

**Case C-13/20****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:**

14 January 2020

**Referring court:**

Cour d'appel de Bruxelles (Belgium)

**Date of the decision to refer:**

20 December 2019

**Appellant:**

Top System SA

**Respondent:**

Belgian State

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**1. Subject matter and facts of the dispute**

- 1 The body responsible for selecting and orienting staff for public authorities ('Selor') has a system for the online submission of applications.
- 2 Top System SA ('Top System') is a company that develops computer programs. To that end, it has designed its own 'Top System Framework' ('TSF'), which is based on Microsoft's '.NET Framework', a suite of tools to assist computer programmers, to which TSF adds additional functionalities and makes improvements.
- 3 To enable Selor to process applications submitted online, Top System created, at Selor's request, various new applications ('the Selor applications'), including 'Selor Web Access' ('SWA'), which was released in March 2004.
- 4 The Selor applications comprise, on the one hand, 'tailor-made' components to meet the needs and requirements of Selor and, on the other, components taken from TSF.

5 Top System and Selor have been working together for a number of years. Following persistent malfunctions, Selor decided to try to find a solution itself. In early 2019, Top System noted that some technical changes had been made to the TSF installed with the Selor applications.

6 By order of 2 February 2019, the President of the Tribunal de Commerce de Bruxelles (Brussels Commercial Court, Belgium) granted a petition lodged by Top System for an order for *saisie-description* (confiscation of works infringing intellectual property rights).

7 The appointed expert wrote the following in his report:

*‘It is apparent from an analysis of the data confiscated that Selor did indeed decompile Top System’s object libraries in order to recreate the source code. In order to do that, Selor very probably used a tool such as ‘Reflector’ (of which Selor has at least one copy, on [X’s] work station ...*

*We found two examples of specific source code where a change was made on 19 December 2008. All the files within the folder in question were changed at that time. We note that all the references to the binary version of ‘Top System’ have been changed to references to the version of the source code added that day.’*

8 On 6 July 2009, Top System issued proceedings against the Belgian State seeking, inter alia:

- a finding that TSF had been decompiled by Selor in breach of Top System’s exclusive rights and that that constitutes the counterfeiting of a work, and
- an order requiring the Belgian State to compensate Top System on account of the decompilation and the copying of the TSF source code.

9 By judgment of 19 March 2013, the tribunal de première instance de Bruxelles (Court of First Instance, Brussels, Belgium) ruled the application unfounded.

10 Top System brought an appeal before the cour d’appel de Bruxelles (Court of Appeal, Brussels), where it pursues its claims.

## **2. Provisions at issue**

### ***Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs***

11 Article 4 provides:

‘Restricted Acts

Subject to the provisions of Articles 5 and 6, the exclusive rights of the rightholder within the meaning of Article 2, shall include the right to do or to authorise:

(a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole. In so far as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorisation by the rightholder;

(b) the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program;

...'

12 Article 5 provides:

'Exceptions to the restricted acts

1. In the absence of specific contractual provisions, the acts referred to in Article 4(a) and (b) shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

...'

13 Article 6 provides:

'Decompilation

1. The authorisation of the rightholder shall not be required where reproduction of the code and translation of its form within the meaning of Article 4(a) and (b) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met:

(a) these acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorised to do so;

(b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in subparagraph (a); and

(c) these acts are confined to the parts of the original program which are necessary to achieve interoperability.

2. The provisions of paragraph 1 shall not permit the information obtained through its application:

- (a) to be used for goals other than to achieve the interoperability of the independently created computer program;
- (b) to be given to others, except when necessary for the interoperability of the independently created computer program; or
- (c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.

3. In accordance with the provisions of the Berne Convention for the protection of Literary and Artistic Works, the provisions of this article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the right holder's legitimate interests or conflicts with a normal exploitation of the computer program.'

### **3. Views of the parties**

#### ***Selor***

- 14 Selor acknowledges that it decompiled part of TSF, the functionalities of which were integrated into the Selor application, in order to disable a function that was not working correctly.
- 15 As its principal argument, Selor maintains that the contractual provisions governing its relationship with Top System entail the waiver by Top System of its right to rely on copyright with regard to any use of the applications. Selor infers from this that it has a right of access to the sources of all the applications provided by Top System, which includes the possibility of accessing those sources itself, by means of decompilation.
- 16 In the alternative, Selor maintains that decompilation was legally permitted for the purpose of correcting errors, in accordance with Directive 91/250. According to Selor, the design flaws affecting the program designed by Top System (in particular, two applications within the TSF program) and the latter's failure to respond to and provide a solution for the problems which it had complained of made it impossible to use the program as intended, and that that justified the decompilation. Selor also argues that it is entitled to 'observe, study or test the functioning' of the program 'in order to determine the ideas and principles' underlying the functionalities of TSF at issue, so that it can circumvent the blockages they were causing (Article 5(3) of Directive 91/250).

#### ***Top System***

- 17 Top System complains that Selor decompiled its 'TSF' program without being authorised to do so, either under contract or by law. It also states that it would in

any event be opposed to such decompilation on the ground that ‘the applications are one thing, the TSF Framework is another’. It submits that TSF was not developed for Selor and that Selor did not fund TSF, which was developed internally by Top System and belongs exclusively to it.

- 18 As regards the legal entitlement to decompile, it maintains that decompilation may only be carried out in order to ensure the interoperability of programs (Article 6 of the directive), not to correct errors (Article 5(1) of the directive), the existence of which, moreover, it disputes. Should the cour d’appel (Court of Appeal) consider interpreting the legal provision (transposing Article 5 of the directive) as permitting the correction of errors, Top System asks that it refer a question to the Court of Justice for a preliminary ruling. In the alternative, Top System maintains that, if decompilation is justified in such case, it must be carried out under the strict conditions laid down in Article 6 of the directive.
- 19 As regards the exception referred to in Article 5(3) of the directive, Top System claims that the decompilation did not take place solely in a testing environment, but also in a development environment, that of Selor’s computer programmers.

#### **4. Assessment of the referring court**

- 20 The cour d’appel (Court of Appeal) emphasises that Top System did not deliver the entirety of the source code for the Selor applications.
- 21 Faced with a failure to perform the contract, Selor should have put Top System on notice to send it the source code, rather than go ahead and decompile the object code. Since Selor had refrained from putting Top System on notice to provide it with the source code to which it was contractually entitled, and since it had deliberately placed itself outside the scope of performance of the contract, it was up to Selor to demonstrate that it had satisfied the legal conditions for carrying out the decompilation.
- 22 The cour d’appel (Court of Appeal) briefly states the positions of the parties as follows. According to Top System, there are only two situations in which decompilation may be carried out, that is to say, where the author has authorised it and where it is sought to achieve interoperability (Article 6 of the directive). On the other hand, decompilation is not permitted in order to correct errors, contrary to what was held in the judgment under appeal. According to Selor, however, the correction of errors, by means of decompilation, is permitted by the provision of national law (transposing Article 5(1) of the directive), which permits all of the acts contemplated by Article 4(b) of the directive to be carried out and thus, in addition to translation, adaptation and arrangement, ‘any other alteration of a computer program and the reproduction of the results thereof’.
- 23 The cour d’appel (Court of Appeal) finds that the exception under Article 5(3) of the directive does not apply. That provision merely permits the person having a right to use a copy of the computer program to observe, study or test the

functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do. The court considers that the decompilation carried out by Selor obviously went beyond that framework.

- 24 The question therefore is whether the decompilation of all or part of a computer program constitutes one of the acts contemplated by Article 4(a) and (b) of Directive 91/250 which a lawful user of a program may carry out for the purposes of error correction.
- 25 Neither the wording of the directive, nor the existing case-law provides sufficient guidance to answer this new question of interpretation of the directive, which is in the general interest of the uniform application of EU law.

**5. Questions referred for a preliminary ruling**

- 26 The cour d'appel (Court of Appeal) refers the following questions to the Court of Justice for a preliminary ruling:
- Is Article 5(1) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs to be interpreted as permitting the lawful purchaser of a computer program to decompile all or part of that program where such decompilation is necessary to enable that person to correct errors affecting the operation of the program, including where the correction consists in disabling a function that is affecting the proper operation of the application of which the program forms a part?
  - In the event that that question is answered in the affirmative, must the conditions referred to in Article 6, or any other conditions, also be satisfied?