

JUDGMENT OF THE COURT (Third Chamber)

6 July 2006^{*}

In Case C-53/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 9 February 2005,

Commission of the European Communities, represented by P. 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 the Chamber, J. Malenovský (Rapporteur),
J.-P. Puissochet, A. Borg Barthet and A. Ó Caoimh, 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 asks the Court for a declaration that, by exempting all categories of public lending establishments from the obligation to pay remuneration to authors for public lending, the Portuguese Republic has failed to fulfil its obligations under Articles 1 and 5 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; ‘the directive’).

Legal context

Community legislation

- 2 The seventh recital in the preamble to the directive is worded as follows:

‘... 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; ... the possibility for securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection of the rightholders concerned’.

- 3 Article 1 of the directive provides:

‘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).

2. For the purposes of this Directive, “rental” means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage.

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.

4. The rights referred to in paragraph 1 shall not be exhausted by any sale or other act of distribution of originals and copies of copyright works and other subject-matter as set out in Article 2(1).’

4 Article 5(1) to (3) of the directive provides:

‘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.’

National legislation

- 5 The directive was transposed into the Portuguese legal system 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'). In its preamble, the Decree-Law provides:

'This Decree-Law creates a public lending right in respect of works protected by copyright, but its entry into force in the Portuguese legal system shall take place within the limits imposed by Community legislation and in compliance with the specific cultural character and level of development of the country as well as the ensuing cultural policy measures and planning.'

- 6 According to Article 6 of the Decree-Law:

'1. An author is entitled to remuneration for the public lending of the original or copies of his work.

2. The proprietor of the establishment which makes the original or copies of the work available to the public is responsible for payment of the remuneration ...

3. The present Article is not applicable to public, school or university libraries, museums, public archives, public foundations and private non-profit-making institutions.'

Pre-litigation procedure

- 7 On 19 December 2003, in accordance with the procedure provided for in the first paragraph of Article 226 EC, the Commission sent the Portuguese Republic a letter of formal notice in which it was requested to implement the provisions of the directive.
- 8 After receiving the response of the Portuguese Republic to that letter, the Commission, on 9 July 2004, issued a reasoned opinion asking that Member State to adopt the measures necessary to comply with that opinion within a period of two months from the date of notification.
- 9 In that reasoned opinion, referring to the Decree-Law, the Commission took the view that the Portuguese Republic had not adopted the measures necessary to ensure transposition of Articles 1 and 5 of the directive.
- 10 As the Portuguese Republic did not reply to the reasoned opinion, the Commission decided to bring the present action.

The action

Arguments of the parties

- 11 According to the Commission, Article 6(3) of the Decree-Law exempts from the obligation to pay a public lending right all State central administrative services, all

bodies which are part of indirect State administration, such as public establishments and public associations, and all local administrative services and bodies. To this list can be added all private-law legal persons carrying out functions of a public nature, such as bodies providing administrative services to the public and even private schools and universities, and all private non-profit-making institutions in general. Ultimately, it amounts to exempting any public lending establishment from the obligation of payment.

- 12 Article 5(3) of the directive provides that Member States may not exempt all categories of establishments, as the Decree-Law provides, but only certain categories. The Portuguese Republic therefore acted outside the limits imposed by the directive and that Decree-Law purely and simply prevents attainment of the directive's objective, which is to ensure that creative and artistic work is adequately remunerated.
- 13 The Commission refers also to the close relationship between the lending of works by public services or bodies and the rental of works by businesses. In both cases, protected works are being utilised. The difference in legal protection accorded to protected works in Member States has an effect upon the functioning of the internal market and is liable to lead to distortions of competition. The lending of works, books, phonograms and videograms represents a considerable volume of activity. People who use those works and material would not buy them and, as a result, authors and creators would suffer a loss of revenue.
- 14 The Commission adds that, in order to be able to make cultural works available to their citizens free of charge, Member States have to remunerate all those who

contribute to the functioning of libraries, that is, not only the staff, but, above all, the authors of the works. Remunerating the latter is in the common interest of the Community.

- 15 In its defence, the Portuguese Republic argues that Article 5 of the directive, in particular paragraph 3 thereof, is 'a compromise text', imprecise, difficult to interpret and open to challenge as regards its meaning and scope. The drafting of that provision was also intended to be open-textured and flexible in order to take into account the levels of cultural development specific to the different Member States. Moreover, the directive does not give any indication as to the meaning of that article.

- 16 The Portuguese Republic further argues that transposition of the directive directly poses the problem of the choice of 'categories of establishments' and, indirectly, the problem of whether persons who are the indirect addressees of the directive can or cannot, and to what extent, derive benefit, in an equal or almost equal manner, from the provisions of that directive which authorise Member States to allow for exemptions from the payment of the remuneration provided for in Article 5(1) of the directive on public lending. That question relates to the issue of the conflict between Article 5(3) and the principles of equal treatment, impartiality, solidarity and social cohesion. The effect of exempting certain 'categories of establishments' from payment of the public lending right would be that Portuguese citizens would not have access to, and would not be able to enjoy, intellectual works under the same conditions. Moreover, the proprietors of the rights should in principle have obtained appropriate revenue in the exercise of their rights of reproduction and distribution.

- 17 In addition, the Portuguese Republic contends that public lending is residual, as the market concerned is limited to the national territory and is of minor importance in the economic area, so that the internal market could not be affected by that situation. It is therefore possible to conclude that the objectives of cultural development are more important than the disadvantages for the internal market. That is the reason why removing those disadvantages would run counter to the principle of proportionality.
- 18 Finally, that Member State argues that, in view of the specific cultural character and different levels of development of the Member States, the adoption of a new scheme for public lending and its incorporation into the national legal systems must, under the principle of subsidiarity, remain within the sphere of competence of those Member States.

Findings of the Court

- 19 Firstly, the subject-matter of the dispute between the Commission and the Portuguese Republic is solely the question relating to the scope to be given to Article 5(3) of the directive, according to which Member States may exempt 'certain categories of establishments' from the payment of the remuneration referred to in Article 5(1).
- 20 According to settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording, but also the context in which it occurs

and the objective pursued by the rules of which it is part (see, *inter alia*, Case C-301/98 *KVS International* [2000] ECR I-3583, paragraph 21, and Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 50).

- 21 As regards firstly the wording of Article 5(3) of the directive, it should be noted that this refers to 'certain categories of establishments'. Therefore it clearly follows that the legislature did not intend to allow Member States to exempt all categories of establishments from payment of the remuneration referred to in Article 5(1).
- 22 Next, under Article 5(3), the directive allows Member States to derogate, in respect of public lending, from the general obligation of remuneration of authors referred to in paragraph 1 of that article. According to settled case-law, the provisions of a directive which derogate from a general principle established by that directive must be strictly interpreted (Case C-476/01 *Kapper* [2004] ECR I-5205, paragraph 72).
- 23 Moreover, Article 5(3) cannot be interpreted as allowing for total derogation from that obligation of remuneration, since the effect of such an interpretation would be to render Article 5(1) meaningless and thus deprive that provision of all effectiveness.
- 24 Finally, the main objective of the directive, as can be seen more precisely from the seventh recital, is to guarantee that authors and performers receive appropriate

income and recoup the especially high and risky investments required particularly for the production of phonograms and films (Case C-200/96 *Metronome Musik* [1998] ECR I-1953, paragraph 22).

- 25 It follows that the fact of exempting all categories of establishments which engage in such lending from the obligation laid down in Article 5(1) of the directive would deprive authors of remuneration with which they could recoup their investments, with inevitable repercussions for the creation of new works (see *Metronome Musik*, paragraph 24). In those circumstances, a transposition of the directive that resulted in such an exemption for all categories of establishments would go directly against the objective of that directive.
- 26 The Portuguese Republic does not in effect dispute that the transposition of the directive effected by the Decree-Law results in exempting all the categories of establishments listed in paragraph 11 of this judgment.
- 27 Accordingly, it must be acknowledged that the effect of the Portuguese legislation is to exempt all categories of public lending establishments from the obligation to pay the remuneration provided for in Article 5(1) of the directive.
- 28 To justify such a measure, that Member State puts forward various arguments, none of which, however, can be considered relevant.

- 29 Firstly, the Portuguese Republic argues that the public lending market is essentially national and not significant at an economic level. It follows that the normal functioning of the internal market cannot be affected by that situation and that, under the principle of subsidiarity, the activity of public lending should remain within the sphere of competence of the Member States.
- 30 However, on the assumption that that Member State thereby intended to dispute the validity of the directive, it should be remembered that, outside the period prescribed in Article 230 EC, it cannot contest the lawfulness of an act adopted by the Community legislature which has become final in its regard. It is settled case-law that a Member State cannot properly plead the unlawfulness of a directive or decision addressed to it as a defence in an action for a declaration that it has failed to implement that decision or comply with that directive (see, *inter alia*, Case C-74/91 *Commission v Germany* [1992] ECR I-5437, paragraph 10; Case C-154/00 *Commission v Greece* [2002] ECR I-3879, paragraph 28; and Case C-194/01 *Commission v Austria* [2004] ECR I-4579, paragraph 41).
- 31 In any event, the Court has already held that, like other industrial and commercial property rights, the exclusive rights conferred by literary and artistic property are by their nature such as to affect trade in goods and services and also competitive relationships within the Community. For that reason, those rights, although governed by national legislation, are subject to the requirements of the EC Treaty and therefore fall within its scope of application (Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, paragraph 22).
- 32 Thus, contrary to the Portuguese Republic's assertion, the difference in the legal protection which protected cultural works enjoy in the Member States as regards

public lending is such as to affect the normal functioning of the internal market of the Community and create distortions of competition.

33 Secondly, that Member State argues that the proprietors of copyrights have, in principle, already received remuneration for reproduction and distribution rights in respect of their works.

34 However, forms of exploitation of a protected work, such as public lending, are different in nature from sale or any other lawful form of distribution. The lending right remains one of the prerogatives of the author notwithstanding sale of the physical recording. Furthermore, the lending right is not exhausted by the sale or any other act of distribution, whereas the distribution right may be exhausted, but only and specifically upon the first sale in the Community by the rightholder or with his consent (see, to that effect, *Metronome Musik*, paragraphs 18 and 19).

35 Thirdly, the Portuguese Republic contends that Article 5(3) of the directive is open-textured and flexible so as to take into account the cultural development of each Member State, and the expression 'certain categories of establishments' calls for a 'variable geometry' style interpretation.

36 However, Article 5(3) of the directive cannot, as indicated in paragraph 22 of the present judgment, be interpreted as allowing for total derogation from the obligation of remuneration laid down in Article 5(1).

- 37 Fourthly, the Portuguese Republic maintains that there is a conflict between Article 5(3) of the directive and the principles of equal treatment, impartiality, solidarity and social cohesion. To exempt only certain 'categories of establishments' from that obligation of remuneration would amount to permitting a situation in which Portuguese citizens did not have access to, and were not able to enjoy, intellectual works under the same conditions.
- 38 In that respect, the exemption of certain public lending establishments, provided for in Article 5(3) of the directive, from the obligation to pay the remuneration referred to in Article 5(1) allows Member States, by leaving them a choice as to which establishments will be covered by the exemption, to retain discretion to decide, from among the sections of the public concerned, those for whom such an exemption will do most to facilitate access to intellectual works, whilst respecting fundamental rights and, in particular, the right to not be discriminated against.
- 39 Moreover, in the absence of sufficiently precise Community criteria in a directive to delimit the obligations thereunder, 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 concerned, compliance with that directive (see, to that effect, Case C-245/00 *SENA* [2003] ECR I-1251, paragraph 34, and Case C-433/02 *Commission v Belgium* [2003] ECR I-12191, paragraph 19).
- 40 In that respect, it has already been held that 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 the relevant criteria to be determined for drawing a valid distinction between categories of establishments, the obligation to pay the remuneration provided for in paragraph 1 of the article must be imposed on all the establishments concerned (*Commission v Belgium*, paragraph 20).

41 In those circumstances, the action brought by the Commission must be regarded as well founded

42 As a result, it must be held that, by exempting all categories of public lending establishments from the obligation to pay remuneration to authors for public lending, the Portuguese Republic has failed to fulfil its obligations under Articles 1 and 5 of the directive.

Costs

43 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 the latter has been unsuccessful, the Portuguese Republic must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

- 1. Declares that, by exempting all categories of public lending establishments from the obligation to pay remuneration to authors for public lending, the Portuguese Republic has failed to fulfil its obligations under Articles 1 and 5 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;**
- 2. Orders the Portuguese Republic to pay the costs.**

[Signatures]