JUDGMENT OF THE COURT (Third Chamber)

13 July 2006 *

In Case C-61/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 10 February 2005,

Commission of the European Communities, represented by P. Guerra e Andrade and W. Wils, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Fernandes and N. Gonçalves, acting as Agents,

defendant,

* Language of the case: Portuguese.

THE COURT (Third Chamber),

composed of A. Rosas, President of Chamber, J. Malenovský (Rapporteur), S. von Bahr, A. Borg Barthet and U. Lõhmus, Judges,

Advocate General: E. Sharpston,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 4 April 2006,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that:

— by creating in national law a rental right in favour of producers of videograms, the Portuguese Republic has failed to fulfil its obligations under Article 2(1) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual

property (OJ 1992 L 346, p. 61), as last amended by 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; 'the Directive');

— by creating in national legislation some doubt as to who is responsible for paying the remuneration owed to artists on assignment of the rental right, the Portuguese Republic has failed to comply with Article 4 of the Directive, read in conjunction with Article 2(5) and (7) thereof.

Legal context

Community legislation

2 The first recital in the preamble to the Directive states:

'whereas differences exist in the legal protection provided by the laws and practices of the Member States for copyright works andsubject-matter of related rights protection as regards rental and lending; whereas such differences are sources of barriers to trade and distortions of competition which impede the achievement and proper functioning of the internal market'.

3 The seventh recital in the preamble to the Directive provides:

'whereas the creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky; whereas the possibility for securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection of the rightholders concerned'.

4 Article 2(1), (5) and (7) of the Directive states:

'1. The exclusive right to authorise or prohibit rental and lending shall belong:

— to the author in respect of the original and copies of his work,

— to the performer in respect of fixations of his performance,

— to the phonogram producer in respect of his phonograms, and

— to the producer of the first fixation of a film in respect of the original and copies of his film. For the purposes of this directive, the term "film" shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.

...

5. Without prejudice to paragraph 7, when a contract concerning film production is concluded, individually or collectively, by performers with a film producer, the performer covered by this contract shall be presumed, subject to contractual clauses to the contrary, to have transferred his rental right, subject to Article 4.

...

7. Member States may provide that the signing of a contract concluded between a performer and a film producer concerning the production of a film has the effect of authorising rental, provided that such contract provides for an equitable remuneration within the meaning of Article 4. ...'

5 Under Article 4 of the Directive:

'1. Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental.

2. The right to obtain an equitable remuneration for rental cannot be waived by authors or performers.

3. The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers.

4. Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.'

National legislation

6 The Directive was transposed into Portuguese law by Decree-Law No 332/97 of 27 November 1997 (*Diário da República* I, Series A, No 275, of 27 November 1997, p. 6393; 'the Decree-Law') establishing the obligation to pay remuneration to artists who have assigned their rental right.

7 Article 5 of the Decree-Law provides:

'1. Where the author transfers or assigns his rental rights concerning a phonogram, a videogram or the original or a copy of a film to a phonogram or film producer, he has an inalienable right to an equitable remuneration for the rental.

2. For the purpose of paragraph 1, the producer is responsible for paying the remuneration which, in the absence of agreement, is set by arbitration and in accordance with the law.'

8 Article 7 of the Decree-Law provides:

'1. The distribution rights, including the right of rental and lending free of charge, is also granted to:

(a) the performer in respect of the fixation of his performance;

(b) the phonogram or videogram producer in respect of his phonograms or videograms;

(c) the producer of the first fixation of a film in respect of the original and copies of his film.

2. The rights referred to in paragraph 1 shall not be extinguished upon sale or any other act of distribution of the objects mentioned.

3. In addition to the provisions of paragraphs 1 and 2, the right to authorise reproduction of the original and copies of that film is also granted to the producer of the first fixation of a film.

4. For the purposes of the present act, "film" is defined as "a cinematographic work, audiovisual work, and any moving images, whether or not accompanied by sound".'

9 Under Article 8 of the Decree-Law:

'The conclusion of a film production contract between performers and the producer gives rise to the presumption, in the absence of a contrary provision, of assignment of the performer's rental right in favour of the producer, without prejudice to the inalienable right to equitable remuneration for the rental, in accordance with Article 2(5).'

Pre-litigation procedure

10 By letter of 31 March 2003, the Commission made the Portuguese authorities aware of its doubts as regards a correct transposition of the directive, in the sense that the Decree-Law grants exclusive rental rights to the producer of videograms and does not define who is responsible for paying the remuneration for the rental. The Commission therefore sent them a request for information.

11 Having received no response within the prescribed period and taking the view that the Portuguese legislation was contrary to Article 2(1) and (4) of the Directive, the Commission, by letter of formal notice of 19 December 2003, initiated proceedings for failure to fulfil obligations under Article 226 EC.

12 By letter of 8 January 2004, the Portuguese Republic presented its observations. Although they related to the Commission's request for information sent on 31 March 2003, the Commission presumed that those observations were also in response to the letter of formal notice.

13 Taking the view that the responses of the Portuguese Republic were unsatisfactory, on 9 July 2004, the Commission delivered a reasoned opinion requesting that Member State to adopt the measures necessary to comply with that opinion within two months of its notification.

14 Having received no further information, the Commission decided to bring the present action.

The action

The first complaint, alleging infringement of Article 2(1) of the Directive

Arguments of the parties

15 The Commission argues that the provisions of Article 2(1) of the Directive do not permit, contrary to the provisions of the Decree-Law, the extension to videogram producers of the exclusive right to authorise or prohibit rental enjoyed by the producer of the first fixation of a film.

16 According to the Commission, the list in Article 2(1) is exhaustive and therefore it is only for the producer of the first fixation and not the producer of videograms to authorise or prohibit the rental of the original and copies of a film. That list is in no way minimal or supplementary. Only the first fixation of a film justifies specific protection by Community law. Protecting copies of a film by means of a right related to copyright is unjustified due to the absence of any 'ancillary' link with the literary or artistic work.

17 It follows that the effect of the Decree-Law, contrary to the provisions of the Directive, is to deprive the producer of the first fixation of a film of the exercise of his exclusive right by no longer allowing him to authorise or prohibit the rental of copies of his film.

18 In its defence, the Portuguese Republic observes that, on the date the Decree-Law was adopted, the Code of copyright and related rights (Código do Direito de Autor e dos Direitos Conexos) gave an identical status to producers of phonograms and videograms. In order to respect that equality and to avoid causing imbalances in the current status of the two types of producer, the legislature thus added the videogram producer to the list of proprietors of exclusive rights. It is therefore with the aim of adapting to the characteristics of its national system that the Decree-Law at issue aligns the treatment of a videogram producer with that of a phonogram producer and, accordingly, grants the videogram producer a level of protection higher than that introduced by Community law.

19 The Portuguese Republic argues moreover that the Directive itself contains an ambiguity. By using, in Article 2(1), the vague term 'film', the Directive seems to amalgamate into one definition cinematographic works and works recorded on videogram. It is therefore permissible to consider that the producer of the first fixation may also be the producer of copies of a film.

20 Finally, that Member State argues that the Decree-Law would be contrary to the Directive only if it transpired that its aims contradicted national legislation, if the Decree-Law undermined the functioning of the internal market or if it infringed third party rights. The application of that Decree-Law has raised no concrete problem at the level of either the internal market or the national market, sinceno one has been deprived of the rights provided for by the directive and no complaint has been made.

Findings of the Court

21 At the outset, it must be stated that that first complaint gives rise to the question whether exclusive rental rights are also granted to the videogram producer.

22 Granting an exclusive right also to videogram producers would not simply add an extra category of rightholders to the list in Article 2(1) of the Directive, but would, on the contrary, call into question the specific exclusive rights set out in that provision.

23 In that respect, Article 2(1) of the Directive confers on the producer of the first fixation an exclusive right to authorise or prohibit rental and lending in respect of the original and copies of his film. It follows that, if the producer of a videogram were also granted the right to control the rental of that videogram, the right of the producer of the first fixation would manifestly no longer be exclusive.

24 That interpretation is confirmed by the object of the Directive, which is to establish harmonised legal protection in the Community for the rental and lending right and certain rights related to copyright in the field of intellectual property (see Case C-200/96 *Metronome Musik* [1998] ECR I-1953, paragraph 22).

25 As is specifically apparent from the first recital in the preamble thereto, the Directive aims to eliminate the differences between the Member States in respect of the legal protection for copyright works as regards rental and lending, with the aim of reducing barriers to trade and distortions of competition. If Article 2(1) of that Directive allowed Member States freely to confer the right to authorise or prohibit the rental of videograms to different categories of persons, that aim would manifestly not be achieved.

26 In that respect, the Court has already held that the commercial distribution of videocassettes takes the form of sales, but also ofhiring-out. The right to prohibit such hiring-out in a Member State is liable to influence trade in videocassettes in that State and hence, indirectly, to affect intra-Community trade in those products (see Case 158/86 *Warner Brothers and Others* [1988] ECR 2605, paragraph 10).

27 In addition, under the seventh recital in the preamble to the Directive, the protection of the exclusive rental rights of the producers of phonograms and films is justified on the grounds of the necessity to safeguard the recoupment of extremely high and risky investments which are required for their production and which are essential if authors are to go on creating new works (see, in particular, as regards specifically the producers of phonograms, *Metronome Musik*, paragraph 24).

28 It does not appear that the production of videograms requires such high and risky investments that they merit special protection. The Court has already recognised the extreme ease with which recordings could be copied (see *Metronome Musik*, paragraph 24). Although that statement was made in the context of sound recordings, the development of new technologies has also helped to facilitate the reproduction of picture recordings.

29 It follows that the Decree-Law, in so far as it provides for a rental right also in favour of videogram producers, does not comply with the Directive.

30 That conclusion is in no way invalidated by the argument of the Portuguese Republic that, with the aim of 'adapting to the characteristics of its national system', Portuguese law gives an identical status to the producers of videograms and phonograms.

31 According to settled case-law, a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations and time-limits laid down by a directive (see, inter alia, Case C-114/02 *Commission* v *France* [2003] ECR I-3783, paragraph 11, and Case C-358/03 *Commission* v *Austria* [2004] ECR I-12055, paragraph 13).

32 Finally, as an action for failure to fulfil obligations is objective in nature (see, inter alia, Case C-73/92 *Commission* v *Spain* [1993] ECR I-5997, paragraph 19), failure to comply with an obligation imposed by a rule of Community law is itself sufficient to constitute the breach, and the fact that such a failure had no adverse effects is irrelevant (see, inter alia, Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901,

paragraphs 60 and 61, and Case C-233/00 *Commission* v *France* [2003] ECR I-6625, paragraph 62). The argument of the Portuguese Republic that the alleged failure to fulfil obligations did not cause any concrete problem must therefore be rejected.

33 In the light of the foregoing considerations, it must be found that the complaint alleging infringement of Article 2(1) of the Directive by the Portuguese Republic must be upheld.

The second complaint, alleging infringement of Article 4 of the Directive, read in conjunction with Article 2(5) and (7) thereof

Arguments of the parties

34 As regards the transfer of the rental right from the performer to the film producer, the Commission argues that the Decree-Law is confused, in so far as it can refer to two different producers, namely the producer of videograms and the producer of the first fixation of a film.

35 Under Article 5(2) of the Decree-Law, the producer is responsible for paying the remuneration for the rental. This gives rise to a difficulty for performers in collecting the remuneration to which they are entitled since they do not know which of the two producers is required to pay that remuneration. On that point, the Directive is clear: only the producer of the first fixation of a film can be assigned the rental right of performers and required to pay the remuneration to which they are entitled. A transposition such as that carried out by the Decree-Law is therefore intended, in actual fact, to favour the copying industry.

36 The Portuguese Republic disputes the allegedly confused nature of the Decree-Law. In the absence of evidence to the contrary, the Decree-Law imposes the obligation to pay remuneration on the producer of the first fixation of a film. Moreover, the ambiguity derives not only from the Decree-Law but also from the definition of the term 'film' given by the Directive.

Findings of the Court

37 According to settled case-law, each Member State is bound to implement the provisions of directives in a manner that fully meets the requirements of clarity and certainty in legal situations imposed by the Community legislature, in the interests of the persons concerned established in the Member States. To that end, the provisions of a directive must be implemented with unquestionable binding force and with the requisite specificity, precision and clarity (see Case C-207/96 *Commission* v *Italy* [1997] ECR I-6869, paragraph 26).

38 As a preliminary point, it is apparent from Article 2(5) and (7) of the Directive that the rights of performers may be presumed to be transferred or transferred by the effect of the law to a film producer. In exchange for transferring that right, Article 4 of that Directive guarantees an equitable remuneration to those performers.

39 Article 8 of the Decree-Law provides for the assignment of exclusive rental rights from the performer to the film 'producer' without further defining that term. According to Article 5 of the Decree-Law, the film producer is responsible for paying the remuneration in respect of the assignment of the rental right relating to a videogram or the original or copy of a film. The interpretation of those two articles combined could lead to the conclusion that the producer of videograms comes within the category of film producers, who are liable for the remuneration.

40 In that respect, the Portuguese Republic itself admits that its Decree-Law is ambiguous.

41 On the other hand, although Article 4(1) of the Directive, as regards the assignment of the rental right, relates to a film producer, in actual fact it refers only to the producer of the first fixation of a film. Since videograms are not mentioned in that article, the producer of videograms does not therefore enjoy the status of film producer.

42 The effect, therefore, of that transposition of the Directive is a situation which may prevent performers in Portugal from collecting the remuneration to which they are entitled, in so far as it is not clear who is the producer responsible for paying the equitable remuneration provided for in Article 4 of the Directive.

43 In those circumstances, the complaint alleging incorrect transposition of Article 4 of the Directive, read in conjunction with Article 2(5) and (7) thereof, must be upheld.

44 It follows from the foregoing that, by creating in national law a rental right also in favour of producers of videograms, the Portuguese Republic has failed to fulfil its obligations under Article 2(1) of the directive and, by creating in national legislation some doubt as to who is responsible for paying the remuneration owed to artists on assignment of the rental right, the Portuguese Republic has failed to comply with Article 4 of the Directive, in conjunction with Article 2(5) and (7) thereof.

Costs

45 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has asked that costs be awarded against the Portuguese Republic, and as the latter has been unsuccessful, the Portuguese Republic must be ordered to pay the costs.

On those grounds, the Court (Third Chamber):

1. Declares that:

— **by creating in national law a rental right also in favour of producers of videograms, the Portuguese Republic has failed to fulfil its obligations under Article 2(1) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, as last amended by 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.**

— **by creating in national legislation some doubt as to who is responsible for paying the remuneration owed to perfomers on assignment of the rental right, the Portuguese Republic has failed to comply with Article 4 of Directive 92/100, as amended by Directive 2001/29, in conjunction with Article 2(5) and (7) thereof;**

2. Orders the Portuguese Republic to pay the costs.

[Signatures]