Reports of Cases

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,

* Language of the case: Dutch.

– 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 audio-visual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders. …'

4 Article 2 of 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 (4*bis*) …

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 60*bis* 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 93*bis* 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

didatisch 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]