

JUDGMENT OF THE COURT (Sixth Chamber)
16 October 2003 *

In Case C-433/02,

Commission of the European Communities, represented by K. Banks, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented by A. Snoecx, acting as Agent,

defendant,

APPLICATION for a declaration that, by failing to apply the provisions on the public lending right provided for in 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), the Kingdom of Belgium has failed to fulfil its obligations under Articles 1 and 5 of that directive,

* Language of the case: French.

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen, C. Gulmann (Rapporteur), V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 29 November 2002, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to apply the provisions on the public lending right provided for in 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, ‘the Directive’), the Kingdom of Belgium had failed to fulfil its obligations under Articles 1 and 5 of that directive.

Legal background

Community legislation

2 Article 1 of the Directive states:

‘Object of harmonisation

1. In accordance with the provisions of this Chapter, Member States shall provide, subject to Article 5, a right to authorise or prohibit the rental and lending of originals and copies of copyright works, and other subject matter as set out in Article 2(1).

...

3. For the purposes of this Directive, “lending” means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.

...’

3 Article 5 of the Directive prescribes:

‘Derogation from the exclusive public lending right

1. Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives.

2. When Member States do not apply the exclusive lending right provided for in Article 1 as regards phonograms, films and computer programs, they shall introduce, at least for authors, a remuneration.

3. Member States may exempt certain categories of establishments from the payment of the remuneration referred to in paragraphs 1 and 2.

...’

4 Article 15 of the Directive provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive not later than 1 July 1994.

National legislation

- 5 The Loi relative au droit d'auteur et aux droits voisins (Law on copyright and related rights) of 30 June 1994 (*Moniteur belge*, 27 July 1994, p. 19297, 'the Law') provides, in Article 1(1):

'The author of a literary or artistic work shall have the sole right to reproduce it or authorise its reproduction in any manner and in any form whatsoever.

This right includes in particular the exclusive right to authorise its adaptation or translation.

This right also includes the exclusive right to authorise its rental or lending...'

- 6 Article 23(1) of the Law prescribes:

'The author may not prohibit the lending of literary works, databases, photographic works, scores of musical works, sound works and audiovisual works where that lending is organised for an educational and cultural purpose by institutions recognised or organised officially for that purpose by the public authorities...'

- 7 In Chapter VI of the Law, which contains the provisions on public lending, Article 62 provides:

‘1. In the event of the lending of literary works, databases, photographic works or scores of musical works under the conditions defined in Article 23, the author shall be entitled to a remuneration.

2. In the event of the lending of sound or audiovisual works, under the conditions defined in Articles 23 and 47, the author, the performer and the producer shall be entitled to a remuneration.’

- 8 Article 63 of the Law provides:

‘After consulting the institutions and collecting societies, the King shall determine the amount of the remunerations referred to in Article 62. They shall be collected by the collecting societies.

In accordance with the detailed conditions he lays down, the King may entrust an association representing all the collecting societies with ensuring the collection and distribution of the remunerations for public lending. After consulting the communities, and as the case may be on their initiative, the King shall determine for certain categories of establishments recognised or organised by the public authorities an exemption or a flat-rate price per lending to establish the remuneration provided for in Article 62.’

The pre-litigation procedure

- 9 By letter of 24 January 2001, the Commission drew the attention of the Belgian authorities to the fact that, although the Directive had been transposed into Belgian law by the Law, no implementing decree had been adopted concerning the lending right.
- 10 The Belgian authorities, by letter of 22 March 2001, confirmed that no implementing decree had been adopted and stated that the problem was at the level of the Belgian federated entities which are competent in matters of culture and opposed the introduction of a lending right.
- 11 On 24 July 2001 the Commission sent the Kingdom of Belgium a letter of formal notice. In reply to that letter, the Belgian Government again referred to the federated entities' opposition to the introduction of a lending right or a remuneration for authors of works. It also referred to the imprecise wording of Article 5(3) of the Directive, which authorises certain exemptions from the obligation to pay authors a remuneration in the event of public lending of their works.
- 12 Since it did not regard that answer as satisfactory, the Commission on 21 December 2001 sent a reasoned opinion to the Kingdom of Belgium, requesting it to adopt the necessary measures to comply with the opinion within two months of its notification.
- 13 Since the Belgian Government did not respond to the reasoned opinion, the Commission decided to bring the present action.

Substance

- 14 The Commission notes that none of the implementing measures relating to the remunerations provided for in Article 63 of the Law has been adopted. The amount of the remunerations referred to in Article 62 of the Law has therefore never been fixed, as a result of which it is impossible in practice for the collecting associations to collect those remunerations on behalf of their members. The Commission therefore submits that the Kingdom of Belgium is in breach of its obligation under Articles 1 and 5 of the Directive to provide at least for a remuneration for the authors of protected works in the event of lending of their works.
- 15 The Belgian Government submits, first, that the reaction of the federated entities to the grant of a remuneration for lending was negative from the outset, *inter alia* because of considerations of cultural policy, as they insist on a general exemption from the payment of remunerations for lending for all categories of establishments which lend works. The result is that no decree implementing Articles 62 and 63 of the Law has been adopted to date.
- 16 Next, the Government submits that the very vague wording of the Directive prevents it from being complied with. As regards Article 1(3), it gives no indication of what is to be understood by ‘not for direct or indirect economic or commercial advantage’, nor does it give a list of establishments accessible to the public. As regards Article 5(1) of the Directive, the Belgian Government raises the question of what is covered by ‘public lending’ in respect of which the Member States may introduce derogations. Finally, Article 5(3) of the Directive does not specify what is to be understood by ‘certain categories of establishments’. Similarly, the Directive does not mention any criterion which the Member States should apply in order to determine the ‘categories of establishments’ which may benefit from an exemption from payment.

- 17 The Belgian Government considers that, in practice, it is very difficult for Member States to designate from the whole class of ‘establishments accessible to the public which lend works with no direct or indirect economic or commercial advantage’ the categories of establishments exempted from payment of the remuneration. The term ‘lending’ as defined in Article 1(3) of the Directive relates only to a freely defined category of establishments. In practice, this concerns lending by public libraries and media libraries, school and university libraries and public documentation centres which are accessible to the public and do not charge borrowers any remuneration for the lending, or only a remuneration whose amount does not exceed what is necessary to cover the establishment’s costs of operation. It is by no means obvious to draw, within that group of establishments, a distinction based on cultural or educational grounds, for example between categories of establishments liable to pay a remuneration for lending, on the one hand, and categories of establishments exempt from such a remuneration, on the other, given that all the establishments covered by Article 1(3) of the Directive are orientated to lending for cultural, educational or similar purposes in view of the fact that, according to the Directive, lending for direct or indirect economic or commercial purposes is outside the scope of that article.
- 18 Finally, the Belgian Government says that the Commission indicated, in a report of 12 September 2002, that it appears that in certain other Member States no remuneration is paid to the persons entitled. That appears to be the case in France, Greece and Luxembourg, and probably elsewhere as well.
- 19 It must be observed, first, that in the absence of sufficiently precise Community criteria in a directive to delimit the obligations under the directive, it is for the Member States to determine, in their own territory, what are the most relevant criteria for ensuring, within the limits imposed by Community law and in particular by the directive, compliance with that directive (see, to that effect, Case C-245/00 *SENA* [2003] ECR I-1251, paragraph 34).

- 20 Moreover, as the Commission observed, Article 5(3) of the Directive authorises but does not oblige a Member State to exempt certain categories of establishments. Consequently, if the circumstances prevailing in the Member State in question do not enable a valid distinction to be drawn between categories of establishments, the obligation to pay the remuneration in question must be imposed on all the establishments concerned.
- 21 Next, even assuming that other Member States do not apply correctly the public lending right as provided for in the Directive, it suffices to point out that, according to settled case-law, a Member State cannot justify its failure to perform its obligations under Community law by relying on the fact that other Member States are also in breach of their obligations (see Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 56).
- 22 Finally, with respect to the difficulties encountered by the federal authorities in convincing the federated entities to accept that an obligation to pay a remuneration for public lending should be imposed on the establishments falling within the scope of Article 1(3) of the Directive, it is settled case-law that a Member State cannot rely on provisions, practices or circumstances in its internal legal order to justify failure to comply with obligations and time-limits laid down by a directive (see Case C-419/01 *Commission v Spain* [2003] ECR I-4947, paragraph 22).
- 23 Consequently, since the directive was not fully transposed within the time-limit set, the Commission's action is well founded.

Costs

- 24 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of Belgium has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that, by failing to apply the provisions on the public lending right provided for in 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, the Kingdom of Belgium has failed to fulfil its obligations under Articles 1 and 5 of that directive;

2. Orders the Kingdom of Belgium to pay the costs.

Puissochet

Schintgen

Gulmann

Skouris

Cunha Rodrigues

Delivered in open court in Luxembourg on 16 October 2003.

R. Grass

Registrar

V. Skouris

President