[DK] High Court judgment on the scheme on compensation for private copying: Finding the Danish state liable for loss due to too slow update of the rules to meet EU requirements

IRIS 2022-6:1/5

Terese Foged
Legal expert

On 19 May 2022, the Danish Eastern High Court delivered a much awaited judgment in a dispute between the Danish organisation that administers the funds allocated to compensation for private copying, Copydan KulturPlus, and the Danish Ministry of Culture.

The Danish levy scheme on compensation for private copying previously comprised DVDs, USBs and storage media that was detachable from devices with a digital reproduction function, but not built-in storage media such as internal memories of smartphones, tablets and computers.

In a preliminary ruling in a national case between Copydan and Nokia, the CJEU found, in 2015, that different national treatment of media that could be used for copying for private use had to be be justified, i.e. indirectly that the Danish exemption of built-in storage media was not compatible with the InfoSoc Directive and Union law.

In 2019, Copydan KulturPlus sued the Danish Ministry of Culture, i.e. the state, for damages, claiming that the Ministry had failed to ensure that the Danish scheme was in accordance with Union law.

With effect from 1 January 2022, the Danish Parliament agreed to amend the scheme to include built-in storage media that could also be used for copying.

Copydan KulturPlus argued that the update of the rules should have taken place much earlier, and claimed compensation for the period from 1 August 2014 until 31 December 2021. The amount claimed by Copydan KulturPlus was DKK 1.3 billion (EUR 175 million), namely DKK 600 million (EUR 80.5 million) with compound interest.

In its judgment of 19 May 2022, the High Court found that the Danish scheme did not in fact meet the requirements under the InfoSoc Directive regarding reasonable compensation to rights holders. Thus the Court held that even though the legislator had a wide margin of discretion in the making of a scheme for reasonable compensation, the judgment by the CJEU in 2015, another CJEU

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judgment in 2016, the technological development, and changes in the Danes' copying behaviour had cast so much doubt on whether the Danish compensation scheme was in accordance with Union law that the Ministry had been obliged to investigate, as quickly as possible, the need for an adjustment of the Danish copyright rules on the compensation for private copying scheme in order to make them in line with the requirements following from Union law.

The High Court found that as the legislator had not implemented the necessary legislation with effect from 1 July 2018 at the latest, there had been a 'sufficiently qualified violation of Union law' for the Ministry of Culture to be liable for the rights holders' loss from 1 July 2018 and until 31 December 2021.

Therefore the High Court awarded Copydan KulturPlus an estimated compensation of DKK 110 million (EUR 15 million) / DKK 138 million (EUR 18.5 million) with compound interest.

Thus the judgment gave Copydan KulturPlus confirmation that the update of the Danish scheme had been too long underway, however the compensation awarded was far less than Copydan KulturPlus' claim of DKK 1.3 billion (EUR 175 million).

It is not currently known whether either of the parties will appeal the judgment.

Østre Landsret, domresumé 19. maj 2022, Staten ansvarlig for, at blankmedieordning var i strid med EU-retten

https://www.domstol.dk/oestrelandsret/aktuelt/2022/5/staten-ansvarlig-for-at-blankmedieordning-var-i-strid-med-eu-retten/

The High Court announcement about its judgment

2015 EU-Domstolens præjudicielle afgørelse i sag om kopiering til privat brug

https://curia.europa.eu/juris/document/document.jsf?docid=162691&text=&dir=&doclang=DA&part=1&occ=first&mode=DOC&pageIndex=0&cid=2054186

2015 CJEU preliminary ruling in case on copying for private use

https://curia.europa.eu/juris/document/document.jsf;jsessionid=1801C40230FF3B7957F36D5A37249836?text=&docid=162691&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=262112

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