Summary on the ECJ-Case C-433/20 Austro Mechana vs. Strato AG on July 7, 2021

Michel Walter, attorney of austro mechana, starts by arguing in favour of the private copying exception and levy on cloud services. He focusses on the Commission's opinion, which he thinks is completely wrong. He also speaks on the issue of double payment, which is not the case here.

Dr. Axel Anderl, as attorney of Strato AG, argues that the instant case is not a case of VCAST but of Art. 2 InfoSoc-Directive only. The first question of the ECJ shall therefore be limited to that right. He says that the provision in Art. 5 para. 2 (b) must be interpreted neutral to the technology employed and that therefore also powerful hard discs must be encompassed by the private copying levy.

He is, however, not of the opinion that any damages result from such actions, since the copies made on such cloud lockers are almost always from private material such as holidays photos or documents written by the user himself.

Therefore, the Austrian legislator had decided not to make such copies in cloud lockers subject to any levy. He thinks that the instant private copy levy also covers cloud copies due its scope. It is absolutely sufficient, in his opinion, that the importer shall pay the fair compensation, and there is thus no obligation of Member States to implement an additional levy on cloud services.

He bases his argumentation on the Austrian parliamentary material in connection with the last amendment of the copyright act, where storage media levy on hard discs, smartphone et alia were introduced. He also argues that due to fact that mobile phones now have storages larger than any stand-alone computer in former days, cloud lockers are already levied by such smartphone levy. Otherwise, there would be an over-compensation by services having to pay the levy in any and all Member States where they serve clients. In the decision VG Wort, the ECJ ruled that it is completely ok to have only one payee in a chain of devices. This would be the case here.

Next, the **Austrian Government** answers the questions of the ECJ. It splits the first question into two partial questions:

The first partial question of the ECJ is not accurate. The C2P right is not relevant here since the Commission's opinion is completely wrong. Therefore, the question of the ECJ is not accurate and does not have any relation to the instant case at hand. It is a case purely on Art. 2 InfoSoc-Directive and not of Art. 3. Both rights have to be distinguished in licensing and in dogmatic approach.

As to the second part enshrined in question 1 of the ECJ, one must differentiate the different kinds of cloud services and some of them are also active and not only passive. This is thus important, in order to separate the different services and to make the appropriate qualification.

As to question 2: The Austrian government is confident that the provisions of the InfoSoc-Directive have to be read neutrally to any technology. It reminds that the technology at hand is not at all new but has been in effect for several decades now. The only difference is that the economic conditions have changed – storages are now much cheaper and internet connections are much faster nowadays.

The motives of private end consumers is that they want to be safeguarded against the loss of any end device and that they can store their private photos, documents etc and have access to it by any kind of device. Those copies in the cloud on the one hand and in the end devices on the other are different copies, however. Technically, both are saved on a sort of hard disc. Only one of them is a service in the business world. Art. 2 in conjunction with Art. 5 InfoSoc-Directive covers those cases already. There is no focus on a specific storage media but rather on the action of reproduction.

As to question 3: The Austrian government is of the opinion that there shall be no mandatory levy for Member States. There is, admittedly, an obligation to deliver a certain result in this respect. On the

contrary, however, the Member States enjoy a large discretion in implementing Art 5 para. 2 (b). A fair compensation is however necessary, but the Austrian Legislator has decided to levy the physical storage media and not cloud locker services. Servers of such services are also physical storage media and the levy can be collected from them. There is the problem of the cross-border dimension and in such respect, Austria fully adheres to the opinion of the defendant.

As to the last question, it thinks that regardless of any levy on local storages, there is second copy on the servers of the cloud service, and this has to be levied separately.

The **French Government** argues that it is here the case of Art. 2 only. There is no C2P at all. The Commission overlooks that there are more sources for private copies than only C2P usages. For instant, a CD collection which is not at all made accessible publicly. It then refers to its nPVR legislation and that in those cases there is also a C2P involved.

Therefore, those nPVR have two functions. First, to make accessible the works to end consumers and second to store them for the end consumer. Thus, the services need the content of the rightholders before any reproduction by the end consumer take place.

This is not the case, however, in the instant case. This is a case which is different from the VCAST ruling. It is important to differentiate between the damage made by the C2P and the reproduction. Both are to be licensed distinctively.

The Tom Kabinet decision is not applicable here and does not support the Commission's opinion; instead, VCAST is supporting the opinion in favour of the private copying exception, since the ECJ distinguished between the two involved rights there. Tom Kabinet on the other hand does not help the Commission's opinion, since it is about the distribution right and the exhaustion principal.

As a first conclusion, the whole case is about the reproduction right and nothing else.

As to the question 2 on the neutrality of technology: Yes, of course, the fair compensation regime must be applied without taking regard of the technology involved. This question must be answered completely in the affirmative.

Also, Art. 17 of the DSM-Directive explicitly excludes cloud lockers from its scope. Member States must implement a fair compensation due to their obligation to deliver results. Recital 35 InfoSoc-Dir., however, foresee that in cases where there is only minimal harm, Member States may refrain from implementing such levy. They can actually choose between the different systems of having a levy or even having none. They have full discretion to decide that on their own.

As to question 4, the answer is "no". There is no double compensation because different copies are involved. Those copies on the end devices have several disadvantages vis-à-vis the cloud copies, first of all they are made on different physical carriers, secondly usually cloud lockers are used more often than the same end devices, so the usage differ and of course the end device can be destroyed without having any influence on the cloud lockers.

The **Dutch Government** refers to its own law that they are already levying certain devices. The whole case is not about Art. 3 and C2P rights, but only on Art. 2, reproduction rights. The Commission's opinion is absolutely wrong. The principle of technology neutrality is applicable here. The provision of the InfoSoc-Directive covers also cloud lockers.

On question 3, the Dutch Government is of the opinion that there is no levy necessary for services. The Members States should enjoy a wide discretion. This comes from the Copydan ruling, where the ECJ stated that services used or provided by third parties are within the scope of the private copying exception. Thus, the Dutch Government made use of that and levied tablets, computers and smart

phones, since those are the devices usually needed for making copies in the cloud. Therefore, manufactures and importers may be obliged to pay the levy, and this is what the Dutch do, actually. This is also based on the thinking that only where the damage is conflicted, a levy can compensate for it. The problem with servers abroad is thus resolved by having a levy on the end devices only.

Finally, Mr. Rintelen reports the **Commission's** opinion. First, he corrects a typo in the opinion of the Commission, which is not at all too relevant; next, he presents the opinion of the Commission, and says that the case is much about the domestic Austrian law which he thinks stands to reason. He also says that the InfoSoc-Directive speaks in favour of the plaintiff since exclusive rights come into play.

The first question of the ECJ is therefore very relevant, since the Commission thinks that it is all about a public performance here. End users makes use of public performances which are then uploaded to the cloud locker, for instance a TV show. The end consumer is participant in the whole act of communication to the public. Therefore, the consent of the rightholder is necessary. It is not a case of Art. 5 para. 2 (b) but of Art. 3 only. Art. 2 is therefore included in Art. 3 and all processes must be subject to the consent of the rightholders. This comes from the high, Union-wide level of protection for rightholders, according to the InfoSoc-Directive.

Question 2: Art. 5 para. 1 of the InfoSoc Directive is technology determined, whereas Art 5 para. 2 (b) must be interpreted along those lines in order not to be technologically hostile. The scope of exceptions must not be too wide, otherwise the high level of protection would be circumvented by such exceptions.

As to question 3, the Commission thinks that Art. 5 para. 2 (b) is not applicable here. Under the assumption that this should be the case, they think that Member States are not obliged to levy any and all media. No Member State, to the knowledge of the Commission, is currently levying cloud services.

Question 4: The Commission thinks that double payment is very probable, since the action of copying is the same for cloud lockers as it is for the end devices. In conclusion, Art. 3 shall be applicable and not Art. 2, if the conditions of Art. 3 are fulfilled, which must be looked at in every single case. Even if that would not be the case, there would be no obligation for a Member State for a levy.

Now follow the questions of the **ECJ**:

First of all, one of the judges asks the Commission how they can argue their opinion at all. Not in all cases a work is already published (C2P). How could they explain that.

Mme Samnadda, who is also present, explains that when a consumer is receiving a certain work and subsequently uploads the same, the whole chain of communication must be considered a public performance, and therefore the end consumer participates in an act of communication to the public. This begins with the broadcaster and ends with the cloud service. Also, when the cloud service makes accessible the work to the end consumer there is another making available right triggered. Since single individuals are the specified clients of servers, there is no doubt that theservice is targets a certain, partial public, which suffices for the making available right. Cloud services are surely within the scope of Art. 3, thinks the Commission.

The judge asks France as to its position on double payment. It could be possible that an end consumer is transmitting a work to the server of the cloud service only but not store it on the end device – what would be the result? France answers that, in those cases, the levy would be on the server only and because there are two different copies it is also justified to levy end devices separately from the cloud lockers. If a server itself is levied, then this can be resolved by reimbursement for commercial uses.

The judge further asks the Commission how it could be, that the copy of a normal CD would be treated differently, depending on whether it would be made on a cloud or on a hard disc on the local computer? The Commission still defends its opinion that this results from the Murphy decision where copies on a decoder were also subject to Art. 5 para. 1 and that its subsequent download would not have been any copies. You could not do any “salami slicing” (quote of Samnadda).

Again, the judge refers to the example of a physical copy, for instance the copy of an entire book. This would certainly only trigger Art. 2, whereas the opinion of the Commission is that due to the upload to the cloud, this would also trigger the C2P. The Commission again says that it is a case of combination of Art. 2, 3 and 5 and not of Art. 5 para. 2 (b) only. It cannot see, however, where the public element was. The Commission is of the opinion that the access to works by the service suffices and that the premise of Art. 5 para. 2 (b) is the invocation of exclusive rights. The Commission thinks that the service must be licensed in its entirety.

Prof. Walter for the plaintiff is then asked what he thinks of the Commission’s opinion and especially whether Art. 3 should be applied to downloads. He says that the private copy exemption still remains intact due to the legal license given by the Member States. So, the two rights have to be separated here. Then he is asked what the “fair compensation” actually was. He tries to answer that but, naturally, no-one can answer this question in full.

Dr. Anderl for the defendant is against the Commission’s opinion as well and that there is no Art. 3 involved and that there is no C2P at all. A private copy is admissible in this case but the fair compensation has already been paid, since Austria has decided to levy physical storage media within its territory only. Otherwise, a service would have to pay for the same 100 TB in 27 Member States. This certainly would lead to an over-compensation of the rightholders.

One of the judges then asks whether it would make a difference if there is a physical copy and a cloud copy dependent on the distinct nature of different media. This is a question which is not quite comprehensible and I doubt that the judge himself has fully understood what the case is about.

Prof. Walter then comes to his conclusions and makes a strong speech for the application of Art. 5 para. 2 (b) on cloud services. Dr. Anderl also delivers his conclusions and again summarizes his opinion. The same goes for France, Netherlands, Austria and the Commission; there is no new aspect involved here.

The final opinion of the General Attorney will be delivered on 23rd September 2021.

Report: Paul Fischer, 12 July 2021