

“Ex-ante” exemption and “Ex-post” reimbursement schemes for Private Copying Levies under EU law and their implementation across Member States’ regimes

Annex I



Austria

In Austria, in principle, both “ex-ante” exemption and “ex-post” reimbursement schemes exist for sound and audiovisual devices subject to levies under the private copying exception, but not for printing/reprographic devices:

<http://www.akm.at/rueckzahlung-der-speichermedienverguetung/>

Austro-Mechana is the collecting entity in charge of the management of “ex-ante” exemption and “ex-post” reimbursement in Austria.

However, regarding “ex-ante” exemption, the system is based on narrow subjective criteria, where (only) professional “small retailers” and “small businesses” are exempt. The scope of the “ex-ante” exemption in Austria is so narrow that it may be considered equivalent to an indiscriminate application of the private copying levy¹.

The “ex-post” regime in Austria foresees reimbursement for professional, by exclusion as it stated that the reimbursement will be made for person that “do not use [the device] for personal or private use”. In order to get reimbursement, the person should bring prima facie evidence justifying its right to reimbursement.

Article n°42b of the Federal Law on Copyright in Works of Literature and Art and on Related Rights as amended up to 2015

3.(6) The collecting society shall refund the equitable remuneration: (...)

2. to the end consumer, who has purchased storage media for a price including the paid levy, but who does not use those for reproductions for personal or private use. The facts justifying the refund shall be furnished by prima facie evidence.

(7) Claims according to par. 1 shall be void if the liable person for payment furnishes prima facie evidence that the storage media are not used by himself or by any other person for reproductions for personal or private use.

(8) The collective management society shall publish on its website a simple, comprehensible and for the average user intelligible way to claim recompense and the exemption from the liability for payment, which allows for an effective claim not being excessively difficult.

¹ Jurisprudence of CJEU (judgment October 21, 2010, case C-467/08, *Padawan*, para. 53) provides that “the indiscriminate application of the private copying levy to all types of digital reproduction equipment, devices and media, including in the case in which they are acquired by persons other than natural persons for purposes clearly unrelated to private copying, does not comply with Article 5(2) of Directive 2001/29”.

It should be further assessed if in practice the mechanisms that permit reimbursement are “effective”, and not “excessively difficult”². If excessively difficult the regime must be considered as not complying with European Union law.

The reimbursement may be made to:

1. *the person who exports storage media or a duplicator before being sold to the final consumer abroad;*
2. *the ultimate consumer who has purchased storage media at a price that includes the paid compensation but does not use or permit it to be used for copying copyrighted material for private use. The facts justifying the refund claim must be credible. A reference to the remuneration for the respective storage media must be shown on the purchase invoices and is a prerequisite for the reimbursement. Final consumers must fill a form for application.*

All in all, in the light of the explanations above, the “ex-ante” exemption scheme in place in Austria should be considered as excessively narrow, whereas proof still must be brought that the “ex-post” system is working and is effective in practice.



Belgium

In Belgium, there is no general “ex-ante” exemption for levies, only a specific and limited exemption scheme for professional users. In addition, “ex-post” reimbursement schemes exist, but their scope is narrower than what is foreseen by European Union law according to the Amazon decision and other jurisprudence of the European Court of Justice.³

The reimbursement of unduly paid levies is possible according to **Article XI. 233 of the Code of Economic Law**, which was implemented and elaborated by the Royal Decree of 18 October 2013 (as modified by the Royal Decree of 11 December 2016).⁴

i) Scope of reimbursements and exemptions

The scope of the reimbursements and exemptions covers only:

- (1) producers of sound works and audiovisual works;*
- (2) broadcasting organizations;*

² CJEU, July 11, 2013, case C-521/11, *Amazon*, para. 37.

³ The reimbursement should be possible for every professional use and the right to reimbursement should be effective and not making reimbursement paid of the levies excessively difficult (para 37, C-521/11 Amazon).

⁴ Koninklijk Besluit 18 Oktober 2013 [Royal Decree], <http://www.ejustice.just.fgov.be/eli/bsluit/2013/10/18/2013011509/justel>.

(3) institutions officially recognized and subsidized by the public authorities for the purpose of preserving audio or audiovisual records. Reimbursement is granted only for media intended for the preservation of document audio-visual material and to their consultation on the spot;

(4) the blind, visually impaired, deaf and hard of hearing persons, as well as to recognized institutions that were created for the benefit of these individuals;

(5) recognized educational institutions that use sound works and audiovisual works for educational or scientific purposes;

(6) recognized hospitals, penitentiaries and youth welfare establishments;

(7) categories of natural persons or legal persons designated by Royal Decree:

- a. that benefit from a complete or partial reimbursement of the levies that were collected and charged on the media and devices that they have acquired; or*
- b. for whom the persons liable to pay, are entirely or partially exempted or reimbursed for the media and devices acquired by these persons.*

The reimbursement to the categories of natural persons or legal persons designated by Royal Decree (option (7) above) is possible when justified by:

(1) the need to guarantee, without prejudice to creation, the most equal access for everyone to the new information and communication technologies, where the remuneration in question would constitute an obstacle to such access;

(2) the need to ensure the acquisition of supports and devices by persons who obviously do not dedicate this material to reproductions referred to in Article XI. 229 of the Code of Economic Law.

The Belgian Royal Decree of 18 October 2013 implements the option provided in article XI.233 of the Code of Economic Law, by designating certain categories of natural persons or legal persons that are exempted or that can demand reimbursement (option (7) in the above), most notably professional users. This is the sole exemption mechanism under Belgian law in this context and it is rather limited, given the conditions as further explained below.

ii) Conditions for reimbursements and exemptions

The persons of the aforementioned categories (1) to (6) can only benefit from a reimbursement under the following conditions:

(1) these persons must remit their articles of association;

(2) the request for reimbursement must be justified by a copy of the invoices relating to the media and devices that are used in the instances included in the scope of reimbursement;

- (3) requests for reimbursements are possible only for amounts of at least 10 euro, which can be the aggregate amount of several invoices;
- (4) these persons must submit a sworn statement (“declaration of honour”) regarding VAT duties.

As regards reimbursements and exemptions to the benefit of professional users, i.e. the aforementioned category (7), the following applies.

First, the Royal Decree of 18 October 2013 allows for reimbursement to all professional users that have purchased devices or media which were indeed subject to these levies although these devices and media are used solely for professional purposes. This Royal Decree imposes the following conditions for reimbursement:

- (1) these professional users must submit a sworn statement (“declaration of honour”), attesting that the media and devices at issue are used only for professional purposes;
- (2) the request for reimbursement must be justified by a copy of the invoices relating to the concerned media and devices;
- (3) requests for reimbursements are possible only for amounts of at least 10 euro, which can be the aggregate amount of several invoices;
- (4) these persons must submit a sworn statement (“declaration of honour”) regarding VAT duties.

Second, the Royal Decree of 18 October 2013 establishes an exemption for professional users. This exemption is available under the following conditions:

- (1) the professional user dedicates these devices and media solely for professional use;
- (2) the professional user purchased devices and/or media from a person that is (in principle) liable to pay the levies but that is exempted and that has concluded an exemption agreement concluded with the collecting society, requiring the person liable to pay the levies to submit information about the devices and media that were put into circulation with professional users on the national territory (see below). The persons that are liable to pay the levies but that are exempted, can be:
 - a. Either manufacturers, as well as importers and intra-community purchasers that are designated as wholesalers and that have an exclusive right to distribute media and devices;
 - b. Or importers and intra-community purchasers that are neither designated as wholesalers nor distributors and that do not have an exclusive right to distribute media and devices, but that distribute devices and media solely to professional users.

- (3) *the professional user submits certain contact information (name, address and company number) as well as a sworn statement that the devices and media will be used solely for professional purposes with the person that is liable to pay the levies but that is exempted.*

The person that is (in principle) liable to pay the levies but that is exempted and that has concluded an exemption agreement with the collecting society, is required to file a declaration with the collecting society each month. This declaration includes the contact details provided by the professional users, their sworn statements as well as the number, the properties and the storage capacity of the concerned devices and media. The requirement of the exemption agreement with the collecting society could be contested in the light of the jurisprudence of the European Court of Justice.⁵

Third, the Royal Decree of 18 October 2013 includes a reimbursement scheme for export, to the benefit of all companies that export blank media or devices as part of their business or supply them within the EU from Belgium and for which they have paid the levy for private copying. This reimbursement must be applied for and is subject to the following conditions:

- (1) *the request for reimbursement must be justified by a copy of the invoices relating to the concerned media and devices, including a mention of the due private copying levy, or any other document attesting that the levies were actually paid.*
- (2) *The applicant must remit documents proving that the concerned devices or media were actually exported or supplied within the EU from Belgium (e.g. invoices and transport documents);*
- (3) *these companies must submit a sworn statement (“declaration of honour”) regarding VAT duties.*

The scope of the subjects covered by the exonerations in the Code of Economic Law is rather narrow, while the reimbursement and exemptions schemes in the Belgian Royal Decree are subject to several conditions. In particular, by adding extra conditions to make possible the reimbursement of the levy that was unduly paid, Belgian law adds requirements that are not provided by European Union jurisprudence. Indeed, under EU law, professional users should be exempted of the payment of the private copying levy or should be able to ask the reimbursement of unduly paid levies without excessive requirements and without thresholds.



Bulgaria

In Bulgaria, the Copyright Act provides for “ex-ante” exemptions and, if undue levies are paid, “ex-post” reimbursements.

The exemption and reimbursement schemes are based on subjective criteria regarding the person buying the device. The scope seems to be sufficiently wide, as the person can be a provider of audio visual services/radio services legally carrying out his activity, a manufacturer of movies or other audio visual

⁵ CJEU, September 22, 2016, case C-110/15, *Microsoft*, para. 56.

works, medical establishments, specialized rehabilitation hospitals, social establishments and penitentiary establishments and legal persons, sole entrepreneurs or natural persons freelancers whose activity does not presuppose their use for reproduction in the sense of Article 25 para.1 (private copying on paper).

Article 25 of the Law on Copyright and Neighboring Rights of 1993 (as amended in 2011)

Free Use with Payment of Compensation (title amend. SG 77/02, in force from 01.01.2003) without consent of the owner of the copyright but upon payment of fair compensation shall be admissible:

1. reproduction with non-commercial purposes of printed works, except note materials, on paper or other similar carrier by reprography or other technique, ensuring similar result;

Article 26 of the Law on Copyright and Neighboring Rights of 1993 (as amended in 2011)

Provides for exemption of levies for the following devices:

5. Purchased by a provider of audio-visual media services/radio services, legally carrying out his activity;

6. Purchased in the country by manufacturers of movies or other audio-visual works;

7. Purchased by medical establishments, specialized rehabilitation hospitals, social establishments and penitentiary establishments;

8. Purchased by legal persons, sole entrepreneurs or natural persons - freelancers, whose activity does not presuppose their use for reproduction in the sense of Article 25, Para 1.

Regarding the reimbursement possibility, the law provides that:

"the facts and circumstances justifying the right to reimbursement shall be proved by the persons claiming it: (...)

(11) When compensatory remunerations have been collected and are subject to reimbursement, the facts and circumstances justifying the right to reimbursement shall be proved by the persons claiming it. The requests, accompanied by the evidence, shall be submitted to the respective organizations referred to in Para 8 within the time limits referred to in Para 12. The organizations referred to in Para 8 shall pronounce on the requests within one month from their submission. The amounts subject to reimbursement shall be paid by the organizations referred to in Para 8 within one month from the date of the protocol for granting the requests with the evidence.

Therefore, it should be recognized that on paper the scope of the entities exempted from levies is wide enough.

Nevertheless, it has to be verified that in practice the reimbursement procedure is residual compared with the "ex ante" exemption and does not lead to impractical issues. For instance, in case a small amount levy is unduly paid, the balance between the time and resources needed to seek reimbursement and choosing not to seek it will weigh in favor of ignoring the possibility of reimbursement. For the simple reason that it will be more profitable to the person who unduly paid the levy to choose not to seek for its reimbursement.



Croatia

Croatia has a narrow subjective “ex-ante” model based on the professional nature of the user, which only includes ephemeral recordings used in broadcasting, certain institutions that do not have any commercial activities and export.

The exemption is possible for professional use by general agreement and individual contracts. The conditions to be eligible for the exemption are established by agreement with the collecting societies. This approach is contrary to EU law⁶.

Moreover, there is a possibility for professionals to negotiate special conditions/prices with collecting societies.

The scope is defined in an Act enacted by the Minister establishing Regulations on Professional Criteria and Procedure of Granting Authorizations for Collective Management of Rights.



Cyprus

In Cyprus, a levy is planned in the law but has never been implemented.

Article 7.2 of Copyright Act of 1993 (which is the renumbered Article 7(1)(a) of the English version of the law) as amended up to law 2004

Copyright shall not include the right to control: (...)

(o) the reproduction on any medium made by a natural person for personal use not for ends that are directly or indirectly commercial, provided that the rightholders receive fair compensation which takes account of the use or not of technological measures in the particular work or other material.



Czech Republic

In Czech Republic, the only exemptions provided are for exportation and consignee for resale. There is no exemption of levies for business use.

⁶ CJEU, March 5, 2015, case C-463/12, *Copydan*, para. 51.



Denmark

In Denmark, “ex ante” exemptions for business use are subject to the prior conclusion of a contract with collecting society Copydan. This situation is contrary to EU law, as results from the judgment of the CJEU concerning Copydan case itself, where this issue was specifically assessed by the CJEU in the context of the Danish legislation.⁷

There is also the possibility of a reimbursement for non-contractors. A contractor can be any company located in Denmark, but it does not need to have its headquarters in the country. This form of contract is open for companies, wholesalers, importers and manufacturers. The application form is available online. After completing the application, a contractor receives a customer number, which is then used to purchase blank media. If the company resells media, they must ensure that the recipient also has a number. If not, levies are required. The company must regularly report the possible sales and the number of privately used or resold blank media. These requisites add an additional unnecessary burden to the professional users. Copydan is entitled to carry out checks on the companies.

A reimbursement can be claimed in case levies have been paid on devices that are used for professional purposes, including educational purposes. This possibility also exists for companies which are non-contractors. The reimbursement form is available online. The claim must be done at least 3 months after the purchase and the refund should be made within six weeks.

The exemption and reimbursement schemes are established in the **Consolidated Act on Copyright 2014 in Articles 41, 43, and 44:**

“41. (1) Companies which for commercial purposes produce or import sound tapes or videotapes, etc., shall be registered with the joint organization.

(2) The organization shall issue a certificate for the registration.

(3) Registered companies shall without the remuneration having been settled be entitled to import or from another registered company to receive sound tapes or videotapes liable to remuneration in accordance with section 39.”

*“43.1) A **deduction** shall be made from the number liable to remuneration made up in accordance with section 42(2):*

(i) the number of sound tapes and videotapes distributed to another registered company in accordance with section 41(3);

(ii) the number of exported sound tapes and videotapes;

(iii) the number of sound tapes and videotapes to be used for professional purposes, including educational purposes;

⁷ CJEU, March 5, 2015, case C-463/12, *Copydan*, para. 51.

(iv) the number of sound tapes and videotapes to be used for production of recordings to be used for the visually handicapped and hearing-impaired persons;

(v) the number of sound tapes and videotapes to be used for special purposes which by the Minister for Culture have been exempted from the remuneration.”

*“44. (1) The remuneration shall be **refunded** in case of:*

(i) commercial export of sound tapes or videotapes on which remuneration has been paid;

(ii) Utilization of sound tapes or videotapes for professional purposes, including educational purposes, on which remuneration has been paid; [...] “



Estonia

In Estonia there is a precise list of devices subject to levies and the regulation states clearly that legal persons are not entitled to use private use exemption. However, there are no “ex-ante” exemptions regarding to the payment of these levies.

There is a subjective “ex-post” reimbursement scheme based on the nature of the person using the device. Nevertheless, there is significant uncertainty regarding the possibility of reimbursement and whether the use made of the device qualifies or not as professional use; in practice, this can lead to confusions leading to unduly paid levies not being asked for reimbursement.

These schemes are applicable to sound and audiovisual devices. For reprographic devices, Estonia has a system of fair compensation funded by means of the public budget.

Articles 26 and 27 of the Copyright Act of 1992 (as amended up to 2014) and Government Regulation no.14 of 2006 on the Establishment of Payment of Remuneration for Private use of Audiovisual Works and Sound Recordings of Works, *the list of recording devices and storage media and the procedure for application for the remuneration for the development of music and film culture and to finance educational and research programs or for use for other similar purposes.*

Copyright Act Article 27:

(5) The remuneration shall be repaid on the storage media and recording devices:

- 1) which, due to their technical characteristics, do not enable the reproduction of audiovisual works and sound recordings of works as single copies;*
- 2) exported or transported from Estonia into the Community customs territory;*
- 3) which are used in the course of the activities specified in the articles of association of the undertaking;*

4) which are used in an activity in the case of which the result of the main activity of the person who makes the recording requires the manufacture of an audio or video recording as an intermediate stage;

5) which are intended for recording activities in educational and research institutions for the purpose of teaching or scientific research;

6) used for making recordings for the benefit of disabled persons.

(6) A collective management organization shall repay the remuneration to the persons specified in subsection (5) of this section within one month after submission of a corresponding written application.

Reimbursement is to take place within one month after application. However, no verification has been made about whether the collecting entity actually complies with this deadline in practice.



Finland

In Finland, there are no levies, but the private copying compensation has been funded from the state budget since the beginning of 2015 (11 MEUR per year).

A survey on private copying is made every year after the decision of budget funding. The surveys show clearly that there has been sustained and significant decrease in private copying. Private copying is being replaced by ever-increasing use of license-based streaming both of music and AV services (e.g. Spotify and Netflix).

By the end of 2018, the Ministry of Culture and Education will present to the Finnish Parliament a report on the functioning of the compensation system, the fairness of compensation and the potential need to make changes. This could mean keeping the system or even reintroducing equipment-based levies, at least as one component of compensation. However, it is clear that the budget-based compensation has been more than fair to the rightholders considering that private copying has decreased significantly but the compensation is almost double as compared to the average sum of levies earlier.



France

In France, both “ex-ante” exemption and “ex-post” reimbursement schemes exist on the paper, whilst actual experience shows that these schemes are not fully working in practice.

Regarding “ex-ante” exemptions, two systems coexist:

- First a subjective system, under which professional users can sign an “ex-ante” exemption agreement⁸ with the bodies in charge of the collection and distribution of the levy (Copie France).
- Then an objective system, exempting tablets according to the operative system they are sold with. No other devices than tablets are exempted under such objective criteria. However, for the rest of devices, an agreement for exemption can be concluded between the beneficiaries of the exemption and the body in charge of the levy collection. If the body in charge deny the agreement, it has to justify the reason why.

The “**ex-post**” reimbursement procedure applies when there is no contract made between Copie France and the professional. Nevertheless, in practice, even if the reimbursement procedure is presented as being easy and fast, in many cases that’s not the case. For instance:

- Let’s take the case of a professional purchasing a pen drive charged with 2€ of levies. In order to be reimbursed, the professional has to complete a questionnaire and add justifying documents (such as an extract of the commercial register which cost around 4€).
- In practice, for such a small amount of levy, the professional **will not even consider** asking for a reimbursement, considering that this is a waste of time and money. In the end, it is more expensive to obtain the document that Copie France asked for, and then the reimbursement of the levy unduly paid, than doing nothing about it.⁹ This situation is making the reimbursement *excessively difficult*, which is contrary to European Union law¹⁰. The French system can therefore be qualified as contrary to European Union law.

Article L311-8 of the French Intellectual Property Code (as amended up to 2014)

l. - Remuneration for private copying shall not be due when the recording medium is acquired for their own use or production by:

1° audiovisual communication companies;

2° Producers of phonograms or videograms and persons who reproduce them on behalf of producers of phonograms or videograms;

2° bis Publishers of works published on digital media;

3° Legal persons or bodies, the list of which is determined by the Minister of Culture, who use recording media for the purpose of assisting the visually or hearing impaired.

⁸ Which, as mentioned before, is contrary to EU law in accordance with the judgement CJEU, March 5, 2015, case C-463/12, *Copydan*, para. 51.

⁹ For example, as described in the report prepared for the French National Assembly by its member Marcel Rogemont, the amount that should have been refunded in 2014 for professional uses was 58 million euros, but the reality was that only 375,805€ were refunded (a 0.65% of total). Similarly, in 2015 there were only 1316 applications for reimbursement (with an acceptance rate of 84%). This shows that effectiveness of reimbursement system is marginal.

¹⁰ CJEU, July 11, 2011, case C-521/11, *Amazon*, para. 37.

II. - The remuneration for private copying shall also not be due for recording media acquired in particular for professional purposes, the conditions of use of which do not allow a private copy to be presumed.

III. An agreement recognizing the exemption and laying down detailed rules may be concluded between the persons benefiting from I or II and one of the bodies referred to in the first paragraph of Article L. 311-6. If one of the bodies refuses to conclude an agreement, the latter must specify the reasons for such refusal.

Failing the conclusion of an agreement, these persons shall be entitled to reimbursement of remuneration on production of supporting documents determined by the ministers responsible for culture and the economy.



Germany

In Germany, neither “ex-ante” exemption nor “ex-post” reimbursement schemes are explicitly regulated by law. As copyright levies are negotiated by debtors (manufacturers and importers) and creditors (collecting societies), in some of these agreements concerning audio and audiovisual products, exemption and reimbursement schemes are included. However, no exemption or reimbursement exists for reprographic products (e.g. SFP, MFP) allegedly because levies are to compensate for other permitted use, i.e. not private copying.

ZPUE¹¹ (Zentralstelle für private Überspielungsrechte, central entity for all collection societies) is the entity responsible for collecting levies for private copying in Germany for audio and audiovisual reproduction only; it is not in charge of copyright levies for reprographic reproductions, which are handled by VG Wort.

The case law does not recognize the existence of exoneration rules as universal, but privately agreed exemption and reimbursement schemes described below are primarily binding only on the contracting parties. The extent to which these have additional binding effect for outside parties (for example commercial end users) has not yet been conclusively clarified by the German courts; anyway, subjecting such exoneration to the prior conclusion of an agreement with ZPUE clearly contradicts jurisprudence of the CJEU.¹²

Public authorities and commercial end users who purchase PCs, tablets and mobile phones (“relevant products”) in Germany since 1 January 2014 at a price that includes the consumer levy remuneration in accordance with § 54 of the Copyright Act (UrhG) benefit from a **right to reimbursement** from the collecting societies of the difference between the consumer and commercial levies. Such difference is to reflect the portion of the levy that compensates for the statutory private copying exception. The lower commercial levy is compensation for other statutory permitted uses by commercial entities.

¹¹ See more information at <https://www.zpue.de/rueckerstattung/rueckerstattung-pc/rueckerstattungen-fuer-behoerden-und-gewerbliche-endabnehmer.html>

¹² See Judgment of 5 March 2015, Copydan Båndkopi, C 463/12, EU:C:2015:144, paragraph 51, and Judgment of 22 September 2016, Microsoft Mobile, C-110/15, EU:C:2016:717, paragraph 56.

§ 54 of the Copyright Act

Compensation obligation

(1) If, according to the nature of a work, it is to be expected that it will be reproduced pursuant to § 53 (1) to (3), the author of the work shall be liable against the manufacturer of devices and storage media whose type alone or in combination with other devices, Storage media or accessories used to make such duplications, is entitled to payment of reasonable compensation.

(2) The claim under subsection (1) shall lapse if, as the circumstances allow, it can be expected that the devices or storage media will not be used for reproduction within the scope of this Act.

In order to obtain the reimbursement in Germany, the entity claiming for the reimbursement has to demonstrate that it is a commercial entity. Moreover, the entity asking for refund has to provide an invoice justifying that the relevant products were purchased in Germany and include the “consumer levy” (higher than the “commercial levy”) and confirming use within the entity, i.e. that no resale-made, as explained below. The confirmation is specifically that the product is used internally within the business entity and not that the product is only used for business purposes.

This may sound like semantics but means legally that any (minimal) non-business use is not fatal to the claim that only the commercial levy is due. This acknowledgement of possible minimal private copying use by employees (often permitted by their employers at their place of work) together with the existence of other statutory permitted uses by commercial entities is the reasoning for the collection society to claim that the levy for commercial users cannot be zero.

In practice, the reimbursement will be made upon application to the ZPÜ. The application has to be made in writing or electronically and must contain the following information regarding the entity asking for the refund:

- Company, address, VAT ID, bank details of the applicant and the name of the person acting for the applicant;
- Company, address, VAT ID of the seller;
- Number of relevant products sold;
- Date and number of the invoice for the acquisition of the relevant products.

Additionally, the application must be accompanied by a copy of the invoice for the purchase of the relevant products, which must clearly identify the applicant as a buyer.

The invoice must be issued by a domestic seller and must clearly indicate how many relevant products have been purchased plus the brand of the relevant product.

Smaller devices such as recording media that may potentially be purchased for professional use and subject to the payment of the compensation for private copying do not have a commercial levy as an assumption was made that there is no different format for business than for consumer use (and therefore

all of them are assumed as purely for consumer use). However, there are now commercial devices of this format.

If the invoice does not clearly indicate what are the relevant products that have been purchased, the application must be accompanied by a product data sheet specifying the technical characteristics of the relevant products.

Another condition to obtain the reimbursement is the submission of one of the following statements about the intended use of the relevant products by the applicant:

"The Applicant declares that the relevant products-for which a refund is requested are used within the framework of his business and are not acquired for the purpose of resale or other marketing. He assures that he has not assigned the claim for restitution either to the seller or to a third party. "

If the applicant is a group company that centrally purchases relevant products for other companies in the group, the following statement must be made:

"The Applicant declares that he is a company of the ____ Group and that the relevant products for which a refund is requested are used within the Group and are not acquired for the purpose of resale or other marketing outside the Group. He assures that he has not assigned the claim for restitution either to the seller or to a third party. "

If the Applicant is a company that provides relevant products to third parties for use on the basis of contracts (e.g. leasing, IT leasing), the following statement must be made:

"The Applicant declares that the relevant products for which a refund is requested will be made available to a third party for use on the basis of a contract (such as leasing, IT leasing). He assures that he has not assigned the claim for restitution either to the seller or to a third party. "

Plus, if the applicant is a natural person, the application must be accompanied by a copy of the VAT ID.

If the above conditions are fulfilled and none of the cases is in which ZPÜ is not obliged to reimburse, the ZPÜ shall reimburse within 10 working days of receipt of the application.

If there are reasonable doubts that the relevant products for which a reimbursement is requested (for example because the importer or manufacturer notifies ZPÜ voluntarily or on request that only the commercial levy was paid) the collecting societies are not obliged to a reimbursement. The same applies as long as the importer or manufacturer who sold the relevant products for which a refund is requested has not complied with his obligation to designate the end-user where he is contractually obliged to do so.

Additionally, based on an agreement signed between ZPUE and the relevant industry associations, there is the possibility to reduce the levy applicable to PC/tablet/mobile phone **"ex-ante"** to the commercial level. For example, for a PC the amount is lowered from 10,55€ for a consumer PC to 3,20€ for a business PC.

The proceeding completely mirrors the “ex-post” reimbursement procedure. Sellers can either invoice the lower commercial PC/tablet/mobile phone and when they report sales to ZPUE provide a copy of the details of the buyer (VAT number) and the buyer’s declaration that the sale was not for resale (i.e. for own use).

Or in case the seller wants to assure there will be no problem, he can send the information to ZPUE in advance in order for the entity to check it and approve it.

Finally, where a device is technically altered so that no copying is possible, no levy is payable. For audio-visual devices, there is an exemplary list of products that are not subject to levies published by ZPUE, e.g. closed system PC used in industrial processes. If a device is not included or the product is a reprographic device, an application must be made to the relevant collection society and will be assessed on an individual basis.

As seen above, the criteria needed to obtain a proper “ex ante” exemption or “ex post” reimbursement in Germany mean that the system is often not generally known, depends on the specific product or collecting society and is onerous. As a result, some commercial users pay private copying levies. As such, the system may be deemed not to be aligned with the requirements imposed by EU law (specifically taking into account the straight forward case law of the CJEU in *Microsoft Mobile* case).



Greece

In Greece, the current system of copyright levies foresees that right-holders will be compensated fairly for reproductions of their works made for private use through technical means, in accordance with **Article 18 of Law 2121/1993 on Copyright, Related Rights and Cultural Matters, as amended by Law 4481/2017**.

(1) Without prejudice to the provisions laid down in the following paragraphs, it shall be permissible for a person to make a reproduction of a lawfully published work for his own private use, without the consent of the author and without payment. The term “private use” shall not include use by an enterprise, a service or an organization.

The Greek law clarifies that the term “private use” does not include the use by an enterprise, a service or an organization. But nevertheless, the law does not provide for any “ex-ante” exemptions (or under certain circumstances, “ex-post” reimbursements) when products are supplied to persons other than natural persons for purposes clearly unrelated to copying for private use (enterprises, services and organizations).

In this context, it should be concluded that the Greek system of copyright levies is incompatible with European Union law.



Hungary

In Hungary, a narrow objective “ex-ante” exemption exists, which is based on the use made of certain devices. It is stated that the exemption occurs when the devices are not used in their “*regular application*”

for the purpose of making private copies of works, performances of performers, or sound recording”. But no precise list of the devices concerned came into the law, which in practice causes difficulties of application.

Article 20 (1) of Act no. IXXVI of 1999 on Copyright (as amended up to 2007)

(3) The obligation to pay remuneration shall not apply to:

(...)

b) video and audio carriers applicable exclusively with devices (e.g., studio equipment, dictaphones) which are not used in their regular application for the private-purpose making of copies of works, performances of performers, or sound recordings.

In conformity with the “International Survey on Private Copying – Law and Practice 2016” published by WIPO and Thuiskopie:

“there are exemptions for:

– professional users under the CA (Art. 20 (3));

– export exemption under the CA (Art. 20 (3));

– upfront exemption for extended professional use, in accordance with the Padawan decision, as well as reimbursement stipulations in accordance with the Amazon decision under the relevant rate chart of Artisjus, and detailed stipulations on the application of the statutory exceptions.”¹³



Ireland

In Ireland, the private copying exception covers only “time-shifting”, allowing a person to record a television or radio broadcast and watch or listen to it later. There is no levy system in place (possibly because such narrow scope is covered by the “*de minimis*” rule).



Italy

In Italy, the historical combined system of “ex-ante” exemption and “ex-post” reimbursement set forth by applicative Ministerial Decrees of Copyright Law No. 633/1941 has been challenged in front of the Italian Supreme Administrative Court, which referred prejudicial questions to the CJEU. and was recently declared invalid.

The CJEU, in its judgment adopted on September 22, 2016, case C110/15, *Microsoft*, then confirmed by a decision of the Italian Supreme Court (“Consiglio di Stato”) of October 25, 2017, recognized that the Italian

¹³ For an outline of the business exemption system, and the various conditions thereto, please consult this report by Hungarian collecting society Artisjus: http://www.artisjus.hu/wp-content/uploads/2018/02/u18_en.pdf (chapter 3)

rules on “ex-ante” exemptions and “ex-post” reimbursements of private copying levies for professional use are incompatible with Directive 2001/29/EC.

The Italian Supreme Court has implemented the CJEU’s ruling and rendered its judgment in accordance [the Italian Supreme Court can only implement a CJEU ruling] , annulling Article 4 of the Technical Annex to the Italian Ministerial Decree of December 30, 2009.

“Ex-ante” exemption

Article 4 of Technical Annex to 2009 and 2014 Ministerial Decrees provided that exemptions are subject to private negotiation. In such regard, the collecting society SIAE was empowered to promote protocols with persons obliged to pay the compensation for private copying, or their trade associations, to provide subjective and objective exonerations, including the case of professional use of the devices.

The CJEU ruled that a national legislation, such as the Italian one, that conditions the exemption from payment of the private copying levy for producers and importers of devices and media intended for use clearly unrelated to private copying to the conclusion of agreements between an entity which has a legal monopoly on the representation of the interests of authors of works, and those liable to pay compensation, or their trade associations is contrary to EU law.

Such system exempts producers and importers from the private copying levy in a way which is not certain but only possible, and the legislation does not contain any generally applicable provision exempting from payment of the private copying levy producers and importers who show that the devices and media were acquired by persons other than natural persons, for purposes clearly unrelated to private copying (CJEU judgment, §40; Italian Supreme Court judgment, § 2.12).

The Italian Government is now in the process of drafting a new “ex-ante” exemption system, which should be based on objective and transparent criteria.

“Ex-post” reimbursement

“Ex-post” reimbursement for media and devices acquired for professional use can be requested only by the final user and not by the manufacturer of the media and devices, subject to fulfillment of certain requirements set forth by the Collecting Society SIAE.

The CJEU and the Italian Supreme Court declared such a system contrary to EU law insofar as the reimbursement of private copying levy, where it has been unduly paid, may be requested only by the final user of those devices and media, while also the manufacturer/importer should be entitled to request such refund.

The CJEU noted that fair compensation regimes must provide reimbursements systems suitable to correct overcompensation when the levy is unduly paid, which is not the case under the Italian Law.

The CJEU ruled that the reimbursement scheme provided for by the Italian regulations cannot be regarded as “effective”, since it is not open to natural persons acquiring devices and media for purposes clearly unrelated to private copying (CJEU judgment, §55), and to producer or importer of the media and devices (§51 and §56).

The Italian Supreme Court implemented the CJEU's findings and listed the reasons why the Italian system of fair compensation is ineffective:

- the fact that *the “SIAE system” of reimbursements only allows “final purchasers” to obtain reimbursement, and not any person who can prove that they have paid the remuneration unfairly;*
- *its inaccessibility to natural persons who purchase devices with recording capabilities for purposes manifestly unrelated to private copying (e. g. professionals);*
- *the very tight deadlines for sending a request for reimbursement to SIAE and the imposition of obligations that are not always justified and discourage the person entitled from requesting reimbursement (e. g. the adoption of codes of conduct). In general, reimbursement is subject to particularly restrictive conditions and contradicts, as noted above, with the EU law;*
- *the unilateral and discretionary amendment of the instructions, at any time, by SIAE itself (see p. 66, paragraph 66, of the Advocate General's Opinion recalled by the Italian Supreme Court at §2.14).*

Based on the judgments of the CJEU and the Italian Supreme Court, the unlawfulness of the Italian system stems from the combined effect of the failure to provide for general exemptions and, on the other hand, the lack of an effective refund procedure. The future compensation system in Italy should be based on objective and transparent criteria.

Legislative sources (excerpts):

The Ministerial Decree of 20 June 2014 on the determination of compensation for the private reproduction of phonograms and videogram, was adopted by the Ministry (MIBACT”) on 20 June 2014 under Article 71 septies, paragraph 2 of the Copyright Law.

- **Article 2 of the Technical Annex to the Decree** sets out the amounts of compensation in respect of private copying with reference to a list of product categories.
- **Article 4 of the technical annex** provides as follows:
 1. *The Collecting society SIAE shall promote protocols for more effective application of the present provisions, in particular for the purpose of providing objective and subjective exemptions, such as, for example, in the event of the professional use of devices and media or in respect of certain devices for video games. Those application protocols shall be adopted in agreement with the persons obliged to pay the compensation for private copying, or their trade associations.*
 2. *Until the protocols referred to in paragraph 1 have been adopted, the agreements valid before the present provisions shall remain in force.*
- **Article 71 septies of the Copyright Law** provides:

1. *The authors and producers of phonograms, and the original producers of audiovisual works, the performers and producers of videograms, and their successors in title, shall be entitled to compensation for the private copying of phonograms and videograms referred to in Article 71 sexies. In respect of devices designed solely for the analogue or digital recording of phonograms or videograms, that compensation shall consist of a percentage of the price paid by the final purchaser to the retailer which, in respect of multipurpose devices, shall be calculated on the basis of the price of a device with characteristics equivalent to those of the internal component designed to record or, where that is not possible, of a fixed amount for each device. In respect of audio and video recording media, such as analogue media, digital media and internal or removable memory designed for recording phonograms or videograms, the compensation shall consist of a sum corresponding to the recording capacity provided by those media. In respect of remote video recording systems, the compensation referred to in the present paragraph shall be payable by the person who provides the service and shall correspond to the remuneration obtained for providing that service.*
 2. *The compensation referred to in paragraph 1 shall be set, in accordance with [EU] law and having regard, in any event, to reproduction rights, by a decree of [MIBAC] adopted no later than 31 December 2009, on the basis of the opinion of the committee referred to in Article 190 and the associations which represent the majority of the manufacturers of the devices and media referred to in paragraph 1. In setting the compensation, account shall be taken of the application or non-application of the technological measures referred to in Article 102 quater and the different effect of digital copying in comparison with analogue copying. The decree shall be updated every three years.*
 3. *The compensation shall be payable by any person who manufactures or imports into the territory of the State, for profit-making purposes, the devices and media referred to in paragraph 1. Those persons must submit to the [SIAE], every three months, a declaration indicating sales made and compensation due, which must be paid at the same time. Where no compensation is paid, the distributor of the recording devices and media shall be jointly and severally liable for payment. ...'*
- **Article 71 octies** provides as follows:
1. *The compensation referred to in Article 71 septies in respect of audio recording devices and media shall be paid to the [SIAE], which shall ensure, following deduction of its costs, payment of a 50% share to the authors and their successors in title, and a 50% share to the producers of phonograms, including through the intermediary of the most representative trade associations.*
 2. *Producers of phonograms shall pay without delay, and in any event within six months, 50% of the compensation received under paragraph 1 to the performers concerned.*
 3. *The compensation referred to in Article 71 septies in respect of video recording devices and media shall be paid to the [SIAE], which shall ensure, following deduction of its costs, payment of a 30% share of the compensation to the authors and the remaining 70% in equal shares to the original producer of audiovisual works, the producers of videograms and performers. 50%*

of the share paid to performers shall be allocated to the activities and objectives described in Article 7(2) of Law No 93 of 5 February 1992.



Latvia

In Latvia, an “ex-ante” exemption system is in place. However, the scope of the exemption is narrow, limiting the exemption to some specific professional use only. In particular, the exemption from the payment of levies only covers broadcasting organizations making a professional use of the device, wholesale importations for commercial purposes, and importations by natural persons for non-commercial purpose.

Article 34 of the Copyright Law of 2000 (as amended up to 2014)

(3) The blank tape levy shall not be paid if the equipment and blank recording media referred to in Paragraph two of this Section is imported for professional use by broadcasting organizations or the equipment and blank recording media are imported wholesale for reproduction of works for commercial purposes, as well as where natural persons import such equipment and blank recording media for non-commercial purposes.

In conformity with the “*International Survey on Private Copying – Law and Practice 2016*” published by WIPO and ThuisKopie, the Latvian levy system includes “ex ante” exemptions and “ex post” refunds, as follows:

- *Are there any consumers or buyers exempt from paying the levies? Professional users are entitled to a refund.*
- *Are there any products exempt from levies? Hard discs, memory cards and mobile phones with mp3 functionality and all analog devices and media are not levied. However, they are levied when imported but the levies are refunded if the products are sold to professional users.*

However, we could not assess the veracity of this information and the real effectiveness of the concerned refund schemes.

In any case, from the information above, it is that there is an indiscriminate application of the private copying levy “ex ante” to all types of digital reproduction equipment, devices and media, including in the case in which they are acquired by persons other than natural persons for purposes clearly unrelated to private copying, does not comply with European Union Law¹⁴. In that extent, the system clearly does not comply with the requirements stated by European Union law.

¹⁴ CJEU, October 21, 2010, case C-467/08, *Padawan*.

**Lithuania**

Lithuania has only a subjective “ex-post” reimbursement system. The levy is to be reimbursed based on the professional use made of the device.

Article 20 of the Law on Copyright and Related Rights no. VIII-1185 of May 18, 1999 (as amended up to 2014)

7. The paid compensatory remuneration shall be refunded in accordance with the procedure laid down by the Government in the following cases:

1) where blank media and devices are acquired for professional needs. For the purposes of the present Article, professional needs shall be deemed to be the needs of broadcasting organizations and persons circulating audiovisual works and works fixed in phonograms or objects of related rights for producers of audiovisual works and phonograms, where such needs are related to the fixation of works or objects of related rights and the needs of the persons who acquire blank media and devices for the purposes evidently other than reproduction of works for private use (e.g. where works are reproduced in public administration and defense agencies and organizations, hospitals, educational institutions, libraries and state archives, museums, research institutions and organizations and where reproduction of works is meant exclusively for the operational needs of the said institutions and organizations);

2) where blank media and devices are acquired for the needs of persons with a disability;

3) where blank media and devices are brought out of the territory of the Republic of Lithuania.

The procedure laid down by the Government should be subject to a further analysis. Based only on the information provided by this legal article, it is not possible to determine whether the system comply with European Union law or not. However, it should be noted that:

- On the one hand, the lack of an “ex ante” exemption means that that there is an indiscriminate application of the private copying levy “ex ante” to all types of digital reproduction equipment, devices and media, including in the case in which they are acquired by persons other than natural persons for purposes clearly unrelated to private copying, does not comply with European Union Law¹⁵. In that extent, the system clearly does not comply with the requirements stated by European Union law.
- On the other hand, in practice it is really difficult for a Member State to provide for an adequate refund system, because in practice it requires the implementation of complex mechanisms in order to be an effective and easy system, given that asking for refund is an administrative burden that can be cumbersome for those asking for such refund and more expensive than assuming the financial burden of undue levies.

¹⁵ CJEU, October 21, 2010, case C-467/08, *Padawan*, para. 53.

**Luxembourg**

In Luxembourg, a fair compensation is provided in the law but no levies have been implemented in practice.

**Malta**

In Malta, a fair compensation is provided in the law but no levies have been implemented in practice.

**Netherlands**

The Supreme Court of the Netherlands recently ruled (in October 2017) that the private copying levy regime in the Netherlands lacked an “ex ante” exemption, and, therefore, was not compatible with EU law from the transposition date of the Copyright Directive, 22 December 2002, until 1 January 2013. The Supreme Court’s ruling specifically determined that the private copying levy regime required parties, who should have been exempted (citing the CJEU’s rulings in Copydan and Microsoft), to pay private copying levies even though they supplied devices to persons other than private end users. The Supreme Court ruled that these parties are entitled to seek reimbursement of the levies that were wrongfully paid.

On 1 January 2013, a Ministerial Order became effective in the Netherlands which is currently under review by the Dutch Supreme Court. This Ministerial Order introduced an “ex ante” exemption scheme that requires a contractual agreement with the Stichting de ThuisKopie, the Dutch collecting society. A ruling by the Dutch Supreme Court on the compatibility with EU law of this “ex ante” exemption scheme and the “ex post” reimbursement scheme discussed below is expected in mid-2018.

An “ex post” reimbursement scheme exists for professional use which requires proof of payment, a fee of 8.50 Euros per request, and is inapplicable to devices purchase by legal entities unless there is also submitted user agreements with employees that specifically prohibit the use of company property (the applicable devices) to make copies that would be considered private copies if the applicable device was privately owned.

On 1 January 2018, a new Decision of SONT (the quasi-governmental foundation with some supervisory decision-making authority over the levy tariff-setting process) has allegedly become effective (its validity is being challenged both procedurally and substantively) which continues the “ex ante” exemption and “ex post” reimbursement schemes discussed above.

**Poland**

In Poland, there is a levy system in place, but there are no “ex ante” exemptions or “ex post” refunds. It could be noted that a reimbursement for export was provided by the law but has not been implemented yet.



Portugal

The system of copyright levies that was approved in Portugal under Law nº 49/2015 can be deemed to be incompatible with European Union law, as it results from the jurisprudence of the Court of Justice of the European Union.

In such regard, jurisprudence of the CJEU sets a number of principles that evidence the lack of conformity with EU law of the system of copyright levies system currently applied in Portugal:

- First, according to jurisprudence of the CJEU *“appropriate “ex-ante” exceptions (or under certain circumstances, “ex-post” reimbursements) should exist when products are supplied to persons other than natural persons for purposes clearly unrelated to copying for private use (e.g. business users and public administration), not being possible to restrict the application of such exemption to any prior registrations.”*¹⁶

However, Article 4 of Law nº 62/98, as amended, does not provide for real exemptions for sales to business and public administration customers in general, but only in very specific situations, and subjects the availability of such exemption to complying with certain prior registration requirements.

Article 4 of Law nº 62/98

1 - The equipment and supports purchased by natural or legal persons, public or private, are exempt from payment of the compensations provided for in this law, under the following conditions:

a) where their activity is for audiovisual communication or the production of phonograms and videograms exclusively for their own productions;

b) When its activity is aimed at supporting people with disabilities;

c) When its main activity is aimed at safeguarding the mobile cultural heritage;

d) Where the media are specially intended for the fixing of images or other works for exclusive use in the professional activity of the respective author, namely in the activity of photographer, designer, architect or engineer, as well as artistic professions duly framed by the code of economic activity;

2 - For the purposes of the provisions of the preceding paragraph, natural or legal persons acquiring persons must:

¹⁶ CJEU, March 5, 2015, case C-463/12, *Copydan*, para. 42-51.

a) To request from the management entity referred to in Article 6, prior to the acquisition of the equipment and supports, the issuance of a declaration stating that the use of the same is included in one of the exemption situations, indicating and proving the respective object of activity;

b) Present, at the time of purchase of the equipment and supports, the declaration referred to in the previous paragraph.

3 - If no reasoned refusal occurs, the failure to issue the declaration referred to in paragraph a) of the previous number, within 15 days of delivery of the request, can be filled by the delivery of proof of delivery of the request.

4 - The legal persons who use the equipment and storage media provided for in sub-paragraphs (p) and (q) of section 2.3 of the table attached to this law are also exempt from paying the compensations provided for in this law without making them available to natural persons provided that equipment and supports are an integral part of automated document management and data-processing systems which do not include reproductions of protected works.

- Second, there should be no combined system of copyright levies and operator fees; no levies when compensation by mean of operator fees is a viable option¹⁷. However, Article 3.2 of Law n° 62/98, as amended, provides for a 3% operator fee, which is accumulated to the fair compensation amount paid in form of levies by repro-centers.

Article 3.2 of Law n° 62/98

2 - Where the use is customary and to serve the public, the sale price for photocopying, electrocopies and other media includes a remuneration the amount of which is fixed by agreement between the legal person provided for in Article 6 and public and private entities private companies, whether for profit or not, using device for the fixing and reproduction of works and services.

- Finally, under jurisprudence of the CJEU “levies must be intended to provide fair compensation to concerned rightholders and can only be used to benefit entitled rightholders through detailed arrangements that are not discriminatory, not being consistent with EU law to benefit to persons other than those entitled or to exclude, de jure or de facto, those who do not have the nationality of the Member State concerned.”¹⁸

However, this principle is not met by the Article 5-A recently added to the Law n° 62/98, which provides that fair compensation collected every year in excess of 15 million euros must be allocated to the *Fundo de Fomento Cultural* (FCC), created under the *Direcção-Geral dos Assuntos Culturais*, “as a contribution to support programs of encouragement to the promotion of cultural activities and the cultural and artistic creation, having as a priority the investment in new talents.”

¹⁷ CJEU, November 15, 2015, case C-572/13, *Hewlett Packard Belgium* para. 82 and ff.

¹⁸ CJEU, July 1, 2013, case C-521/11, *Amazon*, para. 53-54.

It is evident that such “overcompensation” in excess of 15 million Euros should be refunded to those that paid such excessive levies. However, no refund system exists in the benefit of those paying undue levies, but in the benefit of a Governmental entity.

The nature and high number of incompatibilities between Portuguese and EU law (as highlighted above, plus some others such as allocation of levies to publishers, no correlation between compensation and harm and others) make hardly difficult to make an interpretation of Portuguese law “in conformity” with EU law and should result on the non-applicability of the current Portuguese copyright levies system.



Romania

Romania has a very narrow “ex-ante” exemption system, and no “ex-post” reimbursement system. In such regard, it provides exemption of the payment of the levy based on subjective criteria, within a limited scope, inasmuch as exception covers only professionals that are audio and audiovisuals producers, broadcasters and television for own programs.

Article 108 of the Law no. 8 of March 14, 1996 on Copyright and Neighboring Rights

Compensatory remuneration for private copying shall not be paid where unrecorded video, audio or digital physical media manufactured within the country or imported are traded wholesale to the producers of audiovisual and sound recordings or to television and radio broadcasting organizations for their own broadcasts.

According to the jurisprudence of the CJEU, “the indiscriminate application of the private copying levy to all types of digital reproduction equipment, devices and media, including in the case in which they are acquired by persons other than natural persons for purposes clearly unrelated to private copying, does not comply with Article 5(2) of Directive 2001/29”¹⁹. A scope of “ex ante” exemptions as narrow as the one in Romania can be assimilated to an indiscriminate application of the private copying levy. Therefore, the Romanian system has to be considered as contrary to European Union law.



Slovakia

The Slovak Republic provides an exemption of levies for products to be used exclusively for personal use of the person liable to pay levies in first place (importer or recipient in the country). However, no exoneration exists in case those liable to pay the levies put the products into circulation in the market.

Section 167 of the Copyright Act no. 185/2015

(3) Remuneration shall not be paid for technical device or blank recording medium pursuant to Section 36 par. 3 a), which have been exported to third country or sent to another Member State. Remuneration shall not be paid also for technical device or blanket recording medium pursuant to

¹⁹ CJEU, October 21, 2010, case C-467/08, *Padawan*, para. 53.

Section 36 par. 3 a) which will be demonstrably and exclusively used only for personal use of the importer or recipient.



Slovenia

In Slovenia, a levy system is in place but it provides no “ex ante” exemption or “ex post” refund system for professional use. Only libraries, museums and educational organizations are exempted from levies for copies they made provided they are not intended for material benefit.



Spain

In Spain, the Royal Decree-Law 12/2017, of July 3, 2017, re-establishes and updates the old Spanish system of fair compensation through levies that was in force before 2012, by modifying Article 25 of the Consolidated Text of Intellectual Property Law (TRLPI) for this purpose, and delimiting the concept of private copying in amended Article 31.2 b) TRLPI.

Although it abolishes the system of compensation through State-budget and goes back to the levy system that was in force before 2012, the new legislation introduces a series of novelties in comparison with the previous system, some of which were deemed to be necessary in order to comply with the rulings of the CJEU and to prevent, in short, the financing of the equitable compensation from being paid by those who acquire the products for a use manifestly different to the making of private copies. However, those reforms are insufficient and the legal issue of lack of compatibility with EU law remains in the new Spanish system.

One-stop shop

A novelty of the new system is the establishment of a one-stop platform (“*Ventanilla Unica*”) to coordinate activities of collecting societies and act as a central management system for private copying compensation.

The referred central management system is established by the amendment to Article 25 TRLPI, which provides for the setting up by the collecting societies of a legal person responsible for managing payment exemptions and reimbursements, channeling the declarations of levied devices by those liable for payment and the unified communication of invoicing. In general, this entity will act as an intermediary between debtors, users and collecting societies. It is subject to the supervision of the Ministry of Education, Culture and Sport, for which it has various information obligations detailed in Article 25.12 TRLPI.

This central management authority has been providing online services through the <http://ventanillaunica.digital/> website since October 2017.

Although the existence of such one-stop shop and the use of electronic communication protocols may suggest an effective and simple system, it should nevertheless be stressed that this is not the case, as it is elaborated below. Moreover:

- For invoicing and payment related issues, *Ventanilla Unica* acts only as a single point of communication, but invoicing and payment has to be effected directly between debtors and the concerned collecting societies:

	Books and assimilated publications	Phonograms	Videograms
Authors	CEDRO VEGAP	SGAE	SGAE DAMA
Artists	--	AIE	AISGE AIE
Producers & Publishers	CEDRO	AGEDI	EGEDA

This means that for products that are eligible for compensation of multiple type of protected works (such as PCs, which compensation is shared among the 3 types of modalities of reproduction), debtor will have to pay a share of the compensation to up-to 8 collecting societies.

- Due to the lack of visibility and publicity of this system of prior certification, it leaves many professionals, who have not paid the necessary attention to the introduction of the new system, out of the scope of action. In order to ensure a better adequacy with European Union law, and not to fall in an *ineffective or excessively difficult*²⁰ system, a better communication about the existence of this platform should be carried out.

“Ex-ante” exemptions

The prior system, which financed the compensation from the State’s general budget, failed in front of the CJEU and the Spanish Supreme Court because it incurred precisely in the same mistake as the levy system that preceded it²¹: resulting in an indiscriminate application of levies not only to natural persons acting for private purposes, but also legal persons and professionals.

That’s why a new system was created in 2017, in an attempt to better comply with EU law. The new Spanish system amends Article 25 TRLPI seeking to meet the requirement of non-indiscriminate application of levies set by first time in the *Padawan* case by introducing a dual system of exemptions and reimbursement.

Article 25 (7) TRLPI lays down a number of cases in which the acquisition of equipment, device and reproduction media is exempt from the payment of fair compensation (levies):

- (a) purchases by public sector entities;

²⁰ CJEU, July 11, 2011, case C-521/11, *Amazon*, para. 37.

²¹ Indeed, the previous Spanish State-budget system was enacted in order to put an end to the injustice involved in the indiscriminate application of the levies to all type of purchasers, -be they natural or legal persons-, but, by dedicating a part of the State’s budget without allocating such funding from taxes coming from natural persons only, it was failing to comply with an essential criteria of the compensation for private copying, that is the necessity to link the payment of the compensation for private copying to the realization of private copying, as it was established in the judgment *Padawan* , and repeated on an ongoing basis.

- (b) acquisitions made by legal or natural persons acting as final consumers that justify the exclusively professional use of the concerned equipment, device and supports;
- (c) those carried out by those who have the required authorization to carry out the corresponding reproduction of works, artistic performances, phonograms or videograms, as appropriate, in the exercise of their activity; and
- (d) those carried out by natural persons for their private use outside the Spanish territory as travelers.

These last two exceptions were already covered by the Ministerial Order of 2008.

The requirements to benefit from an exemption differ depending on whether the final user is an entity of the public sector or is a legal person or a professional individual.

- a) Entities of the public sector must prove that they benefit from the exemption by means of a certificate issued by the competent administrative body, as established in **Article 25.7 (a) and (b)**:

The following acquisitions of equipment, devices and media of reproduction shall be exempted from payment of compensation:

- a) Those carried out by public sector entities as established in the consolidated text of the Public Sector Contract Law, approved by Royal Legislative Decree 3/2011, of 14 November, as well as by the Congress, the Senate, the General Council of the Judiciary, the Court of Auditors, the Ombudsman, the Legislative Assemblies of the Autonomous Communities and the institution of the Autonomous Communities equivalent to the Court of Auditors and the Ombudsman. This exemption shall be credited to the debtors and, if applicable, those jointly and severally liable:*

1º By means of a certificate issued by the competent body of the General State Administration, of the Autonomous Community Administrations, of the entities that are part of the Local Administration, the managing entities and the common services of the Social Security, of the Public Universities, as well as the Congress, the Senate, the General Council of the Judiciary, the Court of Auditors, the Ombudsman, the Legislative Assemblies of the Autonomous Communities and the institution of the Autonomous Communities equivalent to the Council of State, the Court of Auditors, and the Ombudsman.

2º By means of a certificate issued by the body managing and guiding mutual insurance companies collaborating with the Social Security.

3º By means of a certificate issued by the territorial administration on which the rest of the bodies that form the public sector depend or relate to.

In the light of this legal provision, it may be questioned why should an entity of the public sector need a certificate from a “competent administrative body” to certify that it is a public body benefiting from the exemption? Isn’t it obvious for entities of the public sector that they belong to the public sector?

In our view, this is an unnecessary and disproportionate condition for the application of an “ex-ante” exemption.

- b) For legal persons and professionals acting as final users, who acquire the devices for professional uses, “ex ante” exemption is subject to obtaining a prior certification from the online platform *Ventanilla Unica*.

(b) Those made by legal or physical persons acting as final consumers, justifying the exclusively professional use of the equipment, devices and media purchased and provided that these have not, de facto or de jure, been made available to private users and which were manifestly reserved for uses other than the making of private copies, which they must prove to the debtors and, if applicable, to those jointly and severally liable through a certification issued by the legal entity referred to in paragraph 10. In the absence of a certification, persons benefiting from this exemption may request the reimbursement of the compensation.

- c) A similar certification system exists for exemption of business users that are authorized to make reproductions under a license:

(c) Those [reproductions] made by those who have the required authorization to carry out the corresponding reproduction of works, artistic performances, phonograms or videograms, as appropriate, in the exercise of their activity, which they must prove to the debtors and, if applicable, to those jointly and severally liable, through a certification issued by the legal entity referred to in paragraph 10.

The debtors who are manufacturers or importers benefit indirectly from this "ex ante" exemption system for direct sales to end-users, insofar as they are not obliged to pay compensation for those sales in which they have not passed on the levy amount to the end user because he was exempt under Article 25.7 TRLPI.

However, the situation is different for the wholesale and retail distributors who are successive purchasers of equipment and media from manufacturers/importers. The debtor (manufacturer or importer) will, *in principle*,²² pass on the amount of the fee to these parties - intermediate distributors - since, as they are not final purchasers, even if they are undertakings, they are not beneficiaries of the exemption system provided for in Article 25.7 TRLPI.

According with jurisprudence of the CJEU, the indiscriminate application of the levy can **only** apply where there are practical problems in identifying end-users; however, on the contrary, such applications won't be justified where the debtor can identify who will be the final purchaser and prove that the levied devices are supplied - directly or indirectly through a reseller - to an end customer the benefits from such exemption of payment of levies.

²² The term "*in principle*" is used here because an interpretation in accordance with EU law should make it possible not to pass on the levy to certain sales made by the debtor (manufacturer or importer) to the jointly and severally liable person (distributor), when it is known beforehand, and it can be demonstrated “ex-post” in the relevant audit, that these products are intended exclusively for purchase by a person exempt under Article 25.7 TRLPI.

What typically happens is that these 2nd tier distributors are legally prevented from passing the levy to end-users that benefit from the levy exemption, so that in these cases it is the distributor who bears the financial burden of the fee.

In order to resolve this dysfunctionality, the **Second transitional provision. *Transitional regulation of fair compensation for private copying of the Royal Decree-law 12/2017*** provides in its paragraph (3) for a system of reimbursement to be implemented by Royal Decree in connection with the levies that were paid by the distributors to the manufacturers or importers, but were not passed on to end-users holding a certification that made them eligible for a levies exemption:

“The distributors, wholesalers and retailers, who are subsequent acquirers of equipment, devices and media may request to the collective management societies, according to the procedure to make effective the fair compensation that will be developed by Royal Decree, the reimbursement of that corresponding to the sales of equipment, devices and media to those exempted according to paragraph 7.”

“Ex post” reimbursement

Moreover, Article 25(8) TRLPI provides for an additional reimbursement system in two cases:

- a) for legal or natural persons acting as final users who have not been exempted from the payment of compensation and can justify the exclusively professional use of the equipment; and
- b) for devices intended for export or intra-Community supply.

Article 25(8) TRLPI:

8. The legal or physical persons not exempted from the payment of the compensation may request the reimbursement of it in the terms established by law when:

- a) *They act as final consumers, justifying the professional use of equipment, device or media purchased, provided that they have not, de facto or de jure, been made available to private users and which were manifestly reserved for uses other than the making of private copies.*
- b) *The acquired equipment, devices or media are intended for export or intra-Community delivery.*

No requests for reimbursement of less than twenty-five euros will be accepted. However, if the request for reimbursement accumulates the fair compensation paid for the acquisition of equipment, devices and media made throughout a year, they will be admitted even if they do not reach twenty-five euros.

The method of reimbursement provided for in Article 25 (8)(a) TRLPI seems to have no other objective than to serve as a “second chance” for end-users who have not been able to benefit from the exemption system in Article 25 (7)(b) because they did not receive the certification required from the *Ventanilla Unica*.

However, the refund system is subject to significant administrative burdens given that refund is to be provided not by the *Ventanilla Unica*, but by each collecting society that receives a share of the concerned

levy. For example, the levy applicable on a PC (5.45€) is share among 8 different collecting societies, and notwithstanding the *Ventanilla Unica* acts as single point of communication, the reimbursement is to be issued effectively by each collecting society that received a share of the fair compensation, meaning that the end-user has to issue 8 invoices for insignificant amounts in order to get full refund of the levy (without VAT, as further discussed below).

Overall assessment

The combined system of “ex-ante” exemptions with the possibility of obtaining an “ex post” reimbursement that is available in Spain suffers from certain defects and raises a number of uncertainties and issues. The following issues can be outlined:

- First of all, overall, we understand that the scheme established under the new Spanish system of fair compensation for private copying is incompatible with EU law, mainly because the new article 25.7.(b) TRLPI requires for a prior certification by collecting societies (organized under the *Ventanilla Unica*) in order to benefit from an “ex ante” exemption, which is equivalent to requiring a prior registration with the organization in charge of managing the private copying fee, what has been prohibited by the CJEU in *Copydan*²³.

On the contrary, in order to ensure compatibility with EU law, a compliant system of “ex ante” exemptions must involve the right to exempt the payment of levies, insofar as it can be proved that the devices are acquired as end-users by an undertaking or professional for the purposes of his business activity, without the need to fulfil any additional requirements, in particular without the need to obtain the prior certifications referred to in the article 25.7 TRLPI.

- Secondly, the legislator has been zealous of exempting final purchasers, but has been nevertheless unfavorable to intermediate distributors who neither make private copies nor benefit, in principle, from the “ex-ante” exemption system. Without prejudice to the fact that they may request reimbursement of the compensation which has been passed on to them and which they have not been able to pass on because they are an exempted purchaser, they must manage it with the competent body and temporarily bear the financial burden of the royalty.
- Thirdly, it is uncertain in the law whether, in addition to the cases of reimbursement provided for in Article 25.8(b) and in paragraphs 3 *in fine* of the Second Transitional Provision, the principal debtor (manufacturer or importer) may request reimbursement of the compensation which he would have paid, but which was not due because exempted. This situation may arise for instance when the manufacturer wants to benefit its distributors or final customers by avoiding not only the administrative burden of claiming reimbursement, but also the corresponding financial burden, by reimbursing itself to its distributors and/or final customers and then claiming reimbursement from the legal person. In this regard, it can be understood that the reference contained in paragraph 4 of the Second Transitional Provision of Royal Decree-Law 12/2017 to the “*reimbursement of the amount of compensation paid by the debtor*” must be understood as meaning that the manufacturer or importer may also request reimbursement of compensation when applicable.

²³ CJEU, March 5, 2015 in case C-463/12, *Copydan*, para 50 and 51.

- Fourthly, another question that is open to uncertainty is the possibility for public bodies under Article 25.7 (a) TRLPI to have access to the reimbursement system in the event that, for whatever reason, they had paid the compensation when they were supposed to be exempted. Although Art. 25.8 TRLPI does not expressly provide for this, it seems logical that they should be treated in the same way as private legal persons.
- Fifthly, the Second Transitional Provision of the Royal Decree-law 12/2017 provides in its second paragraph the obligation for debtors (mainly manufacturers and importers) to detail in their liquidation [should this be application?] the exemptions that they have made effective with public sector entities by virtue of the provisions of article 25.7 (a) TRLPI, but does not contain a similar provision for the exemptions that have been granted to undertakings and professionals under Article 25 (7)(b) TRLPI. This requirement for information, although limited to public sector customers who are not registered in the online central management system, seems to be disproportionate and requires detailed information at the individual level for each delivery, which could easily be verified “ex-post” by the legal person or management entities in the exercise of the control operations provided for in Article 25.11 TRLPI.

Moreover, the draft Royal Decree proposed by the Ministry of Culture, as further explained in section below, provides for a significant number of information duties by debtors in connection to the exemptions they apply to business users (including individual identification of those exemptions: purchaser, invoice date, ...).

It is questionable whether these information obligations are compatible with EU law, since these are cases outside the scope of the private copy limit and seem not aligned with the principle of proportionality. In fact, the Advocate General Nils Wahl was vocal on this issue at the hearing concerning SIAE case²⁴, when the Italian management entity SIAE indicated that debtors applying levy exonerations should report to SIAE the sales to companies exempted from compensation. In such regard, AG Wahl indicated that these obligations did not seem to be appropriate since those sales were outside the private copying exception itself, and since they were not natural persons acting for private purposes.

- Finally, an additional problem arises regarding VAT: Given that payment of levies by manufacturers / importers to collecting societies is VAT excluded²⁵, levy reimbursement by collecting society won't include the VAT paid originally paid by the end-user (or the distributor, when it seeks refund) on top of the levy. This results in the need to rectify the invoices that were issued before to exclude the VAT from those original invoices when the fair compensation is to be refunded,²⁶ adding extra administrative burden to make *effective* the right of reimbursement, which may result in a minimal % of reimbursement claims being effectively submitted to *Ventanilla Unica*.

Pending Royal Decree(s): Further regulation of subjective “ex ante” exemption and “ex post” reimbursement protocols, plus effective implementation of an objective “ex ante” exemption

²⁴ CJEU, September 22, 2016, case C-110/15, Microsoft.

²⁵ CJEU, January 18, 2017, case C-37/16, SAWP.

²⁶ See response to binding consultation number V3269-17 issued by the Spanish General Directorate of Taxes (DGT) on December 21, 2017.

The Royal Decree-law 12/2017, in effect since August 1 2017, provides that the Government shall approve a Royal Decree within one year in order to regulate in more detail the process for making effective those “ex ante” exemptions and “ex post” reimbursements.

The Ministry of Culture has drafted a proposal of Royal Decree that should be approved within next months, which contains several provisions that impose restrictive and onerous requirements to apply an “ex ante” exemption or an “ex post” refund, narrowing even more the possibility to apply them and exacerbating the incompatibility of the schemes with EU law.

Moreover, such Royal Decree should set also a new list of devices subject to levies, which is to be elaborated taking account of the criteria provided in Article 25 (4) and (5) TRLPI.

First Final Disposition: Regulatory development.

Within a maximum period of one year from the entry into force of this Royal Decree-Law, a Royal Decree must be approved to develop the provisions contained therein and that, by applying the procedure and criteria contained in paragraphs 4 and 5 of Article 25 of the consolidated text of the Intellectual Property Law, it determines for the first time, on a non-transitory basis, the equipment, devices and media subject to the payment of fair compensation, the amounts that the debtors must pay for this concept to the creditors and the distribution of this compensation between the different modalities of reproduction.

In such regard, it is important to note that under Article 25.5 (d) TRLPI “*equipment, devices and media for reproduction manifestly conceived for professional use*” shall not be subject to the payment of fair compensation for private copying.

The Spanish Government has left aside the implementation of such list of devices subject to levies, and deferred to a second Royal Decree to be drafted once the Royal Decree dealing with exemptions and refunds has been approved.

In case this provision is finally effectively implemented by a new Royal Decree by excluding from levies those categories of products that are intended for use by business customers (e.g. certain categories of computing or printing products for instance), then the indiscriminate application of levies may be significantly mitigated, limiting the application of the exemption and refund procedures to those products that because of their technical characteristics are conceived indistinctly for business and consumer use (e.g. memories sticks, ...). On the contrary, if such exoneration of devices “*manifestly conceived for professional use*” is not effectively implemented, then the indiscriminate nature of the levy system will continue being a legal issue reality in Spain.



Sweden

Sweden has a legal scheme for “**ex ante**” exemption for business users, but in practice there are two different systems in place: One follows the law, whereas the other one is subject to a contract being signed with collecting society Copyswede.

Legal System

The legal basis for the Swedish professional use exemption is the **Article 26k second paragraph, item 1 of Act no. 1960/729 on Copyright in Literary and Artistic Works (as amended up to 2006)**

Section 26 k

When a proprietor trader, in the course of its professional activities, manufactures or imports into this country devices on which sounds or motion pictures may be recorded and which are especially suited for the production of copies of works for private use, the authors of the protected works that have subsequently been broadcast by sound radio or television or on devices through which they can be reproduced, are entitled to compensation from the proprietor.

However, the authors are not entitled to compensation where the devices manufactured or imported:

- 1. are used for purposes other than the production of copies of works for private use;*
- 2. are exported from the country; or*
- 3. are used for the production of copies of works for disabled individuals. (SFS 2005:359).*

The professional use exemption that follows from the law is applicable in practice only if the importer can prove that the device at issue will be exclusively used for professional copying. If the device may be allegedly used for both professional and private copying (which allegedly may be the case for devices such as mobile phones that are acquired by a company and used by its employees) the exemption in the law is not applicable.

In order to apply the professional use exemption that follows from the law, the importer must provide proof to Copyswede that the buyer is a company or any other type of non-personal entity and include a confirmation from the buyer that it acquires the device for mere professional use. Should there be a court dispute with Copyswede on whether or not the professional use exemption is applicable, the importer has to submit the same type of evidence to prove that the exemption shall be applied.

Contractual System

A simplified system for a professional use exemption may be used for certain devices (for example mp3 players and set top boxes) based on a contract with Copyswede. Part of the reason for this system is that by contract with Copyswede the industry and Copyswede agreed to shift the point of payment responsibility from the importer to the company closest to the customer, provided that such company later in the sales chain is a company that has agreed to pick up the responsibility for payment.

Moreover, under this system, Copyswede allows the importer to deduct such devices from payment that are sold to a buyer who is registered in Copyswede's professional use database.

The system has been in force since 2003, with 1,351 companies being registered in Copyswede's professional use database. Any types of enterprises and industry sectors may register.

An importer that imports leviable devices to Sweden must register with Copyswede and report the number of devices that it has imported and how many of these devices that are covered by the professional use exemption. Reports must be made on a monthly basis. However, if the importer only sells to distributors who are registered in Copyswede's professional use database, the importer may instead choose to report on a quarterly basis.

A registrant in Copyswede's professional use database can be any company located in Sweden, but it does not need to have its headquarters in the country. Furthermore, there are no special requirements for companies beside the fact that they are a company and that they have agreed to pick up responsibility for payment if they sell devices to private persons. The application form is available online.

Every other year, those companies that are registered in Copyswede's professional use database must submit a "renewal form" to confirm that they wish to remain registered. On the form, the company must state the name of the supplier(s) and the quantity of the various product categories bought for professional use during the preceding two years. The amount of products bought from each supplier does not have to be specified. Furthermore, if the company has bought products not intended for professional use, the categories and quantities of such products must also be stated in the form and paid for. Companies that do not submit the form are removed from the register. Copyswede sends out the renewal form to the registered company at the end of the second year of the reporting period. A reminder is thereafter sent on January 19 to companies that have not submitted the form. If the form is not submitted by the end of February, the company is removed from the register.

The information supplied by the professional users is used as a basis for scrutinizing the payments made by manufacturers and importers.

Registration in Copyswede's professional use database can be refused if the registrant does not provide the necessary information when registering or if the stated planned use does not qualify as professional use. As mentioned above, the registration must be renewed every two years. Copyswede's examination/audit is focused exclusively on the manufacturers and importers who are liable to pay the levy to Copyswede, not on the users. Copyswede therefore does not revoke registrations of professional users. Thus, registrations are not removed from the database unless the user fails to renew the registration.

Documents required by Copyswede for the registration as manufacturer/importer: Company name, a Swedish company ID number ("Organisationsnummer"), contact details (postal and email address, telephone and fax, visiting address and contact person), description of the company and how the media/equipment is going to be used in the business, signature by the company's authorized signatory(-ies), a company registration certificate (an excerpt/printout from the online company register is sufficient), stating the authorized signatory(-ies) of the company. The certificate must not be older than one year.

Those entities that are registered with Copyswede may also seek for reimbursement in case that they paid undue levies.

In the light of the abovementioned, our understanding is that the system can be appreciated as not complying with European Union law:

- 1) Eligibility for “ex-ante” exemption under the legal system is subject to proving “exclusive use” for professional use and is not working in practice. The contractual system is subject to prior contracting with Copysweden.²⁷, which provides for a lot of unnecessary conditions to register.
- 2) Similarly, Swedish regime adds unnecessary conditions in the reimbursement proceeding, which do not seem to be justified by any relevant reasons that would permit the system to be more efficient or easier.²⁸



United Kingdom

In the United Kingdom, the Government introduced a private copying exception in 2014 without compensation arguing that the harm caused by the exception would be minimal.

After a judicial review against the government initiated by music organizations, the legislation was declared “unlawful” by the High Court and thus, has been overturned in June 2015, leaving the United Kingdom without a private copying exception.

²⁷ CJEU, March 5, 2015 in case C-463/12, *Copydan*, para. 50 and 51.

²⁸ CJEU, July 11, 2011, case C-521/11, *Amazon*, para. 37.