

Reference for a preliminary ruling from the Tribunale di Adria (Italy) lodged on 18 August 2011 — Criminal proceedings against Sagor MD

(Case C-430/11)

(2012/C 25/44)

Language of the case: Italian

Referring court

Tribunale di Adria

Party to the main proceedings

Sagor MD

Questions referred

1. In the light of the principles of sincere cooperation and the effectiveness of directives, do Articles 2, 4, 6, 7 and 8 of Directive 2008/115/EC⁽¹⁾ preclude the possibility that a third-country national illegally staying in a Member State may be liable to a fine, for which home detention is substituted by way of criminal-law sanction, solely as a consequence of that person's illegal entry and stay, even before any failure to comply with a removal order issued by the administrative authorities?
2. In the light of the principles of sincere cooperation and the effectiveness of directives, do Articles 2, 15 and 16 of Directive 2008/115/EC preclude the possibility that, subsequent to the adoption of the directive, a Member State may enact legislation which provides that a third-country national illegally staying in that Member State may be liable to a fine, for which an enforceable order for expulsion with immediate effect is substituted by way of criminal-law sanction, without respecting the procedure and rights of the foreign national laid down in the directive?
3. Does the principle of sincere cooperation established in Article 4(3) TEU preclude national rules adopted during the period prescribed for transposition of a directive in order to circumvent or, in any event, limit the scope of the directive, and what measures must the national court adopt in the event that it concludes that there was such an objective?

⁽¹⁾ OJ 2008 L 348, p. 98.

Reference for a preliminary ruling from the Gerechtshof te Amsterdam (Netherlands) lodged on 10 October 2011 — UPC Nederland BV v Gemeente Hilversum

(Case C-518/11)

(2012/C 25/45)

Language of the case: Dutch

Referring court

Gerechtshof te Amsterdam

Parties to the main proceedings

Applicant: UPC Nederland BV

Defendant: Gemeente Hilversum

Questions referred

1. Does a service consisting of the supply of free-to-air radio and television packages via cable, for the delivery of which both transmission costs and an amount relating to (charges for) payments made to broadcasters and copyright collecting societies in connection with the publication of their content are charged, fall within the scope of the new regulatory framework [for electronic communications networks]?
2. (a) Does the Municipality [of Hilversum], against the background of the liberalisation of the telecommunications sector and the objectives of the new regulatory framework, including a strict coordination and consultation process before a national regulatory authority acquires (exclusive) competence to intervene in retail tariffs by means of a measure such as price control, still have the power (task) to protect the general interest of its inhabitants by intervening in retail tariffs by means of a tariff-limiting clause?
(b) If not, does the new regulatory framework preclude the Municipality from applying a tariff-limiting clause agreed in the context of the sale of its cable network operation?
3. If Questions 2(a) and (b) are answered in the negative, the following question arises:

Is a public authority, such as the Municipality, in a situation such as that at issue here, (still) bound by loyalty to the European Union ('Union loyalty') if, in entering into and then applying the tariff-limiting clause, it is not performing a public duty but is acting in the context of a private-law competence (see also Question 6(a))?

4. If the new regulatory framework is applicable and the Municipality is bound by Union loyalty:
 - (a) Does the obligation of Union loyalty in conjunction with (the objectives of) the new regulatory framework, including a strict coordination and consultation process before a national regulatory authority can intervene in retail tariffs by means of a measure such as price control, preclude the Municipality from applying the tariff-limiting clause?

- (b) If not, is the answer to Question 4(a) different with regard to the period after the Commission, in its 'letter of serious doubt', expressed serious doubts about the compatibility of the price control proposed by [the Independent Post and Telecommunications Authority] OPTA with the objectives of the new regulatory framework as set out in Article 8 of the Framework Directive, and OPTA consequently abandoned that measure?
5. (a) Is Article 101 TFEU a provision relating to public policy, which means that the national court must apply that provision of its own motion beyond the ambit of the dispute within the meaning of Articles 24 and 25 of the *Wetboek van Burgerlijke Rechtsvordering* (Netherlands Code of Civil Procedure) ('Rv')?
- (b) If so, which of the facts that came to light during the proceedings would justify the national court proceeding of its own motion to examine the applicability of Article 101 TFEU? Is the national court bound to do so also if that examination might lead to the supplementation of facts within the meaning of Article 149 Rv, once the parties have been given an opportunity to comment?
6. If Article 101 TFEU must be applied beyond the ambit of the dispute between the parties and having regard to (the objectives of) the new regulatory framework; the application thereof by OPTA and the European Commission; the alignment of concepts used in the new regulatory framework, such as significant market power and definition of the relevant markets, with similar concepts in European competition law, the following questions arise from the facts that have come to light during the proceedings:
- (a) Is the Municipality, in its sale of its cable network operation and its agreement to the tariff-limiting clause in that context, to be regarded as an undertaking within the meaning of Article 101 TFEU (see also Question 3)?
- (b) Is the tariff-limiting clause to be regarded as a hardcore restriction for the purposes of Article 101(1)(a) TFEU and as defined in Commission Notice 2001/C 368/07 on agreements of minor importance which do not appreciably restrict competition [under Article 81(1) of the Treaty establishing the European Community] (*de minimis*)⁽¹⁾ (... point 11)? If so, is there thus an appreciable restriction of competition within the meaning of Article 101(1) TFEU? If not, is the answer affected by the circumstances mentioned in Question 6(d) (below)?
- (c) If the tariff-limiting clause is not a hardcore restriction, does it have an effect which restricts competition (purely) because:
- the Netherlands competition authority has ruled that UPC has not abused its dominant position by virtue of the (higher) tariffs it charged for performing the same services as the supply of the basic package via cable, in the same market;
 - the Commission, in its letter of serious doubt, expressed serious doubts about the compatibility with the objectives set out in Article 8 of the Framework Directive of intervening (*ex ante* by means of price control) in retail tariffs for services such as UPC's supply of the basic package via cable? Is the answer affected by the fact that OPTA abandoned the proposed price control as a result of the Commission's letter?
- (d) Does the Agreement [on the future operation of the Hilversum cable network] containing the tariff-limiting clause appreciably restrict competition within the meaning of Article 101(1) TFEU (also) taking into account that:
- under the new regulatory framework, UPC is considered to be an undertaking with significant market power (Commission Notice 2001/C 368/07, point 7);
 - virtually all Netherlands municipalities which, during the 1990s, sold their cable network operations to cable operators including UPC, retained powers under those agreements with regard to the pricing of the basic package (Commission Notice 2001/C 368/07, point 8)?
- (e) Must the Agreement containing the tariff-limiting clause be regarded as (being capable of) having an appreciable effect on inter-State trade within the meaning of Article 101(1) TFEU and as further defined in the Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ 2004 C 101, p. 81), given that:
- under the new regulatory framework, UPC is considered to be an undertaking with significant market power;
 - OPTA has followed the European consultation procedure in order to take a price control measure in respect of services such as the supply of the basic package via cable by cable operators with significant market power such as UPC, a procedure which, under the new regulatory framework, must be followed if a proposed measure would affect trade between Member States;
 - the Agreement at that time represented a value of NLG 51 million (over EUR 23 million);

- virtually all Netherlands municipalities which, during the 1990s, sold their cable network operations to cable operators including UPC, retained powers under those agreements with regard to the pricing of the basic package?
7. Does the national court still have the power under Article 101(3) TFEU to declare a prohibition under Article 101(1) TFEU inapplicable in respect of the tariff-limiting clause, in the light of the new regulatory framework and the Commission's serious doubts in its letter of serious doubt about the compatibility with the objectives of competition law of (*ex ante*) intervention in retail tariffs? Is the answer affected by the fact that OPTA abandoned the proposed price control as a result of the Commission's letter?
8. Does the European penalty of invalidity under Article 101(2) TFEU allow for some latitude in respect of its effects in terms of time having regard to the circumstances at the time of the conclusion of the Agreement (the beginning of the liberalisation of the telecommunications sector) and later developments in the telecommunications sector, including the entry into force of the new regulatory framework and the consequent serious objections expressed by the Commission against the introduction of price control?

(¹) OJ 2001 C 368, p. 13.

Reference for a preliminary ruling from the Oberster Gerichtshof (Supreme Court) (Austria) lodged on 12 October 2011 — Amazon.com International Sales Inc. and Others v Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft m.b.H.

(Case C-521/11)

(2012/C 25/46)

Language of the case: German

Referring court

Oberster Gerichtshof (Supreme Court)

Parties to the main proceedings

Applicants: Amazon.com International Sales Inc., Amazon EU S.à.r.l., Amazon.de GmbH, Amazon.com GmbH in liquidation, Amazon Logistik GmbH

Defendant: Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft m.b.H.

Questions referred

1. Can a legislative scheme be regarded as establishing 'fair compensation' for the purposes of Article 5(2)(b) of Directive 2001/29/EC, where
 - (a) the persons entitled under Article 2 of Directive 2001/29/EC have a right to equitable remuneration, exercisable only through a collecting society, against persons who, acting on a commercial basis and for remuneration, are first to place on the domestic market recording media capable of reproducing the works of the rightholders,
 - (b) this right applies irrespective of whether the media are marketed to intermediaries, to natural or legal persons for use other than for private purposes or to natural persons for use for private purposes, and
 - (c) the person who uses the media for reproduction with the authorisation of the rightholder or who prior to its sale to the final consumer re-exports the media has an enforceable right against the collecting society to obtain reimbursement of the remuneration?
2. If Question 1 is answered in the negative:
 - 2.1. Does a scheme establish 'fair compensation' for the purposes of Article 5(2)(b) of Directive 2001/29/EC if the right specified in Question 1(a) applies only where recording media are marketed to natural persons who use the recording media to make reproductions for private purposes?
 - 2.2. If Question 2.1 is answered in the affirmative: Where recording media are marketed to natural persons must it be assumed until the contrary is proven that they will use such media with a view to making reproductions for private purposes?
3. If Question 1 or 2.1 is answered in the affirmative:

Does it follow from Article 5 of Directive 2001/29/EC or other provisions of EU law that the right to be exercised by a collecting society to payment of fair compensation does not apply if, in relation to half of the funds received, the collecting society is required by law not to pay these to the persons entitled to compensation but to distribute them to social and cultural institutions?
4. If Question 1 or 2.1 is answered in the affirmative:

Does Article 5(2)(b) of Directive 2001/29/EC or other provision of EU law preclude the right to be exercised by a collecting society to payment of fair compensation if in another Member State — possibly on a basis not in conformity with EU law — equitable remuneration for putting the media on the market has already been paid?