, where that entity performs a task in the public interest, is subject to control by that State and has, in order to perform that task, special powers beyond those which result from the normal rules applicable to relations between individuals.

25 As a preliminary matter, it should be noted that it is clear from the national legal framework applicable to the dispute in the main proceedings, which is set out in the order for reference, that Reprobel takes the legal form of a cooperative governed by private law and that the Belgian State is not represented on its bodies.

26 However, it is settled case-law that individuals may rely directly on provisions of a directive that are unconditional and sufficiently precise not only against Member States and their organs in the strict sense, but also, in particular, against organisations which are subject to the authority or control of a public body, perform a task in the public interest and possess special powers beyond those which result from the normal rules applicable in relations between individuals. Such organisations or bodies can be distinguished from individuals and must be treated as comparable to the State, either because they are legal persons governed by public law that are part of the State in the broad sense, or because they are subject to the authority or control of a public body, or because they have been required, by such a body, to perform a task in the public interest and have been given, for that purpose, such special powers (see, to that effect, judgments of 12 July 1990, *Foster and Others*, C-188/89, EU:C:1990:313, paragraph 20, and of 10 October 2017, *Farrell*, C-413/15, EU:C:2017:745, paragraphs 33 and 34).

27 The Court has clarified in that regard that the conditions that the organisation concerned must, respectively, be subject to the authority or control of the State, and must possess special powers beyond those which result from the normal rules applicable in relations between individuals are not cumulative (judgment of 10 October 2017, *Farrell*, C-413/15, EU:C:2017:745, paragraph 28).

28 In the present case, it is clear from the file before the Court that Reprobel is not an organisation governed by public law and nor is it controlled by the Belgian State. It is therefore necessary to determine whether Reprobel

performs a task in the public interest and has, for that purpose, special powers beyond those which result from the normal rules applicable in relations between individuals.

29 In the first place, in accordance with the case-law cited in paragraph 26 of the present judgment, in so far as concerns the condition relating to the performance of a task in the public interest, the Royal Decree entrusting a society to collect and distribute the remuneration for the copying of works fixed on a graphic or similar medium of 15 October 1997 entrusted Reprobel with the collection and distribution of the remuneration by way of fair compensation provided for in Articles 59 to 61 of the LCRR.

30 In that regard, it should be borne in mind that the Member States are entitled, under Article 5(2)(a) and (b) of Directive 2001/29, to establish in their respective legal systems exceptions to the reproduction right laid down in that provision and that they are also required, for that purpose, to establish fair compensation and a system of financing that compensation (see, to that effect, [judgment of 23 November 2023, *Seven.One Entertainment Group*, C-260/22, EU:C:2023:900](#), paragraph 23).

31 In addition, as regards the form, detailed arrangements and level of fair compensation, the Court has held that that compensation and, therefore, the system on which it is based, as well as the level of compensation, must be linked to the harm resulting for the right holder from the making of copies for private use ([judgments of 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717](#), paragraph 28, and of [24 March 2022, *Austro-Mechana*, C-433/20, EU:C:2022:217](#), paragraph 49).

32 Furthermore, the Court has ruled on the detailed arrangements for the collection and distribution of the remuneration by way of fair compensation provided for by the Belgian legislation. First, it has held that the fair compensation established in Article 5(2)(b) of Directive 2001/29 concerned reproductions on any medium made by means of any kind of technique, that is to say, such compensation is borne by all the users of devices, media or services which serve to produce or which contain such reproductions, since those users are entitled to benefit from the exceptions provided for in that article (see, to that effect, [judgment of 12 November 2015, *Hewlett-Packard Belgium*, C-572/13, EU:C:2015:750](#), paragraphs 30 to 34).

33 Second, the Court has held that fair compensation is, in principle, intended to compensate for the harm suffered as a result of the copies actually produced and that it is, in principle, for the persons who have made the reproductions to make good the harm related to them by financing the compensation to be paid to the right holder. In the light of the practical difficulties in identifying users, the Member States may lay down a system under which that compensation is payable by the persons in possession of digital reproduction equipment, devices and media, where they make that equipment or media or those devices available to users or provide copying

services to users and pass on the financial burden thereof to the final users (see, to that effect, [judgment of 12 November 2015, *Hewlett-Packard Belgium*, C-572/13, EU:C:2015:750](#), paragraphs 69 and 70).

34 In that context, [as the Advocate General noted](#), in essence, in point 40 of his Opinion in the present case, it would be very difficult for the holder of a reproduction right to assert that right with respect to acts performed by users in the private sphere. Inclusion of the exceptions to that right laid down in Article 5(2) of Directive 2001/29 therefore ensures that rightholders can benefit from revenue which would be very difficult to obtain directly from users.

35 The Belgian legislation provides that holders of copyright and related rights, by virtue of those exceptions, are to receive compensation for the harm suffered – composed of a part calculated on a flat-rate basis and fixed in advance and of proportional remuneration fixed after the fact – which are financed by the remuneration paid by all the purchasers of copying devices and media or recipients of copying services entitled to benefit from those exceptions. The collection of that remuneration and the payment of fair compensation to the holders of those rights therefore fall within the scope of tasks in the public interest.

36 It is necessary, in that regard, to reject the French Government's argument that Reprobel does not perform a task in the public interest but acts solely in the private interests of the holders of copyright and related rights. Through the task entrusted to an entity responsible for collecting and distributing remuneration by way of fair compensation, a Member State gives effect to its obligation to achieve a certain result, under Article 5(2)(a) and (b) of Directive 2001/29, that is to say, to ensure, for the benefit of those rightholders, the effective collection of fair compensation intended to preserve a fair balance between the interests involved, which is entirely a matter of the public interest (see, to that effect, [judgment of 8 September 2022, *Ametic*, C-263/21, EU:C:2022:644](#), paragraph 69).

37 In the second place, as regards the assessment of the powers of an organisation such as Reprobel, it is necessary, first of all, to note that Reprobel is the only entity entrusted with collecting and distributing the remuneration by way of fair compensation provided for in Articles 59 to 61 of the LCRR.

38 In that context, [as the Advocate General noted](#), in essence, in point 45 of his Opinion, it is clear from the file before the Court that Reprobel was given special powers beyond those which result from the normal rules applicable in relations between individuals, including the power to claim remuneration by way of fair compensation from the manufacturers and distributors of copying devices and media.

39 An organisation which is authorised, as Reprobel is, to collect remuneration by way of fair compensation may, automatically, claim payment of that remuneration from any person forming part of the group of persons liable to pay it, which is defined in the abstract by the national legislation.

40 In that regard, it is irrelevant that, as Reprobel and the Belgian Government note, it is the public authorities, rather than that organisation, which determine the amount of the remuneration in question. The performance of tasks in the public interest does not mean that the organisation which carries out those tasks determines all aspects of them itself or that the powers it holds in order to perform them are necessarily discretionary. Moreover, the fact that a public authority circumscribes the actions of an organisation entrusted with a task in the public interest is further confirmation that the organisation in question acts on behalf of the State and is an emanation of it.

41 In addition, as is clear from the order for reference, Reprobel has a series of specific powers, in particular in respect of requesting information, to enable it to perform the task in the public interest entrusted to it.

42 First, it is entitled to require both the persons liable to pay the remuneration by way of fair compensation and other operators active on the market for copying equipment, such as the undertakings responsible for maintaining that equipment, on pain of criminal penalties, to provide all the information necessary to identify the persons liable and to determine the amounts payable by them. Such a power must be considered to be a special power beyond those which result from the normal rules applicable in relations between individuals.

43 In that context, it is irrelevant that, as Reprobel and the Belgian Government note, Reprobel has no power to penalise persons that fail to comply with the obligation to provide information to it. Failure to comply with that obligation is, according to the information in the order for reference, punishable by criminal penalties, which, inherently, only the courts have power to impose. Therefore, the very existence of those penalties attests to the distinct nature of the powers conferred on Reprobel.

44 Second, it is clear from the file before the Court that Reprobel is authorised to request the information necessary to perform its tasks from the customs, tax and social security authorities. That authorisation is, subject to the checks that it is for the referring court to carry out, a special power beyond those which result from the normal rules applicable in relations between individuals. Information such as the volume of imports of copying equipment or media or the turnover of the producers or distributors of such devices and media is not, in principle, liable to be disclosed to persons not having such a power.

45 In the light of the foregoing, the answer to the first, second and third questions is that Article 5(2)(a) and (b) of Directive 2001/29 must be interpreted as meaning that an individual may rely, before a national court, against an entity entrusted by a Member State with collecting and distributing the fair compensation established under that provision, on the fact that the national legislation laying down that compensation contravenes provisions of EU law which have direct effect, provided that such an entity has, in order to perform that task in the public interest, special powers beyond those which result from the normal rules applicable in relations between individuals.

The fourth and fifth questions

46 By its fourth and fifth questions, the referring court asks, in essence, whether Article 5(2)(a) and (b) of Directive 2001/29 must be interpreted as having direct effect, and that therefore, in the absence of a correct transposition of that provision, an individual may rely on it for the purposes of disapplying national rules under which that individual is obliged to pay remuneration by way of fair compensation imposed in contravention of that provision.

47 As a preliminary matter, it should be noted that it is settled case-law of the Court that, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 63 and the case-law cited).

48 In that regard, the Court has stated that a provision of EU law is, first, unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States and, second, sufficiently precise to be relied on by an individual and applied by a court where it sets out an obligation in unequivocal terms (judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraph 18).

49 In the present case, Reprobel and the Belgian and French Governments submit that, in view of the wide discretion available to the Member States in the organisation of the system of fair compensation laid down in Article 5(2)(a) and (b) of Directive 2001/29 and of its financing, that provision is not sufficiently unconditional and precise for it to be given direct effect on the basis of the Court's case-law cited above.

50 Nevertheless, the Court has already stated that, even though a directive leaves the Member States a degree of latitude when they adopt rules in order to implement it, a provision of that directive may be regarded as unconditional and precise where it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it (judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraph 19).

51 In that regard, it should be borne in mind that the principle of primacy places the national court which is called upon within the exercise of its jurisdiction to apply provisions of EU law under a duty, where it is unable to interpret national legislation in compliance with the requirements of EU law, to give full effect to the requirements of that law in the dispute before it, if necessary disapplying of its own motion any national

legislation or practice, even if adopted subsequently, which is contrary to a provision of EU law with direct effect, and it is not necessary for that court to request or await the prior setting aside of such national legislation or practice by legislative or other constitutional means (judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraph 37).

52 As regards whether Article 5(2)(a) and (b) of Directive 2001/29 is unconditional and sufficiently precise, the assessment to be carried out for that purpose concerns, in particular, three points: the identity of the persons entitled to the protection provided in that provision, the content of that protection and the identity of the person liable to provide the protection (see, by analogy, judgment of 6 September 2018, *Hampshire*, C-17/17, EU:C:2018:674, paragraph 56).

53 In that regard, the Court has already held that Article 5(2)(a) and (b) of Directive 2001/29 imposes specific obligations on Member States which choose to apply exceptions or limitations in respect of the reproduction right, in order to ensure that fair compensation is provided for the rightholders (see, to that effect, [judgments of 21 October 2010, Padawan, C-467/08, EU:C:2010:620](#), paragraph 36, and of 22 September 2016, [Microsoft Mobile Sales International and Others, C-110/15, EU:C:2016:717](#), paragraph 25).

54 It is true that the Member States are not bound to include the exceptions provided for in Article 5(2)(a) and (b) of Directive 2001/29 in their national law (see, to that effect, [judgments of 21 April 2016, Austro-Mechana, C-572/14, EU:C:2016:286](#), paragraph 18, and of [22 September 2016, Microsoft Mobile Sales International and Others, C-110/15, EU:C:2016:717](#), paragraph 27 and the case-law cited). However, if they do so, they must provide also for the payment of fair compensation to the authors harmed by the application of those exceptions (see, to that effect, [judgment of 21 October 2010, Padawan, C-467/08, EU:C:2010:620](#), paragraph 36) and take into account the requirements relating to the structure and level of that compensation which flow from the interpretation of that provision.

55 Those requirements include those established by the Court in the [judgment of 12 November 2015, Hewlett-Packard Belgium \(C-572/13, EU:C:2015:750\)](#), as regards the detailed arrangements for calculating the remuneration by way of fair compensation. In that judgment, to which the referring court refers, the Court held that although Article 5(2)(a) and (b) of Directive 2001/29 allows Member States to determine the detailed arrangements for financing and collecting fair compensation and the level of that compensation, a system which combines flat-rate remuneration fixed in advance and proportional remuneration fixed after the fact must, taken as a whole, enable a levy to be collected as fair compensation, the amount of which corresponds, in essence, to the actual harm suffered by the rightholders. In order to be able to satisfy that requirement, such a system must contain mechanisms, in

particular for reimbursement, designed to correct any situation where overcompensation occurs, which would be incompatible with the requirement, set out in recital 31 of Directive 2001/29, that a fair balance be safeguarded between the rightholders and the users of protected subject matter, and therefore with Article 5(2)(a) and (b) of Directive 2001/29 (see, to that effect, [judgment of 12 November 2015, Hewlett-Packard Belgium, C-572/13, EU:C:2015:750](#), paragraphs 83 to 86).

56 As regards, specifically, the content of the rights arising from the provisions of Directive 2001/29 which are capable of having direct effect, it is clear from the Court's case-law that individuals are entitled not to bear the financial burden of remuneration by way of fair compensation if that remuneration is collected in contravention of the principles arising, according to the Court's case-law, from Article 5(2)(a) and (b) of that directive (see, to that effect, [judgments of 12 November 2015, Hewlett-Packard Belgium, C-572/13, EU:C:2015:750](#), paragraphs 85 to 87, and of [22 September 2016, Microsoft Mobile Sales International and Others, C-110/15, EU:C:2016:717](#), paragraphs 37, 54 and 55). Accordingly, the Court has expressly noted the need to provide, in the system of fair compensation, a right of reimbursement in respect of remuneration wrongly collected for the purposes of financing that compensation.

57 In the present case, since the national legislation at issue in the main proceedings is incompatible with Article 5(2)(a) and (b) of Directive 2001/29, as is apparent in essence from the [judgment of 12 November 2015, Hewlett-Packard Belgium \(C-572/13, EU:C:2015:750\)](#), the referring court, hearing a dispute relating to the suspension of payment, by an individual, of the remuneration by way of fair compensation required by that legislation, must guarantee the full effectiveness of that provision by disapplying that national legislation for the purposes of resolving the dispute pending before it.

58 In the light of the foregoing, the answer to the fourth and fifth questions is that Article 5(2)(a) and (b) of Directive 2001/29 must be interpreted as having direct effect, and that therefore, in the absence of a correct transposition of that provision, an individual may rely on it for the purposes of disapplying national rules under which that individual is obliged to pay remuneration by way of fair compensation imposed in contravention of that provision.

Costs

59 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (First Chamber) hereby rules:

1. Article 5(2)(a) and (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 meaning that an individual may rely, before a national court, against an entity entrusted by a Member State with collecting and distributing the fair compensation established under that provision, on the fact that the national legislation laying down that compensation contravenes provisions of EU law which have direct effect, provided that such an entity has, in order to perform that task in the public interest, special powers beyond those which result from the normal rules applicable in relations between individuals.

2. Article 5(2)(a) and (b) of Directive 2001/29 must be interpreted as having direct effect, and that therefore, in the absence of a correct transposition of that provision, an individual may rely on it for the purposes of disapplying national rules under which that individual is obliged to pay remuneration by way of fair compensation imposed in contravention of that provision.

[Signatures]

OPINION OF ADVOCATE GENERAL

SZPUNAR

delivered on 6 June 2024 (1)

Case C-230/23

Reprobel CV

v

Copaco Belgium NV

(Request for a preliminary ruling from the Ondernemingsrechtbank Gent Afdeling Gent (Ghent Business Court, Ghent Division, Belgium))

(Reference for a preliminary ruling – Intellectual property – Copyright and related rights – Directive 2001/29/EC – Article 2 – Reproduction right – Article 5(2)(a) and (b) – Exceptions and limitations – Reproduction for private use – Fair compensation – Direct effect – Entity appointed to collect and distribute fair compensation – Possibility of relying directly on the directive against that entity)

Introduction

1. The questions referred for a preliminary ruling in the present case necessitate a return to a fundamental issue in EU law, namely the problem of the direct effect of directive provisions and the possibility of relying on those provisions in vertical relations, that is to say, in a dispute between an individual and a Member State. Although this issue has existed since the European Union's legal order was first constructed, it still gives rise to disputes and controversy. (2)

2. The present case concerns both of the problems referred to above. On the one hand, it concerns the question of whether the provisions of a directive, which the Member State in question decided to implement despite their optional nature, can be considered to have direct effect. In addition, in the present case, that implementation, as is clear from the Court's judgment, was carried out in a manner inconsistent with EU law. On the other hand, the present case once again raises the

question of the possibility of relying on the direct effect of a directive provision against a private entity entrusted by a Member State to perform tasks in the public interest.

3. It appears that the Court will have to clarify its existing case-law on both of those issues.

Legislative framework

European Union law

4. Article 2 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 (3) 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'.

5. According to Article 5(2)(a) and (b) of the directive:

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

(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;

(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;'

Belgian law

6. Belgian law, in the wording applicable to the dispute in the main proceedings, introduced remuneration for exceptions to the reproduction right in Articles 59 and 60 of the wet van 30 juni 1994 betreffende het auteursrecht en de naburige rechten (Law of 30 June 1994 on Copyright and Related Rights). (4) That remuneration consisted of a lump-sum part based on the number of devices allowing the reproduction of protected works, and a part proportional to the number of copies of such works made.

7. Under Article 60bis of that law, the entity appointed to collect and distribute the remuneration was authorised to obtain relevant information from the customs authorities, the value added tax authorities, the social security offices, the Monitoring and Mediation service of the Ministry of Economy, and, subject to reciprocity, from similar foreign bodies.

8. Under Article 61 of the above law, the amount of remuneration was set by the koninklijk besluit van 30 oktober 1997 betreffende de vergoeding verschuldigd

aan auteurs en uitgevers voor het kopiëren voor privégebruik of didactisch gebruik van werken die op grafische of op soortgelijke wijze zijn vastgelegd (Royal Decree of 30 October 1997 concerning the remuneration of authors and publishers for copies made for private or didactic purposes of works fixed on a graphic or similar medium). (5) Under Article 7 of that decree, entities obliged to pay the remuneration in question were required to submit monthly declarations to the entity appointed to collect the remuneration, which included information allowing the obliged entity to be identified and the amount of remuneration due on the basis of the number of devices sold to be determined.

9. Under the koninklijk besluit van 15 oktober 1997 tot het belasten van een vennootschap met de inning en de verdeling van de vergoeding voor het kopiëren van werken die op grafische of soortgelijke wijze zijn vastgelegd (Royal Decree of 15 October 1997 entrusting a society to collect and distribute the remuneration for the copying of works fixed on a graphic or similar medium), (6) Reprobel was appointed to collect and distribute the remuneration in question.

Facts in the main proceedings, procedure and questions referred

10. Copaco Belgium NV, a company incorporated under Belgian law ('Copaco'), is a distributor of IT equipment for businesses and consumers, including copying equipment such as copiers and scanners. As such, it has been subject to the obligation to pay remuneration for the reproduction of works.

11. In its judgment in *Hewlett-Packard Belgium*, (7) the Court ruled in particular that Article 5(2)(a) and (b) of Directive 2001/29 precludes, in principle, legislation, such as the Belgian legislation at issue, which introduces a system that combines lump-sum remuneration with proportional remuneration, and does not at the same time include mechanisms that would allow the amount of remuneration to be adjusted to the actual harm suffered by the rightholders. (8) New Belgian legislation on remuneration for the reproduction of works, which complies with the guidelines resulting from that judgment, came into force in March 2017.

12. As a result of the aforementioned judgment, Copaco refused to pay the invoices issued to it by Reprobel on the basis of the declarations Copaco had submitted for the period from November 2015 to December 2016, since Copaco considers that, as was found in the judgment in *Hewlett-Packard Belgium*, the Belgian system of remuneration for the reproduction of works was incompatible with EU law during the period in question.

13. On 16 December 2020, Reprobel brought legal proceedings against Copaco, demanding payment of the outstanding remuneration for the reproduction of works plus interest and damages. The action was lodged with the referring court in accordance with its territorial jurisdiction. Before that court, Copaco argues that Article 5(2)(a) and (b) of Directive 2001/29 has direct effect, and that Reprobel is an emanation of the State against which that direct effect can be relied on. Reprobel disputes both of those claims.

14. Under those circumstances, the Ondernemingsrechtbank Gent Afdeling Gent (Ghent Business Court, Ghent Division, Belgium) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is an entity such as Reprobel, in so far as it has been entrusted by the State, by means of a royal mandate, to collect and distribute the fair compensation set by the State, within the meaning of Article 5(2)(a) and (b) of Directive 2001/29, and over which the State exercises control, an entity against which an individual may rely, in his or her defence, on the incompatibility with EU law of a national provision which that entity seeks to impose on that individual?

(2) Is it relevant to the answer to that question that the control exercised by the State over that entity includes:

– *The obligation for the entity to always forward to the competent minister a copy of the requests for data it sends to the persons liable to pay the remuneration, required both for the collection and distribution of the remuneration for reprography, in such a way that the minister is in a position to know how the entity exercises the right of supervision and decide whether it is advisable to stipulate, by means of a ministerial decree, the content, number and frequency of the requests for data in such a way as not to impede the activities of the persons receiving those requests more than is necessary;*

– *The obligation for the entity to call upon the minister's representative to send a request for data, required for the collection of the proportional remuneration for reprography, to the persons liable to pay the remuneration, the dealers, whether wholesalers or retailers, the leasing companies or equipment maintenance companies if the person liable to pay the remuneration has not cooperated in the collection, on the understanding that the entity also has the obligation to send a copy of this request to the competent minister in such a way that the latter can determine that the content, number and frequency of the requests do not impede, more than is necessary, the activities of the persons receiving those requests;*

– *The obligation for the entity to submit to the competent minister for approval the rules for the distribution of reprography remuneration and any amendment it makes to them;*

– *The obligation for the entity to submit the declaration form it has prepared to the competent minister for approval, without which it cannot be issued?*

(3) Is it also relevant to the answer to the question referred that the entity has the following powers?

– *The power to request all data necessary for collecting the remuneration for reprography from all persons who are liable to pay the remuneration, liable to pay a contribution, dealers, whether wholesalers or retailers, leasing companies and equipment maintenance companies. Every request must always state the criminal penalties applicable in the event of failure to comply with the time limit set or provision of incomplete or inaccurate information;*

– *The power to require all persons liable to pay remuneration to provide all data relating to copied*

works necessary for the distribution of the remuneration for reprography;

– The power to obtain all information necessary for the performance of its task from the *Administratie der Douane en Accijnzen* (Belgian Customs and Excise), the *Administratie van de btw* (Belgian VAT Administration) and the *Rijksdienst voor Sociale Zekerheid* (Belgian National Office for Social Security).

(4) Does Article 5(2)(a) and (b) of Directive 2001/29 have direct effect?

(5) Is a national court required, on the application of an individual, to disapply a national provision where that provision, imposed by the State, contravenes Article 5(2)(a) and (b) of Directive 2001/29, referred to above, in particular because that provision, contrary to the aforementioned article, obliges that individual to pay charges?’

15. The request for a preliminary ruling was received by the Court on 13 April 2023. Written observations were submitted by the parties to the main proceedings, the Belgian government and the European Commission. The same parties, as well as the French government, were represented at the hearing held on 6 March 2024.

Analysis

16. The referring court has referred five questions for a preliminary ruling in the present case. The first three relate to the possibility of considering an entity such as Repobel to be an emanation of a Member State, with the result that an individual can directly rely on a directive provision against it. The two final questions concern the possibility of relying directly on Article 5(2)(a) and (b) of Directive 2001/29. I propose to begin the analysis with those last two questions.

The fourth and fifth questions

17. By its fourth and fifth questions, the referring court is essentially seeking to determine whether Article 5(2)(a) and (b) of Directive 2001/29 has direct effect, such that an individual may rely on it before a national court to avoid payment of the charge in respect of fair compensation where that charge is collected on the basis of national legislation which is inconsistent with those provisions of Directive 2001/29.

The principle of direct effect

18. The principle of the direct effect of EU law dates back to the very beginnings of the EU’s legal system. Indeed, as is well known, the Court established the principle in the judgment in *van Gend & Loos*, which is of fundamental importance to that system. (9) The application of the principle of direct effect to directive provisions that meet certain conditions was confirmed in the judgment in *Van Duyn*. (10) Currently, the Court formulates the principle as follows:

‘It follows from the settled case-law of the Court that, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly.

The Court has stated that a provision of EU law is, first, unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States and, second, sufficiently precise to be relied on by an individual and applied by a court where it sets out an obligation in unequivocal terms

The Court has also held that, even though a directive leaves the Member States a degree of latitude when they adopt rules in order to implement it, a provision of that directive may be regarded as unconditional and precise where it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it ...’. (11)

19. It is in this context that the answer to the fourth and fifth questions must be considered.

Application to the present case

20. Repobel and the Belgian and French governments argue that in view of the wide latitude that Member States have in organising the system of fair compensation referred to in Article 5(2)(a) and (b) of Directive 2001/29 and its financing, those provisions are not sufficiently unconditional and precise to attribute direct effect to them on the basis of the Court’s case-law cited above.

21. That statement seems open to debate in light of the Court’s case-law, according to which those provisions impose an obligation of result on the Member States which have implemented the exceptions to the reproduction right provided for therein, meaning that those Member States are obliged to ensure the actual recovery of fair compensation, (12) in an amount calculated on the basis of the harm caused to the rightholders, (13) and the financial burden of that compensation should be borne, in principle, by the final users. (14) The Court had little difficulty, therefore, in detecting in the provisions in question precise and unconditional rules regarding how the fair compensation provided for therein should be regulated.

22. Above all, however, and irrespective of whether the obligation to establish such compensation itself meets the criteria for direct effect set out in point 18 of the present Opinion, the argument of the aforementioned parties to the proceedings is, in my view, completely misplaced in the context of the present case. For this case is not about establishing the direct effect of the provisions of Directive 2001/29 in abstract terms, but rather in connection with the dispute in the main proceedings. Those proceedings do not concern the payment of fair compensation directly on the basis of the provisions in question, but rather Copaco’s right to refuse to pay a charge which serves to finance that compensation and is collected in a manner inconsistent with the directive (‘the fee at issue’).

23. When considering the question of the direct effect of EU law, it is necessary to take into account all norms (in other words, legal rules) that arise from the provisions of that law and from which individuals derive precise and unconditional rights vis-à-vis the State. At the same

time, those rules do not have to follow directly from the literal wording of the legislation, but may be constructed on its basis through interpretation, in particular by way of interpretation by the Court. Indeed, as Copaco rightly points out, the Court's interpretation of the provisions of EU law under the preliminary ruling procedure clarifies and specifies the meaning and effect of those provisions as they should be understood and applied from their entry into force, and therefore that interpretation must be taken into account when determining whether a provision is sufficiently precise to be considered to have direct effect. (15)

24. As for the provisions of Article 5(2)(a) and (b) of Directive 2001/29, three legal norms can be derived from them in particular. Firstly, the power of Member States to introduce exceptions to the reproduction right under those provisions; this norm is optional. Secondly, the obligation to establish fair compensation for the holders of reproduction rights; this norm is binding on Member States that have introduced the exceptions in question. Thirdly, and lastly, a series of norms derived from the case-law of the Court and defining the rules on which the fair compensation system should be based. Member States are not obliged, therefore, to implement the exceptions provided for in Article 5(2)(a) and (b) of Directive 2001/29 in their national laws. If they do so, however, then they are obliged to introduce the fair compensation referred to in those provisions and are bound by the rules concerning the composition and financing of that compensation which the Court considers to arise from the provisions in question.

25. These include rules of a negative nature, which the Court established in the judgment in *Hewlett-Packard Belgium* specifically with respect to the method of collecting the fee at issue in Belgium. According to that judgment, it is not permissible to finance the fair compensation referred to in Article 5(2)(a) and (b) of Directive 2001/29 by means of remuneration collected in two forms – as lump-sum remuneration and proportional remuneration – where the lump-sum remuneration is calculated solely by reference to the speed at which the device concerned is capable of producing copies, the proportional remuneration recovered after the fact varies according to whether or not the person liable for payment has cooperated in the recovery of that remuneration, and the combined system, taken as a whole, does not include mechanisms, in particular for reimbursement, which allow the complementary application in respect of different categories of users of the criterion of actual harm suffered and the criterion of harm established as a lump sum. (16) The characteristics of the fee described above correspond to those of the fee at issue. It is those norms, derived from the Court's interpretation of Article 5(2)(a) and (b) of Directive 2001/29, that Copaco is relying on, and it is the direct effect of those norms that is the subject of the fourth question referred for a preliminary ruling.

26. The unconditional nature of the above norms for a Member State that has introduced exceptions to the reproduction right provided for in Article 5(2)(a) and (b) of Directive 2001/29 is beyond doubt. The question

remains whether those norms are precise enough to be considered to have direct effect.

27. When assessing the norms of EU law in terms of their sufficiently precise nature, the Court examines the group of entities that have rights and obligations under those norms and the content of the rights that arise from them. (17) Let me start with this last point.

28. The legal norms in question mean that Member States are prohibited from establishing a fee intended to finance the fair compensation provided for in Article 5(2)(a) and (b) of Directive 2001/29 with the characteristics described in paragraph 4 of the operative part of the judgment in *Hewlett-Packard Belgium*. The Court has already found in the judgment in *van Gend & Loos* that such a prohibition, that is to say, an obligation on a Member State not to act, may be a source of positive rights for individuals. (18)

29. With regard to the fee intended to finance fair compensation, individuals have the right not to bear the financial burden of that fee if it is collected in contravention of the principles arising, in accordance with the Court's case-law, from Article 5(2)(a) and (b) of Directive 2001/29. (19) It is true that in its existing case-law, the Court has stressed that the system of fair compensation must include the right to reimbursement of an unduly collected fee intended to finance that compensation. However, in my view it is clear that individuals have the right to refuse to pay such a fee where payment has not yet occurred, while the inconsistency between the national system establishing fair compensation and the aforementioned provisions of Directive 2001/29 clearly follows from the Court's existing judgment and has been confirmed by the judgments of national courts. Indeed, in such circumstances, forcing the entity concerned to pay such a fee and then wait for its reimbursement would be illogical and would make it excessively difficult for that entity to exercise its rights under EU law.

30. It must therefore be considered that the provisions of Article 5(2)(a) and (b) of Directive 2001/29, as interpreted in the judgment in *Hewlett-Packard Belgium*, establish an unconditional and sufficiently precise right for individuals to refuse to pay a fee intended to finance the fair compensation provided for in those provisions if that fee has characteristics such as those listed in paragraph 4 of the operative part of that judgment.

31. As for the group of entities entitled to such refusal, this is also precisely defined and includes any entity liable for the aforementioned fee. Identifying the obliged entity does not raise any doubts either, since it is the Member States that have the right, under Article 5(2)(a) and (b) of Directive 2001/29, to introduce in their legal orders exceptions to the reproduction right provided for therein, and it is they who are also obliged to establish fair compensation and a system for financing the compensation in that regard. Therefore, Member States are also necessarily subject to all obligations, both positive and negative, related to the organisation of such a system and arising from the Court's case-law, including the prohibition on charging fees that do not

comply with the aforementioned provisions of Directive 2001/29.

32. In the present case, the incompatibility with Article 5(2)(a) and (b) of Directive 2001/29 of the Belgian regulations establishing the fee at issue, in the wording applicable to the main proceedings, was clear from the judgment in *Hewlett-Packard Belgium*, which resulted in those regulations being amended. Thus, those provisions of the directive, taking into account their interpretation by the Court, are sufficiently precise and unconditional to find the national provisions to be incompatible with them. (20) Therefore, as Copaco rightly argues, the referring court should disapply those national provisions and find Reprobel's claim based on them to be unfounded.

Reply to questions

33. In view of the above, the answer to the fourth and fifth questions should, in my opinion, be that Article 5(2)(a) and (b) of Directive 2001/29 has direct effect, such that an individual may rely on it before a national court to avoid payment of the charge in respect of fair compensation where that charge is collected on the basis of national legislation which is inconsistent with those provisions of Directive 2001/29, including the Court's case-law concerning their interpretation.

34. In the context of the main proceedings, this obviously necessitates the conclusion that Reprobel can be considered an emanation of the Belgian State, which brings us to the analysis of the first three questions referred.

The first, second and third questions

35. By raising the first, second and third questions referred, which I propose to consider together, the referring court is essentially seeking to determine whether individuals may rely directly on provisions of EU law to preclude the application to them of national provisions incompatible with that law vis-à-vis an entity entrusted by the Member State to collect charges in order to finance fair compensation within the meaning of Article 5(2)(a) and (b) of Directive 2001/29 and to pay that compensation to the rightholders, and which has special powers enabling it to perform its tasks.

36. In the main proceedings, it is common ground that Reprobel is not a body of the Belgian State. However, according to the Court's settled case-law, individuals can rely directly on provisions of EU law not only against Member States and their bodies in the strict sense, but also, in particular, against entities that perform tasks in the public interest and have special powers beyond those which result from the normal rules applicable in relations between individuals. (21) Moreover, it is not required that those entities be subject to the authority or control of the State. (22)

37. A detailed analysis of those criteria was recently conducted by Advocates General E. Sharpston (23) and N. Emiliou. (24) While their theoretical discussion of the subject is very interesting, I will not repeat it here, but instead refer you to their Opinions. Here I shall restrict myself to matters pertaining to the special circumstances of the present case.

Tasks in the public interest

38. Reprobel is not a public-law entity, nor is it controlled by the Belgian State in such a way that it could be considered structurally part of it. It is therefore necessary to consider whether it performs tasks in the public interest and has special powers for that purpose beyond those which result from the normal rules applicable in relations between individuals.

39. As I mentioned earlier, it is the Member States which are entitled, under Article 5(2)(a) and (b) of Directive 2001/29, to introduce in their legal orders exceptions to the reproduction right provided for therein, and it is they who are also obliged to establish fair compensation and a system for financing it in that regard. (25) The Court has ruled that, in principle, the economic burden of that financing should be borne by final users who have been granted rights under those exceptions. However, in view of the practical difficulty of identifying those users, it is open to the Member States to establish a system whereby the burden falls on the manufacturers or distributors of devices and media that allow works and other subject matter protected by reproduction rights to be copied, or on the providers of reproduction services, who pass on the financial burden to the final users, presumably in the price of the devices and media or services concerned. (26)

40. In that context, it should also be noted that the harm suffered by the holders of a reproduction right is largely hypothetical, especially with regard to the exception provided for in Article 5(2)(b) of Directive 2001/29, since it would be very difficult for the rightholders to assert that right with respect to the users' private activities which the latter consider to be a natural way of using a legally acquired copy of a work. Therefore, the introduction of exceptions to that right is an element of public policy. Under that policy, the State, on the one hand, legalises activities that users would engage in anyway, regardless of whether they are legal or not, given the low probability of their detection and prosecution. On the other hand, it provides the rightholders with income that would usually be very difficult to obtain directly from users.

41. The fee charged in this manner has the character of a public-law charge on copying devices and media – it is borne by all purchasers of such devices and media or services who have been granted rights under the exceptions provided for in Article 5(2)(a) and (b) of Directive 2001/29. (27) Thus, its collection does not depend on whether the users actually take advantage of those exceptions. Indeed, as the Court has ruled, users must be deemed to take full advantage of their rights in that regard. (28) On the other hand, Member States that set the amount of the fee on devices and media are obliged to set it at such a level that the revenues from it compensate for the actual harm that the copyright and related rights holders suffer from those exceptions. (29)

42. What we are dealing with, therefore, is not a reciprocal performance between final users and rightholders, but rather an *erga omnes* regulation, according to which each person covered by the exceptions in question has the right to perform the activities covered by the exceptions provided for in

Article 5(2)(a) and (b) of Directive 2001/29, while the rightholders are compensated for the harm they have suffered, which is calculated as a lump sum and financed from the fees paid by all purchasers of copying devices and media or users of reproduction services who benefit from the exceptions in question. The collection of such fees and the payment of fair compensation to the rightholders is therefore a task performed in the public interest.

43. For that reason, Reprobel's argument that it is acting as a collective management organisation of copyright and related rights is misplaced. The company may *also* be acting as a collective management organisation, but this does not change the fact that by collecting the fee at issue and paying fair compensation, it is performing a task in the public interest rather than engaging in the management of exclusive rights. That is because the copyright and related right holders do not voluntarily (30) entrust it with the management of the reproduction right, since that right, to the extent covered by the exceptions in question, simply does not exist. On the other hand, users do not pay *remuneration* to the rightholders for the actual use of works or other protected subject matter, since that use is free of charge, but rather finance, by paying a form of indirect tax, *compensation* for the loss of exclusive rights by the rightholders. (31)

44. Therefore, the French government's view that Reprobel is not performing a task in the public interest, but rather in the private interest of the copyright and related rights holders, is incorrect. The exceptions to the reproduction right provided for in the provisions of Directive 2001/29 are introduced in the public interest, as they are intended to establish a general right for natural persons to copy works and other protected subject matter for their own use without having to obtain permission from the rightholders. On the other hand, fair compensation for those rightholders is a correlative of that right and serves to maintain a proper balance between the interests at stake, which is certainly in the public interest.

Special powers

45. As for the special powers of an entity such as Reprobel that go beyond those which result from the normal rules applicable in relations between individuals, such special powers are inherent in the very right to demand that manufacturers and distributors of copying devices and media pay the fee at issue. In relations between individuals which are based on the principle of equality of parties, a claim for payment is always associated with a specific legal event, such as a contract, tort or other event that results in a legal relationship between two or more named persons. However, the entity authorised to collect the fee at issue has, by operation of law, a claim for its payment against any person who is included in the abstractly defined group of obliged persons. It therefore exercises *ius imperium*.

46. It is important to distinguish the situation of such an entity from that of the aforementioned manufacturers and distributors, who are only capable of passing on the financial burden of the fee in question to their customers,

by way of a contract, in the price of the devices and media they sell. Similarly, any seller of any commodity has, subject to market conditions of course, the possibility of offsetting its costs for manufacturing or acquiring that commodity as well as for public-law charges, including, in particular, indirect taxes, through the price of that commodity. Thus, in so far as those manufacturers and distributors participate in performing the public-interest task at issue here, from a legal point of view they are only acting as entities obliged to make certain payments and do not have any special powers beyond those which result from the normal rules applicable in relations between individuals.

47. The fact, raised by Reprobel and the Belgian government, that it is not Reprobel but the public authorities that set the amount of the fee at issue is irrelevant here. Performing tasks in the public interest does not mean that the entity performing those tasks determines, independently and comprehensively, all aspects of those tasks or that its special powers must be discretionary. On the contrary, the performance of *entrusted* tasks by definition implies that the party that entrusts them defines the limits of the actions of the party executing those tasks. The fact that the freedom of action of an entity performing tasks in the public interest is limited by a public authority further confirms that the entity is acting on behalf of the State and is an emanation of the State within the meaning of the Court's case-law on the direct effect of EU law.

48. That argument, moreover, is double-edged, for if Reprobel were to be considered as nothing more than an automatic enforcer of the laws laid down by the Belgian State without any powers of its own in that regard, it would be yet another argument in favour of considering the dispute in the main proceedings to be a vertical one between Copaco and that State. After all, as Copaco rightly points out, it would be completely illogical if the King (read: the Belgian State) could not collect the fee at issue, and yet Reprobel, which merely carries out his orders, could.

49. The power to legally demand payment of the fee at issue is Reprobel's special power that goes beyond the normal rules applicable in relations between individuals, a power which, in my opinion, would be sufficient in itself to recognise Reprobel as an emanation of the Belgian State. Of crucial importance here is the fact that the power derives directly from provisions of law, and not from the individual legal relationships between Reprobel and the obliged entities.

50. In order to perform the public interest task entrusted to it, Reprobel also has a number of special powers to obtain information. Firstly, it has the right to request both the entities obliged to pay the fee at issue and other entities operating in the copying device market (such as companies engaged in the maintenance of such devices) to provide any information necessary to determine the obliged entities and the amounts owed by them, and those entities are obliged to provide that information under threat of criminal sanction.

51. That power goes beyond the powers that result from the normal rules applicable in relations between

individuals, as no one is ordinarily obliged to provide to third parties, under threat of sanction, information about their own, let alone someone else's, business activities. On the contrary, such information is often protected as a business secret, and the obligation to disclose it arises only in specific situations and under specific regulations, for instance during tax investigations or accounting audits, or within the framework of a legal relationship between an individual and a specific other entity.

52. Therefore, the argument raised by the Belgian government that Reprebel's situation should be compared to that of a bank, which can also demand extensive information about its customers' financial situation, is misplaced. The difference lies precisely in the fact that a bank may only request such information from its customers who have voluntarily entered into, or intend to enter into, a contract with it, and the only sanction for failing to provide that information will be that the customer is unable to enter into the contract or will have it terminated. (32) No bank has the authority to request any information from persons with whom it has no legal relationship. On the other hand, manufacturers and distributors of copying devices and media are obliged to provide information to Reprebel by law, without having to enter into any legal relationship with it.

53. Likewise irrelevant is the point raised by both Reprebel and the Belgian government that Reprebel has no authority to impose sanctions on entities that fail to provide information to it. The Foster test does not require an entity performing a task in the public interest to have all the powers normally vested in State authorities, including the right to impose sanctions. According to the information contained in the request for a preliminary ruling, failure to comply with information obligations to Reprebel may result in criminal sanctions, which obviously only the courts are competent to impose. The very existence of those sanctions, however, demonstrates the special nature of Reprebel's powers.

54. Secondly, Reprebel is authorised to seek information necessary for the performance of its tasks from customs authorities, tax authorities, and social security offices. That power, too, goes beyond the powers that result from the normal rules applicable in relations between individuals. Indeed, even under the most transparent conditions, individuals are not able to seek information about other individuals from such bodies, except for information that is in principle public, such as registration for value added tax. Such information, however, would not be sufficient for the task entrusted to Reprebel, and thus we must be dealing with information that is more far-reaching, such as the volume of imports of copying devices or media, or the turnover of manufacturers or distributors of such devices and media. Public authorities do not provide such information to entities that do not have special powers.

55. Therefore, the arguments of the French government that Reprebel's right to seek information from public authorities does not concern its relationship with the entities obliged to pay the fee at issue, as required by the judgment in *Foster*, are once again unfounded. Firstly,

neither the judgment in *Foster* nor the subsequent case-law of the Court require that the special powers of an entity performing tasks in the public interest must concern, strictly and exclusively, that entity's direct relations with the individual. Those powers are to be granted to that entity *for the purpose* of performing the task entrusted to it in the public interest. (33) Secondly, it cannot be seriously argued, as the French government does, that Reprebel's right to seek information from customs and tax authorities relates to Reprebel's relationships with those authorities rather than with the entities obliged to pay the fee at issue. Reprebel has the right to obtain information not about its own tax or customs situation, but about the activities of the obliged entities, and it obtains that information in order to determine the amount of the fee at issue that is due from them. Therefore, the right clearly concerns its relationship with those entities.

Summary

56. The above considerations lead to the conclusion that Reprebel meets the so-called Foster test, as it performs a task in the public interest and has special powers for that purpose beyond those which result from the normal rules applicable in relations between individuals.

57. That conclusion can be generalised. The introduction into national law of exceptions to the reproduction right provided for in Article 5(2)(a) and (b) of Directive 2001/29 is an action by the State in the public interest, namely in the interest of all users of works and other subject matter protected by that right who are natural persons. It is also an action in the public interest to pay fair compensation to the rightholders, as provided for in the directive, and to organise a system for financing that compensation, including, in particular, through a fee or other charge collected from manufacturers or distributors of devices and media that makes it possible to take advantage of those exceptions to the reproduction right. Accordingly, the entity entrusted with collecting such a charge and paying fair compensation to the rightholders performs a task in the public interest. To that end, the entity must necessarily have special powers beyond those which result from the normal rules applicable in relations between individuals, beginning with the right to demand payment of such a charge. (34) In a dispute with such an entity, individuals may therefore rely directly on EU law and demand that national laws which are incompatible with EU law be disapplied.

58. Therefore, the answer to the first, second and third questions should, in my opinion, be that individuals may rely directly on provisions of EU law to preclude the application to them of national provisions incompatible with that law vis-à-vis an entity that is entrusted by the Member State to collect charges in order to finance fair compensation within the meaning of Article 5(2)(a) and (b) of Directive 2001/29 and to pay that compensation to the rightholders, and which has special powers enabling it to perform its tasks.

Conclusions

59. In light of all of the above considerations, I propose that the following response be given to the questions

referred for a preliminary ruling by the Ondernemingsrechtbank Gent Afdeling Gent (Ghent Business Court, Ghent Division, Belgium):

(1) Article 5(2)(a) and (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 has direct effect, such that an individual may rely on it before a national court to avoid payment of the charge in respect of fair compensation where that charge is collected on the basis of national legislation which is inconsistent with those provisions of Directive 2001/29, including the Court's case-law concerning their interpretation.

(2) Individuals may rely directly on provisions of EU law to preclude the application to them of national provisions incompatible with that law vis-à-vis an entity that is entrusted by the Member State to collect charges in order to finance fair compensation within the meaning of Article 5(2)(a) and (b) of Directive 2001/29 and to pay that compensation to the rightholders, and which has special powers enabling it to perform its tasks.

FOOTNOTES

1 Original language: Polish.

2 See the recent judgment of 11 April 2024, Gabel Industria Tessile and Canavesi (C-316/22, EU:C:2024:301) and the Opinion of Advocate General Emiliou in that case (C-316/22, EU:C:2023:885).

3 OJ 2001 L 167, p. 10.

4 Belgisch Staatsblad of 27 July 1994, p. 19297.

5 Belgisch Staatsblad of 7 November 1997, p. 29874.

6 Belgisch Staatsblad of 7 November 1997, p. 29873.

7 Judgment of 12 November 2015 (C-572/13, 'the judgment in Hewlett-Packard Belgium', EU:C:2015:750).

8 The judgment in Hewlett-Packard Belgium, paragraph 4 of the operative part.

9 Judgment of 5 February 1963 (26/62, EU:C:1963:1).

10 Judgment of 4 December 1974 (41/74, EU:C:1974:133)

11 Judgment of 8 March 2022, Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect) (C-205/20, EU:C:2022:168, paragraphs 17 to 19).

12 Judgment of 9 February 2012, Luksan (C-277/10, EU:C:2012:65, paragraph 106).

13 Judgment of 21 October 2010, Padawan (C-467/08, EU:C:2010:620, paragraph 42).

14 Judgment of 16 June 2011, Stichting de ThuisKopie (C-462/09, EU:C:2011:397, paragraph 29).

15 See, to that effect, judgments of 22 September 2016, Microsoft Mobile Sales International and Others (C-110/15, EU:C:2016:717, paragraph 59) and of 6 September 2018, Hampshire (C-17/17, EU:C:2018:674, paragraphs 58 to 60).

16 The judgment in Hewlett-Packard Belgium, paragraph 4 of the operative part.

17 See, to that effect, the judgment of 6 September 2018, Hampshire (C-17/17, EU:C:2018:674, paragraph 56).

18 Judgment of 5 February 1963 (26/62, EU:C:1963:1)
19 See, inter alia, the judgment in Hewlett-Packard Belgium, paragraphs 85 to 87, as well as judgment of 22 September 2016, Microsoft Mobile Sales International and Others (C-110/15, EU:C:2016:717, paragraphs 37, 54 and 55).

20 To be more precise, the condition for the application of those provisions has been met, as the Kingdom of Belgium has introduced in its national law the exceptions to the reproduction right provided for therein.

21 See the judgments of 12 July 1990, Foster and Others (C-188/89, 'the judgment in Foster', EU:C:1990:313, paragraph 20), and of 10 October 2017, Farrell (C-413/15, EU:C:2017:745, paragraphs 33, 34). This is the so-called 'Foster test'.

22 See the judgment of 10 October 2017, Farrell (C-413/15, EU:C:2017:745, paragraphs 27 to 29).

23 Opinion of Advocate General Sharpston in Farrell (C-413/15, EU:C:2017:492, points 35 to 54 and 130 to 147).

24 Opinion of Advocate General Emiliou in Gabel Industria Tessile and Canavesi (C-316/22, EU:C:2023:885, points 33 to 47).

25 Point 31 of the present Opinion.

26 The judgment in Hewlett-Packard Belgium, paragraphs 69 and 70 and the case-law cited.

27 In that regard, the scope of application of Article 5(2)(a) of Directive 2001/29 differs from that of Article 5(2)(b) thereof. The exception under letter (b) only applies to natural persons making reproductions for private use, while the exception under letter (a) covers all categories of users and reproductions for any purpose (see the judgment in Hewlett-Packard Belgium, paragraphs 30 to 34).

28 See, to that effect, the judgment in Hewlett-Packard Belgium, paragraphs 36 and 85 and the case-law cited.

29 The judgment in Hewlett-Packard Belgium, paragraph 72 and the case-law cited.

30 Or even compulsorily, as is sometimes the case when the law provides for mandatory collective management.

31 Who suffer harm because of the exceptions to the exclusive right in question, which is not the case where that right is exploited on a paid basis (see, most recently, the judgment of 8 September 2022, Ametic, C-263/21, EU:C:2022:644, paragraph 68).

32 Providing false information can be treated as fraud and may result in civil or criminal liability. Nevertheless, the obligation to provide information arises from the legal relationship between the customer and the bank

33 The judgment in Foster, paragraph 20.

34 See, to that effect, the judgment of 8 September 2022, Ametic (C-263/21, EU:C:2022:644, paragraphs 68 to 72).