

AG Szpunar: licensee may decompile a computer program to correct errors unless restricted by licence (Top System SA v Belgium)

TMT analysis: According to the Advocate General (AG) Szpunar, the 1991 Software Directive, Directive 91/250/EC allows licensees to decompile a licensed computer program, to the extent decompilation is necessary to correct errors in the program. Decompilation is the reverse process of compilation, aiming at creating human-readable (and editable) source code from the machine-readable object code (also known as binary code). According to the AG, the right to decompile for error correction is however strictly limited and only applies unless the licence agreement provides otherwise. This case concerned the provisions of the repealed Directive 91/250/EC but the relevant Articles are substantively identical to those contained in the current Software Directive, Directive 2009/24/EC. Written by Hakim Haouideg, Partner at Fieldfisher.

Top System - [Case C-13/20](#)

What are the practical implications of this opinion?

AGs present opinions on cases brought before the Court of Justice that raise new points of law. AGs' opinions are carefully considered by the court but are not legally binding. The Court of Justice often follows the AG's opinion, but may not do so.

The relevant Articles of the 1991 Software Directive are substantively identical to those contained in the current Software Directive, Directive 2009/24/EC. Therefore, the practical implications would apply to arrangements governed by either Directive.

Practitioners already know that software licence agreements may not forbid decompilation when it is indispensable to obtain information necessary to achieve the interoperability between computer programs and provided that the conditions laid down in the relevant Software Directive are met.

Outside this (narrow) exception, the AG concluded that contractual provisions forbidding decompilation for any other reasons are permitted by each Software Directive, including when decompilation is intended only for error correction. Such clauses are commonly included in software licences.

But what happens when the software licence does not expressly forbid (or does not address) decompilation?

Should the Court of justice follow the AG's opinion, licensees would be allowed to decompile the licensed software for error correction without the licensor's consent. This means that licensees would be entitled to decompile the software when the licence agreement does not expressly forbid it.

Carefully drafted provisions on decompilation should therefore remain an essential part of the licence agreement when the licensor wishes to prevent this practice.

What was the background?

Top System developed a software licensed to Selor, the staff selection agency of the federal government of Belgium.

When a dispute arose between the parties regarding the correction of some errors in the software, Selor decided to take the matter in its own hands and decompiled the software in order to correct the errors without involving Top System.

Top System started proceedings against Selor, claiming damages in excess of €1.3m for the decompilation of its computer program without its authorisation.

The claim was rejected in first instance.

On appeal, the Brussels Court of Appeal noted that the 1991 Software Directive only expressly refers to the decompilation in the context of interoperability (Article 6) but remains silent with regards to decompilation in the context of error correction.

Top System argued that because Article 6 of the 1991 Software Directive is the only provision referring to decompilation and only allows decompilation in the context of interoperability, then the 1991 Software Directive requires that decompilation is not allowed in any other context (such as error correction).

On the other hand, Selor, supported by the European Commission, argued that decompilation for error correction is permitted under Article 5(1) of the 1991 Software Directive, which allows the licensee to perform the acts of reproduction referred to in Article 4 (a) and (b) of the 1991 Software Directive when such acts are required for a lawful acquirer to use the software in accordance with its intended purpose, 'including for error correction'.

What was the AG's opinion?

Siding with Selor and the European Commission, AG Szpunar considers that decompilation is an act that falls within the concept of reproduction or adaptation in Article 4 (a) and (b) of the 1991 Software Directive.

Therefore, pursuant to Article 5(1) of the 1991 Software Directive, the licensee may – in the absence of specific contractual provisions – decompile the software when the decompilation is necessary for the use of the computer program in accordance with its intended purpose, including for error correction.

Article 6 of the 1991 Software Directive is not a *lex specialis* and is independent (and autonomous) from Article 5(1) of the same Directive.

The AG Szpunar then went on to elaborate on what he considers to be 'an error' and when it is 'necessary' to decompile for error correction.

An 'error' is any dysfunction that prevents the licensee from using the computer program in accordance with its intended purpose. In other words, the AG does not consider that error correction includes any evolution or improvement of the computer program. Even technical obsolescence should not be considered as an error, which means that upgrading the computer program to avoid obsolescence should not be considered as correcting an error according to the AG Szpunar.

Turning to when the decompilation is 'necessary', the AG considers that this requirement should be interpreted to cover not only the code that needs to be corrected in a strict sense but also the code

that must be decompiled in order to search for the error to be corrected (which could imply the decompilation of the entire computer program, depending on the circumstances).

Finally, the AG concluded that clauses limiting or forbidding a licensee's right to decompile for error correction are valid in light of the 1991 Software Directive.

Case details

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