

Case C-826/21**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:**

22 December 2021

Referring court:

Curtea de Apel București (Romania)

Date of the decision to refer:

1 July 2021

Applicant at first instance and appellant:

Uniunea Producătorilor de Fonograme din România (UPFR)

Defendant at first instance and respondent:Societatea Națională de Transport Feroviar de Călători (SNTFC)
'CFR Călători' SA**Subject matter of the main proceedings**

Appeal against a judgment of the Tribunalul București (Regional Court, Bucharest, Romania) dismissing an action for damages by which the applicant at first instance and appellant ('the appellant') is seeking an order requiring the defendant at first instance and respondent ('the respondent') to pay equitable remuneration for the communication to the public of musical works. In essence, the issue is whether a communication to the public can be deemed to have been made simply through passenger train carriages being fitted with sound systems.

Subject matter and legal basis of the request

An interpretation of Article 3 of Directive 2001/29/EC of the European Parliament and of the Council is sought pursuant to Article 267 TFEU

Questions referred for a preliminary ruling

(1) Does a rail carrier which uses train carriages in which sound systems intended for the communication of information to passengers are installed thereby make a communication to the public within the meaning of Article 3 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?

(2) Does Article 3 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 preclude national legislation which establishes a rebuttable presumption of communication to the public on the basis of the existence of sound systems, where those sound systems are required by other provisions of law governing the carrier's activity?

Provisions of European Union law and case-law relied on

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, Article 3

Judgments of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764; of 15 March 2012, *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141; of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631; of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140; and of 31 May 2016, *Reha Trening*, C-117/15, EU:C:2016:379

Provisions of national law relied on

Legea nr. 8/1996 privind dreptul de autor și drepturile conexe (**Law No 8/1996** on copyright and related rights). This law provides that, for the direct or indirect use of phonograms published for commercial purposes or of reproductions thereof by broadcasting or any other means of communication to the public, performers and phonogram producers are to have the right to a single equitable remuneration, the amount of which is to be fixed by methodologies. That right may be exercised individually or through collective management organisations. The agreement between the collective management organisations and users referred to in that law concerning the negotiated methodologies is to be recorded in a protocol deposited with the Oficiul Român pentru Drepturile de Autor (Romanian Copyright Office) ('ORDA'). The methodologies thus published are to be effective against all users in the sector in respect of which the negotiations have taken place.

Decizia nr. 399/2006 a ORDA pentru publicarea în *Monitorul Oficial al României*, Partea I, a Metodologiei privind comunicarea publică a fonogramelor publicate în scop comercial sau a reproducerilor acestora și tabelele cuprinzând

drepturile patrimoniale ale artiștilor interpreți ori executanți și producătorilor de fonograme (ORDA **Decision No 399/2006** on the publication in the *Monitorul Oficial al României*, Part I, of the Methodology concerning the communication to the public of phonograms published for commercial purposes or of reproductions thereof and the tables containing the economic rights of performers and phonogram producers), as amended by ORDA Decision No 189/2013

‘1. “*communication to the public of phonograms published for commercial purposes or of reproductions thereof*” shall mean the communication of such phonograms or reproductions in public spaces (whether closed or open), regardless of the manner in which the communication is made, by the use of mechanical, electro-acoustic or digital means (amplification systems, devices for reproducing sound or audiovisual recordings, radio receivers or televisions, IT equipment, and so on).

...

3. “*phonogram user*” shall mean, for the purposes of the present methodology, any authorised natural or legal person who communicates to the public phonograms published for commercial purposes or reproductions thereof, in spaces held in any way (ownership, management, letting, subletting, commodatum, and so on).

...

5. The user shall be required to obtain authorisations in the form of non-exclusive licences issued by the collective management organisations of the ... phonogram producers for the communication to the public of phonograms published for commercial purposes ... in return for remuneration according to the tables set out below, irrespective of the actual duration of the communication to the public. ...’

The table mentioned in paragraph 5 above provides for a monthly remuneration of 30 Romanian lei (RON) per carriage in respect of trains equipped with sound systems.

Codul de procedură civilă (Code of Civil Procedure)

Article 329 provides that ‘in the case of presumptions left to the scrutiny and discretion of a court, that court may rely on them only if they have the weight and force to establish the probability of the presumed fact; however, they shall be admissible only in cases where the law permits witness evidence’.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The appellant is a collective management organisation designated by ORDA to collect the remuneration due to phonogram producers. The respondent's activity consists of the public transportation of passengers by rail.
- 2 In respect of certain categories of train operated by the respondent, the fitting of passenger carriages with sound systems is compulsory under an order of the Romanian minister for transport. In respect of the other categories, no such fitting has been demonstrated. The parties disagree as to whether or not the systems in question enable the communication of phonograms, which the referring court considers to be a detail to be established by further evidence, depending on the answer given by the Court of Justice. There is also no direct evidence concerning the broadcasting of phonograms in the background in the train carriages used by the respondent.
- 3 By an action brought before the Tribunalul București (Regional Court, Bucharest) on 2 December 2013, the appellant requested, in essence, that the respondent be ordered to pay equitable remuneration for the communication to the public of musical works in passenger trains. The Tribunalul București (Regional Court, Bucharest) dismissed the action on the ground that only sound systems which make it technically possible for the public to access sound recordings constitute a communication to the public and that this had not been demonstrated by the appellant. The appellant lodged an appeal against that judgment with the referring court.

The essential arguments of the parties in the main proceedings

- 4 The appellant claims that the mere existence of sound systems in the carriages of the passenger trains operated by the respondent amounts to an act of communication to the public. Furthermore, it argues that no distinction should be drawn between carriages with simple sound systems, on the one hand, and those with sound systems which also have the necessary equipment to communicate phonograms, on the other, since all the respondent's sound systems also enable the communication to the public of phonograms.
- 5 The respondent asks that this line of argument be rejected on the ground that equitable remuneration is due only in respect of acts of communication to the public consisting of the actual broadcasting of phonograms; acts which the appellant has failed to demonstrate took place. In addition, it argues that technical sound systems – the fitting of which is compulsory under both national and EU law – cannot be equated with a communication to the public; nor can they constitute a sufficient basis for a presumption of communication to the public.
- 6 At first instance, the respondent requested that a question be referred to the Court of Justice for a preliminary ruling on those issues, but that request was dismissed by the Tribunalul București (Regional Court, Bucharest). The referring court has

brought that matter to the attention of the parties of its own motion and decided to make a reference to the Court of Justice.

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

- 7 As regards **the first question referred**, the referring court considers it necessary to analyse two sub-questions, that is to say: (1) does the fitting of sound systems amount to a communication to the public, and (2) is the communication of music as background music in passenger train carriages of a profit-making nature?
- 8 As regards *the first sub-question*, the referring court alludes to the judgment of 7 December 2006, *SGAE*, in which the Court of Justice held that the existence of television sets installed in hotel rooms, together with the supply of an in-room television signal to hotel customers, who – taking into account the high rate of turnover of such customers – constitute a new public, is an act of communication to the public effected with the aim of making a profit, in that it is an additional hotel service. On the basis of that case-law of the Court of Justice, the majority of national courts consider that the installation of devices for reproducing sound recordings for the public constitutes a communication to the public, regardless of whether or not such a communication actually took place.
- 9 However, the referring court considers that this is not the meaning of the case-law of the Court of Justice. Thus, from an analysis of the judgment of 7 December 2006, *SGAE*, and the judgment of 15 March 2012, *Phonographic Performance (Ireland)*, it concludes that the mere installation of television sets in hotel rooms is not sufficient since the deliberate act of the hotel operator of supplying an in-room television signal to the customers who constitute a ‘new public’ is also necessary.
- 10 Applying that case-law to the present case, that court considers that the appellant must furnish evidence not only of the existence of sound systems, but also of the respondent’s intention to communicate phonograms publicly to passengers, demonstrating, by various forms of evidence, an actual communication to the public in passenger trains.
- 11 As regards *the second sub-question*, it must be examined in the event of a finding by the Court of Justice that the mere existence of sound systems amounts to an act of communication to the public. Thus, according to the case-law of the Court of Justice, the profit-making nature of the communication is a relevant criterion in assessing the existence of an act of communication to the public.
- 12 In that regard, the referring court recalls the judgment of 7 December 2006, *SGAE*, and the judgment of 4 October 2011, *Football Association Premier League and Others*, from which it concludes that if a rail carrier were to equip certain carriages with systems by means of which passengers could individually access musical works or works of intellectual creation in general (for example, touch screens, radio sets, devices with headphones making it possible to select certain audiovisual or musical works), that service would constitute a communication to

the public and would undoubtedly be offered with the aim of increasing the commercial attractiveness of the train journey and thus with the aim of making a profit.

- 13 On the other hand, however, the profit-making nature of the communication is debatable where pieces of music or fragments of pieces of music are offered only as background music during a train journey. It is difficult to accept that a potential customer chooses the train on which he or she travels on the basis of the music which he or she can listen to during the journey. Moreover, there is very limited competition in the rail sector in Romania since a single carrier operates on most routes. The relevant criteria are therefore the time of the train, the offer of a direct journey, the journey time and the comfort of the carriages, but the last of those criteria does not include music broadcast to all passengers, which could, on the contrary, be a source of disturbance for the majority of those passengers.
- 14 In that regard, the referring court recalls the findings of the Court of Justice in its judgment of 15 March 2012, *SCF*, and its judgment of 31 May 2016, *Reha Trening*, and considers that the factual situation in the present case is closer to that of the case which gave rise to the first of those judgments since the decisive factor is the quasi-monopoly in the rail transport sector, which does not leave the passenger an actual choice as to the service in question.
- 15 As regards **the second question referred**, the referring court recalls that national legislation requires certain passenger carriages to be fitted with sound systems and that the methodology approved by ORDA Decision No 399/2006 makes the payment of remuneration compulsory in respect of every train with a sound system. Consequently, in that situation there is a rebuttable presumption of communication to the public.
- 16 However, the compulsory collective management system adopted by national legislation and the rules on the general compulsory effect of the negotiated methodologies cannot alter the mechanism for applying Article 3 of Directive 2001/29 to such an extent that, de facto, the existence of means of communication is sufficient per se to give rise to an obligation to pay remuneration. Thus, the mere existence of technical means capable of carrying out an act of communication to the public cannot be equated with the communication itself and, *de jure*, cannot give rise to an obligation to pay remuneration.
- 17 Consequently, a presumption such as that at issue in the second question cannot be made on the basis of the mere existence of sound systems, it being necessary to prove, in addition, other circumstances demonstrating the existence of an actual communication to the public.