ECLI:EU:C:2016:717

JUDGMENT OF THE COURT (Second Chamber)

22 September 2016 (*)

(Reference for a preliminary ruling — Approximation of laws — Intellectual property — Copyright and related rights — Directive 2001/29/EC — Exclusive right of reproduction — Exceptions and limitations — Article 5(2)(b) — Private copying exception — Fair compensation — Conclusion of agreements governed by private law to determine the criteria for exemption from payment of fair compensation — Request for reimbursement of compensation confined to the final user)

In Case C-110/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decision of 4 December 2014, received at the Court on 2 March 2015, in the proceedings

Microsoft Mobile Sales International Oy, formerly Nokia Italia SpA,

Hewlett-Packard Italiana Srl,

Telecom Italia SpA,

Samsung Electronics Italia SpA,

Dell SpA,

Fastweb SpA,

Sony Mobile Communications Italy SpA,

Wind Telecomunicazioni SpA,

v

Ministero per i beni e le attività culturali (MIBAC),

Società italiana degli autori ed editori (SIAE),

Istituto per la tutela dei diritti degli artisti interpreti esecutori (IMAIE), in liquidation,

Associazione nazionale industrie cinematografiche audiovisive e multimediali (ANICA),

Associazione produttori televisivi (APT),

interveners:

Assotelecomunicazioni (Asstel),

Vodafone Omnitel NV,

H3G SpA,

Movimento Difesa del Cittadino,

Assoutenti,

Adiconsum,

Cittadinanza Attiva,

Altroconsumo,

THE COURT (Second Chamber),

composed of M. Ilešič (Rapporteur), President of the Chamber, C. Toader, A. Rosas, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: N. Wahl,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 24 February 2016,

after considering the observations submitted on behalf of:

– Microsoft Mobile Sales International Oy, by G. Cuonzo and Vincenzo Cerulli Irelli, avvocati,

– Hewlett-Packard Italiana Srl, by A. Clarizia and M. Quattrone, avvocati,

– Telecom Italia SpA, by F. Lattanzi and E. Stajano, avvocati,

– Samsung Electronics Italia SpA, by S. Cassamagnaghi, P. Todaro and E. Raffaelli, avvocati,

– Dell SpA, by L. Mansani and F. Fusco, avvocati,

– Sony Mobile Communications Italy SpA, by G. Cuonzo and Vincenzo and Vittorio Cerulli Irelli, avvocati,

– Wind Telecomunicazioni SpA, by B. Caravita di Toritto, S. Fiorucci and R. Santi, avvocati,

– la Società italiana degli autori ed editori (SIAE), by M. Siragusa and M. Mandel, avvocati,

– Assotelecomunicazioni (Asstel), by M. Libertini, avvocato,

– Altroconsumo, by G. Scorza, D. Reccia and L. Salvati, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by A. Vitale and S. Fiorentino, avvocati dello Stato,

– the French Government, by D. Colas and D. Segoin, acting as Agents,

– the European Commission, by V. Di Bucci and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 May 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5(2)(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 That request has been made in the context of several disputes between, on the one hand, companies which produce and sell, inter alia, personal computers, recorders, recording media, mobile telephones and cameras and, on the other hand, the Ministero per i beni e le attività culturali e del turismo (Italian Ministry of cultural assets and activities and tourism, 'the MIBAC'), the Società italiana degli autori ed editori (Italian society for authors and publishers, 'the SIAE'), the Istituto per la tutela dei diritti degli artisti interpreti esecutori (Institute for the protection of performing artists), in liquidation, l'Associazione nazionale industrie cinematografiche audiovisive e multimediali (National association of cinema, audiovisual and multimedia industries) and the Associazione produttori televisivi (Association of television producers) concerning the 'fair compensation' to be paid, through the SIAE, to the authors of intellectual works for private reproduction of those works for personal use.

Legal context

EU law

3 Recitals 31, 35 and 38 of Directive 2001/29 state the following:

'(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. …

…

(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 Directive 2001/29, entitled 'Reproduction right', provides as follows:

‘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, of the original and copies of their films;

(e) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.’

5 Article 5(2)(b) of that directive, entitled ‘Exceptions and limitations’, provides as follows:

‘Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

…

(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 rightholders 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;

…’

Italian law

6 Directive 2001/29 was transposed into Italian law by Legislative Decree No 68 — Implementation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (decreto legislativo n. 68 — Attuazione della direttiva 2001/29/CE sull’armonizzazione di taluni aspetti del diritto d’autore e dei diritti connessi nella società dell’informazione) of 9 April 2003 (Ordinary Supplement to GURI No 87 of 14 April 2003), which amended Law No 633 on the protection of copyright and other rights relating to its exercise (legge n. 633 — Protezione del diritto d’autore e di altri diritti connessi al suo esercizio) of 22 April 1941 (‘the Law on copyright’) by inserting Articles 71 *sexies*, 71 *septies* and 71 *octies* relating to ‘private reproduction for personal use’.

7 Paragraph 1 of Article 71 *sexies* of the Law on copyright provides:

‘Private copying of phonograms and videograms on any media carried out by natural persons for personal use only shall be permitted, provided that it is not for profit or ends that are neither directly nor indirectly commercial, in compliance with the technological measures referred to in Article 102 *quater*.

8 Article 71 *septies* of the Law on copyright provides:

‘1. The authors and producers of phonograms, and the original producers of audiovisual works, the performers and producers of videograms, and their successors in title, shall be entitled to compensation for the private copying of phonograms and videograms referred to in Article 71 *sexies*. In respect of devices designed solely for the analogue or digital recording of phonograms or videograms, that compensation shall consist of a percentage of the price paid by the final purchaser to the retailer which, in respect of multipurpose devices, shall be calculated on the basis of the price of a device with characteristics equivalent to those of the internal component designed to record or, where that is not possible, of a fixed amount for each device. In respect of audio and video recording media, such as analogue media, digital media and internal or removable memory designed for recording phonograms or videograms, the compensation shall consist of a sum corresponding to the recording capacity provided by those media. In respect of remote video recording systems, the compensation referred to in the present paragraph shall be payable by the person who provides the service and shall correspond to the remuneration obtained for providing that service.

2. The compensation referred to in paragraph 1 shall be set, in accordance with [EU] law and having regard, in any event, to reproduction rights, by a decree of [MIBAC] adopted no later than 31 December 2009, on the basis of the opinion of the committee referred to in Article 190 and the associations which represent the majority of the manufacturers of the devices and media referred to in paragraph 1. In setting the compensation, account shall be taken of the application or non-application of the technological measures referred to in Article 102 *quater* and the different effect of digital copying in comparison with analogue copying. The decree shall be updated every three years.

3. The compensation shall be payable by any person who manufactures or imports into the territory of the State, for profit-making purposes, the devices and media referred to in paragraph 1. Those persons must submit to the [SIAE], every three months, a declaration indicating sales made and compensation due, which must be paid at the same time. Where no compensation is paid, the distributor of the recording devices and media shall be jointly and severally liable for payment. …’

9 Article 71 *octies* of the Law on copyright provides as follows:

‘1. The compensation referred to in Article 71 *septies* in respect of audio recording devices and media shall be paid to the [SIAE], which shall ensure, following deduction of its costs, payment of a 50% share to the authors and their successors in title, and a 50%

share to the producers of phonograms, including through the intermediary of the most representative trade associations.

2. Producers of phonograms shall pay without delay, and in any event within six months, 50% of the compensation received under paragraph 1 to the performers concerned.

3. The compensation referred to in Article 71 *septies* in respect of video recording devices and media shall be paid to the [SIAE], which shall ensure, following deduction of its costs, payment of a 30% share of the compensation to the authors and the remaining 70% in equal shares to the original producer of audiovisual works, the producers of videograms and performers. 50% of the share paid to performers shall be allocated to the activities and objectives described in Article 7(2) of Law No 93 of 5 February 1992.'

10 Under Article 71 *septies*, paragraph 2 of the Law on copyright, on 30 December 2009, the MIBAC adopted the Decree on the determination of compensation for the private reproduction of phonograms and videograms (decreto relativo alla determinazione del compenso per la riproduzione privata di fonogrammi e di videogrammi, 'the decree of 30 December 2009'), which consists of a single article stating that 'the technical annex which is an integral part [of that] decree establishes the amount of compensation in respect of the private reproduction of phonograms and videograms by virtue of Article 71 *septies* of [the Law on copyright]'.

11 Article 2 of the technical annex to the decree of 30 December 2009 ('the technical annex') sets out the amounts of compensation in respect of private copying and provides a list of 26 categories of products, each associated with the amount of that compensation.

12 Article 4 of the technical annex provides as follows:

'1. The [SIAE] shall promote protocols for more effective application of the present provisions, in particular for the purpose of providing objective and subjective exemptions, such as, for example, in the event of the professional use of devices and media or in respect of certain devices for video games. Those application protocols shall be adopted in agreement with the persons obliged to pay the compensation for private copying, or their trade associations.

2. Until the protocols referred to in paragraph 1 have been adopted, the agreements valid before the present provisions shall remain in force.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 The applicants in the main proceedings produce and sell inter alia personal computers, recorders, storage media, mobile telephones and cameras.

14 Those applicants brought actions before the Tribunale amministrativo regionale del Lazio (Lazio Regional Administrative Court, Italy) seeking annulment of the decree of 30 December 2009. In support of those actions, they maintained that the national legislation in question is contrary to EU law, inter alia on account of the private copying levy for persons acting for purposes clearly unrelated to private copying, in particular, legal persons and persons engaged in professional activities. They also claimed that the delegation of powers by MIBAC to the SIAE, which is the body in charge of the collective management of copyright in Italy, is discriminatory, since the Italian legislation empowers the SIAE to designate the persons who should be exempted from payment of the private copying levy and those entitled to benefit from the procedure for reimbursement of that levy, where it has been paid.

15 The Tribunale amministrativo regionale del Lazio (Lazio Regional Administrative Court) dismissed those actions.

16 The applicants in the main proceedings appealed against the decision dismissing those actions before the Consiglio di Stato (Council of State, Italy), which, entertaining doubts as to the proper construction, in that context, of Article 5(2)(b) of Directive 2001/29, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does EU law, and in particular recital 31 and Article 5(2)(b) of Directive 2001/29, preclude national legislation (specifically Article 71 *sexies* of the Law on copyright, read in conjunction with Article 4 of the technical annex) that, when media and devices are acquired for purposes clearly unrelated to private copying (that is to say, for professional use only), leaves the determination of the criteria for a *ex ante* exemption from the levy for private copying to the conclusion of agreements, or “free bargaining”, governed by private law, in particular the “application protocols” referred to in Article 4, without any general provisions or guarantees of equal treatment between the SIAE and persons obliged to pay compensation, or their trade associations?

(2) Does EU law, and in particular recital 31 and Article 5(2)(b) of Directive 2001/29, preclude national legislation (specifically Article 71 *sexies* of the Italian Law on copyright, read in conjunction with the decree of 30 December 2009 and the instructions on reimbursement given by the SIAE) that provides that, when media and devices are acquired for purposes clearly unrelated to private copying (that is to say, for professional use only), reimbursement may be requested only by the final user and not by the manufacturer of the media and devices?’

Consideration of the questions referred

Admissibility

17 The SIAE considers that the first question is inadmissible, because it ought to have been answered by an interpretation of Italian law in accordance with EU law as meaning

that recording and media devices acquired by persons other than natural persons for exclusively professional purposes are not subject to payment of the private copying levy.

18 It must be borne in mind in that regard that, according to the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (see, in particular, judgments of 21 October 2010, *Padawan*, C-467/08, EU:C:2010:620, paragraph 21, and 12 November 2015, *Hewlett-Packard Belgium*, C-572/13, EU:C:2015:750, paragraph 24).

19 The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, in particular, judgments of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 25, and 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, paragraph 30).

20 That is not the situation in the present case, in so far as the first question referred to the Court, which concerns the interpretation of EU law, is in no way hypothetical, and relates to the actual facts of the case in the main proceedings, since that question concerns the interpretation of provisions of EU law that the referring court considers to be of crucial importance for the decision it will be required to make in the main proceedings, more particularly as regards the detailed rules governing exemption from payment of the private copying levy when media and devices are purchased for purposes clearly unrelated to private copying.

21 The SIAE also submits that the second question is inadmissible, since it is identical to a question on which the Court has already ruled.

22 Such a plea of inadmissibility must be rejected. Even if the question raised is materially identical to a question which has already been the subject of a preliminary ruling in a similar case, that fact in no way prohibits a national court from referring a question to the Court for a preliminary ruling and does not result in the inadmissibility of the question raised (see, to that effect, judgments of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335, paragraphs 13 and 15; 2 April 2009, *Pedro IV Servicios*, C-260/07, EU:C:2009:215, paragraph 31, and 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 49).

23 It follows that the questions referred are admissible.

Substance

24 By its questions, which must be examined together, the referring court asks, in essence, whether EU law, in particular Article 5(2)(b) of Directive 2001/29, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, on the one hand, subjects exemption from payment of the private copying levy for producers and importers of devices and media intended for use clearly unrelated to private copying to the conclusion of agreements between an entity which has a legal monopoly on the representation of the interests of authors of works, and those liable to pay the compensation, or their trade associations, and, on the other hand, provides that the reimbursement of such a levy, when it has been unduly paid, may be requested only by the final user of those devices and media.

25 It must be recalled, in the first place, that, in accordance with Article 5(2)(b) of Directive 2001/29, Member States may provide for an exception or limitation to the exclusive reproduction right provided for under Article 2 of that directive 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 rightholders receive fair compensation taking into account the technological measures referred to in Article 6 of that directive.

26 As is apparent from recitals 35 and 38 of Directive 2001/29, Article 5(2)(b) of that directive reflects the EU legislature's intention of establishing a specific compensation scheme which is triggered by the existence of harm caused to rightholders, which gives rise, in principle, to the obligation to 'compensate' them (judgment of 9 June 2016, *EGEDA and Others*, C-470/14, EU:C:2016:418, paragraph 19 and the case-law cited).

27 Inasmuch as Directive 2001/29 does not expressly address the various elements of the fair compensation system, the Member States enjoy broad discretion in determining who is to pay that compensation. The same is true of the form, detailed arrangements and possible level of such compensation (see, to that effect, judgment of 11 July 2013, *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515, point 20 and the case-law cited).

28 As is apparent from the case-law of the Court, in order to comply with Article 5(2)(b) of Directive 2001/29, fair compensation and, therefore, the system on which it is based, must be linked to the harm resulting for the rightholder from the making of copies for private use (see, to that effect, judgment of 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraph 21 and the case-law cited).

29 Accordingly, a system for financing fair compensation is compatible with the requirements of a 'fair balance', referred to in recital 31 of Directive 2001/29, between the rights and interests of authors, who are the recipients of the fair compensation, on the one hand, and those of users of protected subject matter, on the other, only if the digital reproduction equipment, devices and media concerned are liable to be used for private copying and, therefore, are likely to cause harm to the author of the protected work.

There is therefore, having regard to those requirements, a necessary link between the application of the private copying levy to those digital reproduction devices and media and their use for private reproduction (see, to that effect, judgment of 21 October 2010, *Padawan*, C-467/08, EU:C:2010:620, paragraph 52).

30 In the second place, it must be noted that the Court has held that, since the person who has caused harm to the holder of the exclusive right of reproduction is the person who, for his private use, reproduces a protected work without seeking prior authorisation from that rightholder, it is, in principle, for that person to make good the harm relating to that copying by financing the compensation to be paid to that rightholder (judgments of 21 October 2010, *Padawan*, C-467/08, EU:C:2010:620, paragraph 45; 16 June 2011, *Stichting de Thuiskopie*, C-462/09, EU:C:2011:397, paragraph 26, and 11 July 2013, *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515, paragraph 23).

31 The Court has however accepted that, given the practical difficulties in identifying private users and obliging them to compensate the holders of the exclusive right of reproduction for the harm caused to them, it is open to the Member States to establish a 'private copying levy' for the purposes of financing fair compensation, chargeable not to the private persons concerned but to those who have the reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users. Under such a system, it is the persons having that equipment who must discharge the private copying levy (see, to that effect, judgments of 21 October 2010, *Padawan*, C-467/08, EU:C:2010:620, paragraph 46; 16 June 2011, *Stichting de Thuiskopie*, C-462/09, EU:C:2011:397, paragraph 27, and 11 July 2013, *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515, paragraph 24).

32 Accordingly, the Member States may, under certain conditions, apply the private copying levy indiscriminately with regard to recording media suitable for reproduction, including where the final use of such media does not meet the criteria set out in Article 5(2)(b) of Regulation No 2001/29 (see judgment of 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraph 44).

33 The Court has, further, pointed out that, since that system enables the persons responsible for payment to pass on the amount of the private copying levy in the price charged for making the reproduction equipment, devices and media available, or in the price for the copying service supplied, the burden of the levy will ultimately be borne by the private user who pays that price, in a way consistent with the 'fair balance', referred to in recital 31 of Directive 2001/29 between the interests of the holders of the exclusive right of reproduction and those of the users of the protected subject matter (see, to that effect, judgments of 16 June 2011, *Stichting de Thuiskopie*, C-462/09, EU:C:2011:397, paragraph 28, and 11 July 2013, *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515, paragraph 25).

34 Nonetheless, the Court has held that a system for the application of such a levy will be consistent with Article 5(2)(b) of Directive 2001/29 only if its introduction is justified by practical difficulties and if the persons responsible for payment have a right to

reimbursement of the levy where it is not due (see, to that effect, judgments of 11 July 2013, *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515, paragraph 31, and 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraph 45).

35 In that regard, a private copying levy system may be justified by, inter alia, the need to address the fact that it is impossible to identify the final users or the practical difficulties associated with identifying those users or other similar difficulties (judgment of 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraph 46 and the case-law cited).

36 However, it is apparent from the Court's case-law that, in any event, that levy must not be applied to the supply of reproduction equipment, devices and media to persons other than natural persons for purposes clearly unrelated to private copying (judgment of 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraph 47 and the case-law cited).

37 Moreover, such a system must provide for a right to reimbursement of the private copying levy which is effective and does not make it excessively difficult to obtain repayment of the levy paid. In that regard, the scope, the effectiveness, the availability, the public awareness and simplicity of use of the right to reimbursement allow for the correction of any imbalances created by the private copying levy system, in order to respond to the practical difficulties observed (see, to that effect, judgments of 11 July 2013, *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515, paragraph 36, and 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraph 52).

38 It is in the light of those two principles that the questions referred by the national court should be considered.

39 In the first place, it must be noted that the fair compensation system at issue in the main proceedings provides, as is apparent from paragraph 1 of Article 71 *septies* of the Law on copyright, that the private copying levy consists in part of the price paid by the final user to the retailer in respect of the devices and media in question, which is a fixed amount corresponding to their recording capacity. According to paragraph 3 of Article 71 *septies* of the Law on copyright, that levy is to be payable by any person who manufactures or imports such devices and media into the territory of the State for profit-making purposes.

40 It is settled case-law in that regard that the legislation at issue in the main proceedings contains no generally applicable provision exempting from payment of the private copying level producers and importers who show that the devices and media were acquired by persons other than natural persons, for purposes clearly unrelated to private copying.

41 It is apparent from the Court's case-law, referred to in paragraph 36 of the present judgment, that that levy must not be applied to the supply of such equipment.

42 As noted in paragraph 29 of the present judgment, a system for financing fair compensation is compatible with the requirements of a 'fair balance', referred to in recital 31 of Directive 2001/29, only if the digital reproduction devices and media concerned are liable to be used for private copying.

43 It is true that, as emphasised by the Italian Government, Article 4 of the technical annex provides that the SIAE is to 'promote' protocols inter alia 'for the purpose of providing objective and subjective exemptions, as, for example, in the event of the professional use of devices and media or in respect of certain devices for video games', which must be adopted in agreement with the persons obliged to pay the compensation for private copying, or their trade associations.

44 However, the Court has noted that the exceptions provided for in Article 5 of Directive 2001/29 must be applied in a manner consistent with the principle of equal treatment, affirmed in Article 20 of the Charter of Fundamental Rights of the European Union, which, according to the Court's established case-law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (judgment of 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraphs 31 and 32 and the case-law cited).

45 Member States may not therefore lay down detailed fair compensation rules that would discriminate, unjustifiably, between the different categories of economic operators marketing comparable goods covered by the private copying exception or between the different categories of users of protected subject matter (judgment of 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraph 33 and the case-law cited).

46 In the present case, it must be noted that the legislation at issue in the main proceedings does not make it possible to ensure equal treatment in every case between the producers and importers required to pay the private copying levy, who might be in comparable situations.

47 First, that legislation, which, as noted in paragraph 40 of the present judgment, does not contain any generally applicable provision exempting from payment of the private copying levy producers and importers who show that the devices and media were acquired by persons other than natural persons, for purposes clearly unrelated to private copying, merely imposes an obligation to use best endeavours on the SIAE, which is required only to 'promote' the conclusion of agreement protocols with persons required to pay the private copying levy. It follows that producers and importers in comparable situations may be treated differently, depending on whether or not they have concluded an agreement protocol with the SIAE.

48 Next, that legislation, in particular Article 4 of the technical annex, does not lay down objective and transparent criteria to be satisfied by persons required to pay fair compensation or by their trade associations for the purposes of concluding such agreement protocols, since it refers merely, by way of example, to the exemption 'in the event of the professional use of devices or media or in respect of certain devices for video games', while the exemptions applied in practice may, moreover, in accordance with the actual wording of that article, be objective or subjective in nature.

49 Finally, since the conclusion of those protocols is left to free bargaining between, on the one hand, the SIAE and, on the other, persons required to pay fair compensation, or their trade associations, the view must be taken, even if such protocols are concluded with all persons entitled to claim an exemption from payment of the private copying levy, that there is no guarantee that producers and importers in comparable situations will be treated equally, the terms of such agreements being the result of negotiation governed by private law.

50 Moreover, the points highlighted in paragraphs 47 to 49 of the present judgment do not permit the view that the national legislation at issue in the main proceedings is capable of ensuring that the requirement referred to in paragraph 44 of the present judgment is satisfied effectively and in accordance, in particular, with the principle of legal certainty.

51 In the second place, as is apparent from the wording of the second question referred and the observations made before the Court, the reimbursement procedure, which was drawn up by the SIAE and is included in the latter's 'instructions' available on the internet, provides that reimbursement may be requested only by a final user who is not a natural person. The reimbursement may not, however, be requested by a producer or importer of the media and devices.

52 In that regard, it suffices to note, as the Advocate General observed in points 58 and 59 of his opinion, that while it is true that the Court held in its judgment of 5 March 2015, *Copydan Båndkopi* (C-463/12, EU:C:2015:144, paragraph 55) that EU law does not preclude a system of fair compensation which provides for a right to reimbursement of the private copying levy for the final user of the devices or media subject to the levy, it observed that such a system is compatible with EU law only if the persons responsible for payment are exempt, in accordance with EU law, from payment of that levy if they establish that they have supplied the devices and media in question to persons other than natural persons for purposes clearly unrelated to private copying.

53 That is not the situation in the present case, as is apparent from the considerations set out in paragraphs 39 to 49 of the present judgment.

54 Moreover, it must be recalled that, as is apparent from recital 31 of Directive 2001/29, a fair balance must be safeguarded between the rightholders and the users of protected subject matter. According to the Court's case-law, a fair compensation system must, therefore, contain mechanisms, in particular for reimbursement, which are designed

to correct any situation where ‘overcompensation’ occurs to the detriment of particular categories of users, which would not be compatible with the requirement set out in that recital (see, by analogy, judgment of 12 November 2015, *Hewlett-Packard Belgium*, C-572/13, EU:C:2015:750, paragraphs 85 and 86).

55 In the present case, since the system of fair compensation at issue in the main proceedings does not provide for sufficient guarantees in respect of the exemption from payment of the levy of producers and importers who show that the devices and media were acquired for purposes clearly unrelated to private copying, that system should, in any event, as noted in paragraph 37 of the present judgment, provide for a right to reimbursement of the levy that is effective and does not make it excessively difficult to obtain repayment of the levy paid. The right to reimbursement provided for by the system of fair compensation at issue in the main proceedings cannot be regarded as effective, since it is common ground that it is not open to natural persons, even where they acquire devices and media for purposes clearly unrelated to private copying.

56 Having regard to all the above considerations, the answer to the questions referred is that EU law, in particular, Article 5(2)(b) of Directive 2001/29, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, that, on the one hand, subjects exemption from payment of the private copying levy for producers and importers of devices and media intended for use clearly unrelated to private copying to the conclusion of agreements between an entity which has a legal monopoly on the representation of the interests of authors of works, and those liable to pay compensation, or their trade associations, and, on the other hand, provides that the reimbursement of such a levy, where it has been unduly paid, may be requested only by the final user of those devices and media.

The request that the effects of the present judgment should be limited in time

57 In its written observations, the SIAE requested that the Court limit the temporal effects of the present judgment in the event that it should find that Article 5(2)(b) of Directive 2001/29 precludes national legislation such as that at issue in the main proceedings.

58 In support of its request, SIAE draws the Court’s attention, first, to the serious financial repercussions for the SIAE that a judgment containing such a finding would have, since, with the exception of the SIAE’s deduction to cover the expenses arising from its collection activity, the compensation has already been paid to the recipients. Secondly, the SIAE claims that there is no doubt that it acted in good faith with the full conviction that the national legislation at issue in the main proceedings was fully compatible with EU law, a conviction reinforced by the fact that, despite application of that legislation over a long period, the Commission, which was fully aware of it, never made any objection as to its compatibility with EU law.

59 In that connection, it should be recalled that, according to settled case-law of the Court, the interpretation which, in the exercise of the jurisdiction conferred on it by

Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the courts having jurisdiction are satisfied (see, inter alia, judgments of 17 February 2005, *Linneweber and Akritidis*, C-453/02 and C-462/02, EU:C:2005:92, paragraph 41; 6 March 2007, *Meilicke and Others*, C-292/04, EU:C:2007:132, paragraph 34, and 27 February 2014, *Transportes Jordi Besora*, C-82/12, EU:C:2014:108, paragraph 40).

60 It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely, that those concerned should have acted in good faith and that there should be a risk of serious difficulties (see, inter alia, judgments of 10 January 2006, *Skov and Bilka*, C-402/03, EU:C:2006:6, paragraph 51; 3 June 2010, *Kalinchev*, C-2/09, EU:C:2010:312, paragraph 50, and 27 February 2014, *Transportes Jordi Besora*, C-82/12, EU:C:2014:108, paragraph 41).

61 More specifically, the Court has taken that step only in quite specific circumstances, notably where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with EU law by reason of objective, significant uncertainty regarding the implications of European Union provisions, to which the conduct of other Member States or the European Commission may even have contributed (judgment of 27 February 2014, *Transportes Jordi Besora*, C-82/12, EU:C:2014:108, paragraph 42 and the case-law cited).

62 In the present case, as regards the first criterion, it must be noted that, in judgment of 21 October 2010, *Padawan* (C-467/08, EU:C:2010:620, paragraph 53), the Court had already ruled on the compatibility of EU law of a system providing for the indiscriminate application of the private copying levy to all types of digital reproduction devices and media, including in the event that they are acquired by persons other than natural persons for purposes clearly unrelated to private copying. Under those circumstances, the SIAE may not claim that it was satisfied that the legislation at issue in the main proceedings complied with EU law because of the lack of objection on the part of the Commission as to the compatibility of that legislation with EU law.

63 In any event, as regards the second criterion, it must be noted that the SIAE has not demonstrated the existence of serious difficulties, having merely indicated that the compensation has already been distributed in full to the recipients and that it ‘was probably not in a position to recover such amounts’.

64 It is therefore not appropriate to limit the temporal effects of the present judgment.

Costs

65 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Second Chamber) hereby rules:

EU law, in particular, Article 5(2)(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 precluding national legislation, such as that at issue in the main proceedings, that, on the one hand, subjects exemption from payment of the private copying levy for producers and importers of devices and media intended for use clearly unrelated to private copying to the conclusion of agreements between an entity which has a legal monopoly on the representation of the interests of authors of works, and those liable to pay compensation, or their trade associations, and, on the other hand, provides that the reimbursement of such a levy, where it has been unduly paid, may be requested only by the final user of those devices and media.

[Signatures]

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* Language of the case: Italian.