

**Case C-230/23****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

13 April 2023

**Referring court:**

Ondernemingsrechtbank Gent Afdeling Gent (Belgium)

**Date of the decision to refer:**

16 February 2023

**Applicant:**

CV REPROBEL

**Defendant:**

NV COPACO BELGIUM

**Subject matter of the main proceedings**

The applicant – CV REPROBEL ('REPROBEL') – claims, in essence, that the defendant should be ordered to pay EUR 28 614.49 (including VAT) for unpaid invoices and EUR 2 861.44 by way of damages, plus interest. The defendant – NV COPACO BELGIUM ('COPACO') – contends that the applicant's claim should be dismissed as unfounded.

**Subject matter and legal basis of the request**

This request under Article 267 TFEU concerns the question of whether an entity entrusted by the State to collect and distribute the fair compensation within the meaning of Article 5(2)(a) and (b) of Directive 2001/29 and over which the State exercises control is 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, whether Article 5(2)(a) and (b) of Directive 2001/29 has direct effect and whether a national court is required to

disapply a national provision contrary to Article 5(2)(a) and (b) of Directive 2001/29.

### **Questions referred for a preliminary ruling**

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?

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

- o 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;
- o 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;
- o 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;
- o 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.

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

- o 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;
- o 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;
- o 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).

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

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?

### **Provisions of European Union law relied on**

Article 5(2)(a) and (b) and recital 52 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 ('Directive 2001/29')

### **Provisions of national law relied on**

Koninklijk besluit van 30 oktober 1997 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 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; 'the Royal Decree of 30 October 1997')

Wet van 22 december 2016 tot wijziging van sommige bepalingen van het boek XI van het Wetboek van economisch recht (Law of 22 December 2016 amending certain provisions of Book XI of the Code on Economic Law)

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 REPROBEL claims, in essence, that COPACO should be ordered to pay EUR 28 614.49 for unpaid invoices and EUR 2 861.44 by way of damages, plus interest. COPACO contends that the applicant's claim should be dismissed as unfounded.

### **The essential arguments of the parties in the main proceedings**

- 2 COPACO relies on the conflict between the provisions of the Royal Decree of 30 October 1997 that provide for a two-part remuneration for copies made for private or didactic purposes of works fixed on a graphic or similar medium – lump-sum remuneration and proportional remuneration – and Article 5(2)(a) and (b) of Directive 2001/29, which authorises Member States that incorporate the reproduction right in their legislation to provide for exceptions to that right.
- 3 In response to the judgment of the Court of Justice of 12 November 2015 in Case C-572/13, *Hewlett-Packard Belgium*, in which the Court held that Article 5(2)(a) and (b) of Directive 2001/29 precluded the reprography system, developed by Belgium, of charging lump-sum remuneration, COPACO suspended payment of its invoices from November 2015 until after January 2017. Belgium's new reprography regime entered into force in March 2017. The unpaid invoices therefore predate the entry into force of that new regime.
- 4 According to COPACO, Article 5(2)(a) and (b) has direct effect.  
  
REPROBEL disputes the unconditional, clear and precise nature of Article 5(2)(a) and (b) of Directive 2001/29, on the ground that it leaves Member States free to provide for exceptions or not and interpret the fairness of compensation as they see fit. COPACO counters that the precise purport of that provision and the requirement that it be unconditional, clear and precise were shaped in part by the Court's interpretations, to which that provision had already given rise.
- 5 REPROBEL also considers that it is not a State entity for several reasons. COPACO holds the opposite view.

### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 6 The referring court explains that, in principle, the provisions of a directive do not have direct effect on the law of a Member State until after they have been transposed into national law.

In its judgment of 18 November 2004, the Court censured the Belgian State for late implementation of Directive 2001/29, which should have been transposed by 22 December 2002 at the latest (judgment of 18 November 2004, *Commission v Belgium*, C-143/04).

In exceptional cases and where the directive has not been transposed into Belgian law within the prescribed period and no interpretation in conformity with the directive is possible, national provisions must give way to Community provisions contained in a directive and the provisions of the directive must be applied as a rule of Belgian law. As can be observed from paragraphs 4 and 5 above, the parties have divergent views on the interpretation of the conditions that must be satisfied for that to be the case.

- 7 According to the referring court, the question of whether REPROBEL is a State entity is important for determining whether there is a horizontal conflict (between individuals) or a vertical conflict (between an individual and the State or its organs). In the latter case, the provisions of a directive could possibly be relied on directly. In its view, the precise definition of the concept of ‘State entity’ continues to give rise to controversial positions which do not promote legal certainty and it falls exclusively to the Court to resolve the question of whether REPROBEL is to be regarded as an entity within the meaning of EU law.
- 8 If the present case is a vertical conflict, provisions of the directive may be relied on directly by an individual against the State or its organ, provided that they are formulated in unconditional, clear and sufficiently precise terms. The question of whether that is the case here is the subject of disagreement between the parties.
- 9 According to the referring court, the requirement that provisions be formulated in unconditional, clear and sufficiently precise terms is satisfied where the Member States are required to follow a particular course of action and/or a clear and precise obligation as to the result to be achieved is imposed on them.

Allowing Member States an option does not appear to be incompatible with the condition that the provision of the directive is unconditional and sufficiently precise (judgments of 12 February 2009, *Cobelfret*, C-138/07, and of 17 March 2022, *Daimler*, C-232/20).

- 10 Interpretation may be necessary not because of the imprecise or unclear nature of the provision of the directive, but because an interpretation is called for in a given case, without calling into question the unconditional, clear or precise nature of the provision itself.

Such an interpretation is a matter exclusively for the Court of Justice and not for the national court.

- 11 At the centre of the case is the interpretation of the concept of ‘fair compensation’, which has been addressed in several past judgments of the Court in response to questions referred for a preliminary ruling seeking a more precise interpretation of the substance of that concept, though not involving findings that the provision was imprecisely or unclearly formulated.