Court of Justice EU, 25 May 2023, AKM v Canal+

AUTOREN / KOMPONISTEN / MUSIKVERLEGER

v

CANAL+

COPYRIGHT – RELATED RIGHTS

Where a satellite package provider is required to obtain authorisation for the communication to the public by satellite in which it participates

- **That authorisation must be obtained only in the Member State in which the programme-carrying signals are introduced into the chain of communication leading to the satellite.**

30 It follows from the wording of Article 1(2)(b) of Directive 93/83 and from the scheme of Article 1(2)(a) to (c) that, where a satellite package provider is required to obtain, for the communication to the public by satellite in which it participates, the authorisation of the holders of the copyright and related rights concerned, that authorisation must be obtained, such as that granted to the broadcasting organisation concerned, only in the Member State in which the programme-carrying signals are introduced into the chain of communication leading to the satellite.

31 Furthermore, that conclusion is supported by the objective pursued by Article 1(2)(b) of Directive 93/83. In that regard, it should be noted, first, that it is apparent from recitals 5 and 14 of that directive that the legal uncertainty resulting from differences between national rules of copyright constitutes a direct obstacle in the free movement of programmes within the European Union and that the legal uncertainty regarding the rights to be acquired, which impedes cross-border satellite broadcasting, should be overcome by defining the concept of communication to the public by satellite at EU level, in order, in particular, to avoid the cumulative application of several national laws to a single act of broadcasting. Secondly, recital 15 of that directive further states that the acquisition on a contractual basis of exclusive broadcasting rights should comply with any legislation on copyright and rights related to copyright in the Member State in which communication to the public by satellite occurs.

32 It thus follows from recitals 5, 14 and 15 of Directive 93/83 that Article 1(2)(b) thereof seeks to ensure that any 'communication to the public by satellite', within the meaning of Article 1(2)(a) and (c), is subject exclusively to the legislation on copyright and related rights in force in the Member State in which the programme-carrying signals are introduced into the chain of communication leading to the satellite. Accordingly, it would be contrary to that objective if a satellite package provider were also required to obtain authorisation from the holders of the copyright and related rights concerned in other Member States.

33 In the light of all the foregoing considerations, the answer to the first question is that Article 1(2)(b) of Directive 93/83 must be interpreted as meaning that, where a satellite package provider is required to obtain, for the communication to the public by satellite in which it participates, the authorisation of the holders of the copyright and related rights concerned, that authorisation must be obtained, such as that granted to the broadcasting organisation concerned, only in the Member State in which the programme-carrying signals are introduced into the chain of communication leading to the satellite.

Source: **ECLI:EU:C:2023:424**

Court of Justice EU, 25 May 2023

(A. Arabadjiev, K. Lenaerts, L. Bay Larsen, P.G. Xuereb en I. Ziemele)

JUDGMENT OF THE COURT (First Chamber)

25 May 2023[1]

(Reference for a preliminary ruling – Intellectual property – Copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission – Directive 93/83/EEC – Article 1(2) – Communication to the public by satellite – Concept – Satellite package provider – Broadcasting of programmes in another Member State – Place of the act of exploitation by which that provider participates in such communication)

In Case C-290/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 20 April 2021, received at the Court on 5 May 2021, in the proceedings

Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger Reg. Gen. mbH (AKM)

v

Canal+ Luxembourg Sàrl

intervening parties:

Tele 5 TM-TV GmbH,

Österreichische Rundfunksender GmbH & Co. KG,

Seven.One Entertainment Group GmbH,

ProSiebenSat.1 PULS 4 GmbH,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, K. Lenaerts, President of the Cour, acting as judge of the First Chamber, L. Bay Larsen, Vice-President of the Court, acting as judge of the First Chamber, P.G. Xuereb and I. Ziemele (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: S. Beer, Administrator,

having regard to the written procedure and further to the hearing on 8 June 2022,

[1] Language of the case: German

after considering the observations submitted on behalf of:
– Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger Reg. Gen. mbH (AKM), by N. Kraft, Rechtsanwalt,
– Canal+ Luxembourg Sàrl, by A. Anderl, Rechtsanwalt,
– Seven.One Entertainment Group GmbH and ProSiebenSat.1 PULS 4 GmbH, by M. Boesch, Rechtsanwalt,
– the European Commission, by J. Samnadda and G. von Rintelen, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 22 September 2022,
gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(2)(a) to (c) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15) and of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

2 The request has been made in proceedings between Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger Reg. Gen. mbH ('AKM'), an Austrian society responsible for the collective management of copyright, and Canal+ Luxembourg Sàrl ('Canal+'), a satellite television operator, concerning the broadcasting by that company of television programmes in Austria.

Legal context

European Union law

Directive 93/83

3 Recitals 5, 14, 15 and 17 of Directive 93/83 state:

'(5) Whereas, however, the achievement of [the objectives of the European Union] in respect of cross-border satellite broadcasting and the cable retransmission of programmes from other Member States is currently still obstructed by a series of differences between national rules of copyright and some degree of legal uncertainty; whereas this means that holders of rights are exposed to the threat of seeing their works exploited without payment of remuneration or that the individual holders of exclusive rights in various Member States block the exploitation of their rights; whereas the legal uncertainty in particular constitutes a direct obstacle in the free circulation of programmes within the [European Union];

...

(14) Whereas the legal uncertainty regarding the rights to be acquired which impedes cross-border satellite broadcasting should be overcome by defining the notion of communication to the public by satellite at [EU] level; whereas this definition should at the same time specify where the act of communication takes place; whereas such a definition is necessary to avoid the cumulative application of several national laws to one single act of broadcasting; whereas communication to the public by satellite occurs only when, and in the Member State where, the programme-carrying signals are introduced under the control and responsibility of the broadcasting organisation into an uninterrupted chain of communication leading to the satellite and down towards the earth; whereas normal technical procedures relating to the programme-carrying signals should not be considered as interruptions to the chain of broadcasting;

(15) Whereas the acquisition on a contractual basis of exclusive broadcasting rights should comply with any legislation on copyright and rights related to copyright in the Member State in which communication to the public by satellite occurs;

...

(17) Whereas, in arriving at the amount of the payment to be made for the rights acquired, the parties should take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version'.

4 Article 1 of that directive, entitled 'Definitions', provides in paragraph 2 (a) to (c):

'(a) For the purpose of this Directive, ''communication to the public by satellite'' means the act of introducing, under the control and responsibility of the broadcasting organisation, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(b) The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(c) If the programme-carrying signals are encrypted, then there is communication to the public by satellite on condition that the means for decrypting the broadcast are provided to the public by the broadcasting organisation or with its consent.'

5 Article 2 of that directive provides:

'Member States shall provide an exclusive right for the author to authorize the communication to the public by satellite of copyright works, subject to the provisions set out in this chapter.'

Directive 2001/29

6 Article 3 of Directive 2001/29, entitled 'Right of communication to the public of works and right of making available to the public other subject matter', provides in paragraph 1:

'Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.'

Austrian law

7 Paragraph 17b(1) of the Urheberrechtsgesetz (Law on Copyright) of 9 April 1936 (BGBl. 111/1936), in the version of 27 December 2018 (BGBl. I 105/2018) states: *'In satellite broadcasting, the act of exploitation reserved for the author consists in the introduction, under the control and responsibility of a broadcasting body, of the programme-carrying signals into an uninterrupted chain of communication leading to the satellite and down towards the earth. Subject to subparagraph 2, satellite broadcasting therefore occurs only in the State in which the signal is introduced.'*

8 Paragraph 59a of that law provides:

'1. Only collecting societies may exercise the right to use broadcasts, including satellite broadcasts, of works for simultaneous, complete and unmodified retransmission by cable; however, this does not concern the right to bring legal proceedings for copyright infringements.

2. Broadcasts may be used for retransmission within the meaning of paragraph 1 if the broadcasting organisation making the retransmission has obtained authorisation from the responsible collecting society for that purpose.

3. However, paragraphs 1 and 2 shall not apply where the broadcasting organisation whose broadcast is retransmitted has the right to broadcast within the meaning of paragraph 1.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 AKM holds a licence to exploit musical works, entitling it to exercise broadcasting rights in Austria on a fiduciary basis.

10 Canal+, established in Luxembourg, offers in Austria, by satellite, in return for payment, packages of encrypted programmes ('the satellite packages at issue in the main proceedings') of various broadcasting organisations located in other Member States, both in high-definition and in standard definition.

11 The introduction of each of the programme-carrying satellite signals into the chain of communication (uplinking) is carried out for the most part by those broadcasting organisations themselves, sometimes by Canal+, in those other Member States. A stream is broadcast containing the entire programme in high-definition quality together with all additional information, such as audio data and subtitle data. After being 're-sent' by the satellite, that stream is received by satellite-receiving equipment within the coverage area. That stream is then split up and the user may access each of the programmes on a terminal by means of a decoder.

12 The satellite packages at issue in the main proceedings contain free-to-air television programmes. Those programmes are not encrypted and may always be received in standard quality by everyone in Austrian territory.

13 AKM has brought an action seeking, in essence, an injunction against the broadcasting by Canal+ of satellite signals in Austria and payment of damages, claiming that, in the Member States in which the act of broadcasting or of communication to the public by satellite takes place, no authorisation had been obtained for such exploitation and that it had not authorised that broadcasting in Austria. AKM submits that that broadcasting serves an additional category of Canal+ customers, which is not covered by the authorisations obtained, as the case may be, in the broadcasting Member States, by the broadcasting organisations concerned, for the purposes of communication to the public of the works in question by satellite, and that Canal+ should also have obtained an authorisation from AKM for broadcasting satellite signals in Austria. Accordingly, AKM claims that Canal+ is infringing the rights which AKM manages.

14 Canal+ replies that it merely provides, with the consent of the broadcasting organisations, equipment enabling a signal introduced by those organisations outside Austria into a chain of communication leading to a satellite to be encoded. Under the broadcasting Member State principle laid down in Article 1(2)(b) of Directive 93/83, it is not AKM who is entitled to assert claims arising from the act of exploitation at issue in the main proceedings, but only the collecting societies of the copyright in the broadcasting Member State. Furthermore, that act of exploitation carried out by Canal+ is covered by the authorisations obtained in the broadcasting Member States by the broadcasting organisations concerned.

15 Four companies, including Seven.One Entertainment Group GmbH, a broadcasting organisation established in Germany, and ProSiebenSat.1 PULS 4 GmbH, a broadcasting organisation established in Austria, were granted leave to intervene in the main proceedings in support of Canal+.

16 By judgment of 31 October 2019, the Handelsgericht Wien (Commercial Court, Vienna, Austria) dismissed the action for an injunction prohibiting the broadcasting of satellite signals in Austria, but largely upheld both the action (in part in the alternative) seeking an injunction against the satellite broadcasting, directed towards Austria, of the programme signals at issue and the request for the production of documents related thereto. Hearing an appeal against that judgment, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), by judgment of 30 June 2020, ruled broadly to the same effect. That court considered, in particular, that the satellite packages at issue in the main proceedings reached a new public, that is to say, a different public from that for the broadcasters' free-to-air transmissions. AKM, Canal+, Seven.One Entertainment Group GmbH and ProSiebenSat.1 PULS 4 GmbH brought appeals on a point of law ('Revision') against that latter judgment before the referring court.

17 Referring to paragraphs 61 and 69 of the judgment of **13 October 2011, Airfield and Canal Digitaal (C-431/09 and C-432/09, EU:C:2011:648)**, which also concerned a satellite package provider, the referring court considers that it could be considered that both the act of exploitation of the broadcasting organisation and the intervention of the satellite package provider must be located exclusively in the Member State in which the programme-carrying signals are introduced into the chain of communication concerned, since such a provider, in carrying out its activity alongside the

broadcasting organisation, merely participates in the original, single and indivisible act of satellite broadcasting.

18 If that were not the case, the question would arise as to the extent to which the actual acts of exploitation of that provider infringe copyright on the ground that a new public would potentially be affected in the Member State in which those signals are received. It would be necessary, in that context, to determine whether the fact that, in the satellite packages at issue in the main proceedings, that provider also offers free television programmes is relevant, since those programmes are already freely accessible to any user within the coverage area.

19 In those circumstances, the Oberster Gerichtshof (Supreme Court, Austria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 1(2)(b) of [Directive 93/83] to be interpreted as meaning that not only the broadcasting organisation, but also a satellite package provider intervening in the indivisible and single act of broadcasting, carries out an act of exploitation – which in any case requires consent – simply in the State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth, with the result that the intervention of the satellite package provider in the act of broadcasting is not liable to infringe copyright in the receiving State?

(2) If Question 1 is answered in the negative:

is the concept of "communication to the public" set out in Article 1(2)(a) and (c) of [Directive 93/83] and in Article 3(1) of [Directive 2001/29] to be interpreted as meaning that the satellite package provider, which intervenes as another operator during a communication to the public by satellite, bundles several encrypted high-definition signals of free-to-air and pay-TV programmes and offers the independent audiovisual product created in this way to its customers in return for payment, requires separate authorisation from the right holder concerned even in respect of the protected content in the free-to-air TV programmes contained in the package of programmes, although in this respect it is merely providing its customers with access to works which are already freely accessible – albeit in poorer standard-definition quality – to everyone in the broadcasting area?'

Consideration of the questions referred

The first question

20 By its first question, the referring court asks, in essence, whether Article 1(2)(b) of Directive 93/83 must be interpreted as meaning that, where a satellite package provider is required to obtain, for the act of communication to the public by satellite in which it participates, the authorisation of the holders of the copyright and rights related to copyright concerned, that authorisation must be obtained, such as that granted to the broadcasting organisation concerned, only in the Member State in which the programme-carrying signals are introduced into the chain of communication leading to the satellite.

21 Under Article 1(2)(b) of Directive 93/83, the act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

22 In order for the rule laid down in Article 1(2)(b) of Directive 93/83 to apply, there must be a 'communication to the public by satellite', within the meaning of Article 1(2)(a) and (c), those provisions laying down cumulative conditions to that effect. Thus, a transmission constitutes a single 'communication to the public by satellite' if, first, it is triggered by an 'act of introducing' of programme-carrying signals carried out 'under the control and responsibility of the broadcasting organisation'; secondly, those signals are introduced 'into an uninterrupted chain of communication leading to the satellite and down towards the earth'; thirdly, those signals are 'intended for reception by the public', and fourthly, if those signals are encrypted, their decoding device is 'provided to the public by the broadcasting organisation or with its consent' (see, to that effect, judgment of **13 October 2011, Airfield and Canal Digitaal, C-431/09 and C-432/09, EU:C:2011:648, paragraph 52)**.

23 As regards a transmission such as that at issue in the main proceedings, the Court has already held that both the indirect and direct transmission of television programmes that fulfil all of those cumulative conditions, must each be regarded as constituting a single communication to the public by satellite and thus as indivisible. Yet, the indivisibility of such a communication, within the meaning of Article 1(2)(a) and (c), does not however signify that the intervention of the satellite package provider in that communication can occur without the authorisation of the right holders concerned (see, to that effect, judgment of **13 October 2011, Airfield and Canal Digitaal, C-431/09 and C-432/09, EU:C:2011:648**, paragraphs 69 and 70).

24 It should be borne in mind that it is apparent from Article 2 of Directive 93/83, read in conjunction with recital 17 thereof, that copyright holders must authorise any communication of the protected works to the public by satellite and that, in order to determine the appropriate remuneration of those right holders for such communication of their works, all aspects of the broadcast must be taken into account, such as its actual audience and its potential audience (see, to that effect, **judgment of 13 October 2011, Airfield and Canal Digitaal, C-431/09 and C-432/09, EU:C:2011:648**, paragraphs 71 and 73).

25 Such authorisation must be obtained, in particular, by a person who triggers such a communication or who intervenes when it is carried out, so that, by means of that communication, he or she makes the protected works accessible to a new public, that is to say, a public which was not taken into account by the authors of the protected works within the framework of an

authorisation given to another person (see, to that effect, **judgment of 13 October 2011, Airfield and Canal Digitaal, C-431/09 and C-432/09, EU:C:2011:648**, paragraph 72).

26 In that regard, the Court has already noted that, in accordance with Article 1(2)(a) of Directive 93/83, a communication to the public by satellite, such as that at issue in the main proceedings, is triggered by the broadcasting organisation under whose control and responsibility the programme-carrying signals are introduced into the chain of communication leading to the satellite. Furthermore, it is common ground that, as a general rule, that organisation thereby renders the protected works accessible to a new public. Consequently, that organisation is required to obtain the authorisation provided for in Article 2 of Directive 93/83 (judgment of **13 October 2011, Airfield and Canal Digitaal, C-431/09 and C-432/09, EU:C:2011:648**, paragraph 75).

27 In so far as, pursuant to the rule laid down in Article 1(2)(b) of Directive 93/83, such a communication to the public by satellite is deemed to take place only in the Member State in which the programme-carrying signals are introduced into the chain of communication leading to the satellite, the broadcasting organisation is required to obtain that authorisation only in that Member State.

28 However, as has been pointed out in paragraph 24 of this judgment, in order to determine the appropriate remuneration of the copyright holders for such communication of their works, all aspects of the broadcast concerned must be taken into account, such as its actual audience and its potential audience. Accordingly, where part of that actual or potential audience is located in Member States other than that in which the programme-carrying signals are introduced into the chain of communication leading to the satellite, it is, where appropriate, for the various collecting societies concerned to find adequate solutions in order to ensure equitable remuneration of those right holders.

29 That said, it cannot be ruled out that other operators may intervene in the course of a communication to the public by satellite, with the result that they render the protected works or subject matter accessible to a public wider than that targeted by the broadcasting organisation concerned, that is to say, a public which was not taken into account by the authors of those works or subject matter when they authorised the use of the latter by the broadcasting organisation. In such a situation, the intervention of those operators is thus not covered by the authorisation granted to that organisation. That may in particular be the case where an operator expands the circle of persons having access to that communication and thereby renders the protected works or subject matter accessible to a new public (judgment of **13 October 2011, Airfield and Canal Digitaal, C-431/09 and C-432/09, EU:C:2011:648**, paragraphs 76 and 77).

30 It follows from the wording of Article 1(2)(b) of Directive 93/83 and from the scheme of Article 1(2)(a) to (c) that, where a satellite package provider is required to obtain, for the communication to the public by satellite in which it participates, the authorisation of the holders of the copyright and related rights concerned, that authorisation must be obtained, such as that granted to the broadcasting organisation concerned, only in the Member State in which the programme-carrying signals are introduced into the chain of communication leading to the satellite.

31 Furthermore, that conclusion is supported by the objective pursued by Article 1(2)(b) of Directive 93/83. In that regard, it should be noted, first, that it is apparent from recitals 5 and 14 of that directive that the legal uncertainty resulting from differences between national rules of copyright constitutes a direct obstacle in the free movement of programmes within the European Union and that the legal uncertainty regarding the rights to be acquired, which impedes cross-border satellite broadcasting, should be overcome by defining the concept of communication to the public by satellite at EU level, in order, in particular, to avoid the cumulative application of several national laws to a single act of broadcasting. Secondly, recital 15 of that directive further states that the acquisition on a contractual basis of exclusive broadcasting rights should comply with any legislation on copyright and rights related to copyright in the Member State in which communication to the public by satellite occurs.

32 It thus follows from recitals 5, 14 and 15 of Directive 93/83 that Article 1(2)(b) thereof seeks to ensure that any ‘communication to the public by satellite’, within the meaning of Article 1(2)(a) and (c), is subject exclusively to the legislation on copyright and related rights in force in the Member State in which the programme-carrying signals are introduced into the chain of communication leading to the satellite. Accordingly, it would be contrary to that objective if a satellite package provider were also required to obtain authorisation from the holders of the copyright and related rights concerned in other Member States.

33 In the light of all the foregoing considerations, the answer to the first question is that Article 1(2)(b) of Directive 93/83 must be interpreted as meaning that, where a satellite package provider is required to obtain, for the communication to the public by satellite in which it participates, the authorisation of the holders of the copyright and related rights concerned, that authorisation must be obtained, such as that granted to the broadcasting organisation concerned, only in the Member State in which the programme-carrying signals are introduced into the chain of communication leading to the satellite.

The second question

34 Having regard to the answer given to the first question, there is no need to answer the second question.

Costs

35 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 1(2)(b) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission
must be interpreted as meaning that, where a satellite package provider is required to obtain, for the communication to the public by satellite in which it participates, the authorisation of the holders of the copyright and related rights concerned, that authorisation must be obtained, such as that granted to the broadcasting organisation concerned, only in the Member State in which the programme-carrying signals are introduced into the chain of communication leading to the satellite.

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 22 September 2022[2]
Case C-290/21
Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger Reg. Gen. mbH (AKM)
v
Canal+ Luxembourg Sàrl
interveners:
Tele 5 TM-TV GmbH,
Österreichische Rundfunksender GmbH & Co KG,
Seven.One Entertainment Group GmbH,
ProSiebenSat.1 PULS 4 GmbH
(Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria))
(Reference for a preliminary ruling – Intellectual property – Copyright and related rights – Satellite broadcasting and cable retransmission – Directive 93/83/EEC – Article 1(2) – Satellite package provider – Broadcasting of programmes in another Member State – Place of the act of exploitation – Provision, in return for payment, of pay programmes and free-to-air programmes in high definition – Availability of those programmes in standard definition in the receiving State also by satellite)

Introduction

1. ‘If I had to do it again, I would begin with culture’, Jean Monnet is supposed to have said about the process of European integration. However, culture, in any event from its economic aspect, is to a large extent regulated by copyright. And one element stands in the way of progress towards integration in that field and helps to entrench the fragmentation of the internal market according to national borders: the immutable principle of territoriality (in the sense of national territory) of copyright, and also the practices of the market players, including those of the collective management organisations which have been set up on the basis of that principle. Paradoxically, the more that technology, in particular satellite broadcasting – at issue in the present case – and, more recently, the internet permit inter-State cultural exchanges, the more the obstacle of the principle of territoriality of copyright makes itself felt.

2. It is true, quite clearly, that there is also an objective reason for that market fragmentation, namely linguistic diversity, which is a fundamental aspect of culture. The present case shows, however, that even in situations where the language barrier does not exist, the interested parties defend unguibus et rostro the principle of territoriality defined according to national borders, which are nonetheless eliminated in the internal market. The Court will have the opportunity in the present case to help to promote the integration of Europe through culture, in accordance with the will of the European Union legislature, expressed almost 30 years ago.

Legal framework

European Union law

3. Article 1(2)(a) to (c) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (2) provides:

‘2. (a) For the purpose of this Directive, ‘‘communication to the public by satellite’’ means the act of introducing, under the control and responsibility of the broadcasting organisation, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(b) The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(c) If the programme-carrying signals are encrypted, then there is communication to the public by satellite on condition that the means for decrypting the broadcast are provided to the public by the broadcasting organisation or with its consent.’

4. Article 2 of that directive provides:

‘Member States shall provide an exclusive right for the author to authorise the communication to the public by satellite of copyright works, subject to the provisions set out in this chapter.’

5. Article 4 of that directive extends to the communication to the public by satellite the protection afforded to performers, phonogram producers and broadcasting organisations by Directive 92/100/EEC. (3)

6. Article 1(2)(c) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (4) is worded as follows:

‘Except in the cases referred to in Article 11, [(5)] this Directive shall leave intact and shall in no way affect existing [EU] provisions relating to:

…

[2] Original language: French

(c) copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission'.

7. Pursuant to Article 3(1) of that directive:

'Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, …'

Austrian law

8. Paragraph 17b(1) of the Urheberrechtsgesetz (Law on Copyright) of 9 April 1936, in the version of 27 December 2018, (6) applicable in the present case, states:

'In satellite broadcasting, the act of exploitation reserved for the author consists in the introduction, under the control and responsibility of a broadcasting body, of the programme-carrying signals into an uninterrupted chain of communication leading to the satellite and down towards the earth. Subject to subparagraph 2, satellite broadcasting therefore occurs only in the State in which the signal is introduced.'

Facts, procedure and questions referred for a preliminary ruling

9. The Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger Reg. Gen. mbH (Non-profit society of authors, composers and music publishers, Austria) ('AKM') is an Austrian society responsible for the collective management of copyright and related rights in musical works.

10. Canal+ Luxembourg Sàrl ('Canal+') is a company governed by Luxembourg law which offers in Austria, in return for payment, packages of programmes of numerous broadcasting companies ('satellite packages').

11. The introduction of each of the programme-carrying satellite signals into the chain of communication (uplinking) is carried out for the most part by the broadcasting organisations themselves, sometimes by Canal+; never in Austria, however, but in other Member States of the European Union. A stream is broadcast containing the entire programme in high-definition quality together with all additional information, such as audio data, subtitle data, and so forth. After being 're-sent' by the satellite, the bundle is received by satellite-receiving equipment within the broadcasting area. The bundle is then split up and the user may access each of the programmes on a terminal. The programmes are encrypted and must be decrypted by the receiving equipment in order to be used. Canal+ makes access keys available to its customers with the consent of the broadcasting organisations. The 'packages' are created by combining the access keys for different programmes.

12. The packages contain pay-TV and free-to-air programmes. The latter programmes are not encrypted and may always be received in standard quality by everyone in Austria.

13. AKM has brought an application seeking, in essence, an injunction against the broadcasting of satellite signals in Austria and payment of damages, claiming that it had not authorised that broadcasting. AKM takes the view that, notwithstanding any authorisation which the broadcasting organisations may have received to communicate the works to the public by satellite, Canal+ should also have such authorisation, which it has not been able to prove. AKM thus takes the view that Canal+ is infringing the rights which AKM manages.

14. Four companies, including Seven.One Entertainment Group GmbH, a broadcasting organisation established in Germany, and ProSiebenSat.1 PULS 4 GmbH, a broadcasting organisation established in Austria (collectively, 'the interveners'), were granted leave to intervene in the main proceedings in support of Canal+.

15. By decision of 30 June 2020, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), on appeal, upheld the action in part. That court considered, in particular, that the satellite packages provided by Canal+ reached a new public, that is to say, a different public from that for the broadcasters' free-to-air transmissions. Both AKM and Canal+, the latter supported by the interveners, appealed on points of law against that decision before the referring court.

16. In those circumstances, the Oberster Gerichtshof (Supreme Court, Austria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 1(2)(b) of [Directive 93/83] to be interpreted as meaning that not only the broadcasting organisation, but also a satellite package provider intervening in the indivisible and single act of broadcasting, carries out an act of exploitation – which in any case requires consent – simply in the State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth, with the result that the intervention of the satellite package provider in the act of broadcasting is not liable to infringe copyright in the receiving State?

(2) If Question 1 is answered in the negative: is the concept of "communication to the public" set out in Article 1(2)(a) and (c) of [Directive 93/83] and in Article 3(1) of [Directive 2001/29] to be interpreted as meaning that the satellite package provider, which intervenes as another operator during a communication to the public by satellite, bundles several encrypted high-definition signals of free-to-air and pay-TV programmes and offers the independent audiovisual product created in this way to its customers in return for payment, requires separate authorisation from the rightholder concerned even in respect of the protected content in the free-to-air TV programmes contained in the package of programmes, although in this respect it is merely providing its customers with access to works which are already freely accessible – albeit in poorer standard-definition quality – to everyone in the broadcasting area?'

17. The request for a preliminary ruling was lodged on 5 May 2021. Written observations have been submitted by AKM, Canal+, the interveners, and by the

European Commission. Those parties were represented at the hearing on 8 June 2022.

Analysis

18. The referring court asks two questions, the latter depending on the answer to the former. In view of the answer which I propose should be given to the first question, there will be no need to answer the second question, if the Court follows my reasoning. I shall nonetheless examine it briefly, in the interest of completeness.

Question 1

19. By its first question, the referring court asks, in essence, whether Article 1(2)(b) of Directive 93/83 must be interpreted as meaning that a satellite package provider is required to obtain, in the Member State in which the protected objects thus communicated are accessible to the public (the receiving Member State), the authorisation of the copyright and related rights holders for the act of communication to the public by satellite in which it participates.

20. That question touches on the Court's case-law resulting, in particular, from the judgment of 13 October 2011, Airfield and Canal Digitaal (C-431/09 and C-432/09, EU:C:2011:648; 'judgment in Airfield') and relates in reality to the interpretation of that judgment.

21. Before I analyse the judgment in Airfield, it is necessary to make a few preliminary remarks.

Communication to the public by satellite, within the meaning of Directive 93/83

22. At its inception, television broadcasting was naturally confined within national borders – it used radio waves, the frequencies of which were at the disposal of the States, which allocated them to operators for broadcasting limited to the national territory. The signal coverage area therefore corresponded essentially to the territory of the broadcasting State, which at the same time constituted the field of territorial applicability of the copyright of that State.

23. The arrival of satellite television disrupted that scene, as it meant that a much wider territory than that of a single State could be covered. The question therefore arose as to which copyright was applicable: only the copyright of the State from which the signal was transmitted to the satellite, or also the right or rights of the States in which that signal could be received? (7)

24. Article 1(2)(b) of Directive 93/83 answers that question from the viewpoint of EU law. Although it appears under the heading 'Definitions', that provision establishes one of the main substantive rules of that directive, namely the 'broadcasting Member State' principle. Under that principle, the act of communication to the public by satellite, as defined in that directive, is deemed to occur only in the Member State in which the signal was sent to the satellite. It is therefore also the copyright of that State that will apply to such an act.

25. At the same time, Directive 93/83 guarantees equivalent protection of copyright and related rights in all Member States, by harmonising that protection in Articles 2 and 4 and excluding compulsory licences in Article 3(1) thereof. The rights of the rightholders to the use of the works in the receiving Member States will therefore be protected, in an equivalent fashion, by virtue of the copyright of the broadcasting Member State. (8) It is up to them to ensure that the payment agreed upon for the use of those rights takes account of the entire potential public, in accordance with recital 17 of Directive 93/83.

26. The main aim of the establishment of the 'broadcasting Member State' principle was to facilitate the cross-border satellite broadcasting of radio and television programmes by ensuring legal certainty and an adequate level of protection of their rights to all the stakeholders involved. (9)

27. However, the 'broadcasting Member State' principle applies only to the act of communication to the public by satellite, as defined in Article 1(2)(a) and (b) of Directive 93/83. That definition is composed of a number of elements. First, that act of communication to the public by satellite consists in the introduction of programme-carrying signals into a chain of communication leading to the satellite and down towards the earth. Second, the introduction of the signals must be carried out under the control and responsibility of a broadcasting organisation. Third, the programme-carrying signals must be intended for reception by the public. Fourth, the chain of communication in question must be uninterrupted from the introduction of the signals until the (potential (10)) reception by the public. Fifth, if the signals are encrypted, the means for decrypting those signals must be provided to the public by or with the consent of the broadcasting organisation under whose control and responsibility the act took place. (11)

28. An act which satisfies those conditions is an act of 'communication to the public by satellite' within the meaning of Article 1(2)(a) of Directive 93/83 and is covered by the 'broadcasting Member State' principle. That principle covers not only the broadcast sensu stricto, that is to say the introduction of the programme-carrying signal into the link leading to the satellite, but also the entire communication, including the conveyance of the signal to the final users. Only the law of the broadcasting Member State therefore applies to the entire communication. Conversely, any act of distance exploitation, including with the assistance of a satellite, of the objects protected by copyright or related rights which does not satisfy the conditions of Article 1(2)(a) and (c) of Directive 93/83 cannot be classified as a 'communication to the public by satellite' within the meaning of Article 1(2)(a) and is not covered by the 'broadcasting Member State' principle.

The judgment in Airfield and its application to the present case

29. In the judgment in Airfield, the Court was required to examine the activity of a satellite package provider similar to the activity of Canal+ in the present case. It concluded that that activity was a communication to the public by satellite, within the meaning of Article 1(2)(a) to (c) of Directive 93/83. (12)

30. In the present case, it must be stated that the referring court is relatively economical with information about the technical details of the communication at issue

in the main proceedings. However, since the questions for a preliminary ruling concern the interpretation of Article 1(2)(b) of Directive 93/83, and also, indirectly, the judgment in Airfield, I shall proceed on the assumption that the conclusion which the Court reached in that judgment concerning the classification of the activity of a satellite package provider can be transposed to the present case.

31. That means that the programme-carrying signals are introduced into a chain of communication leading to the satellite and back to earth, either by the broadcasting organisations themselves or by Canal+, but with their consent. The broadcasting organisations therefore have control of, and assume responsibility for, the introduction of the signals. (13) Those signals are intended for reception by the public. The objective of the activity in question is the transmission of programmes for direct reception by the public. (14) The chain of communication is uninterrupted between the introduction of the signals into the uplink to the satellite and the potential reception by the public. Any interventions in those signals, such as compression or encryption and decryption, fall within the customary technical activities carried out to prepare the signals for transmission by satellite and do not constitute an interruption of the chain of communication. (15) Lastly, it is common ground that the means of decrypting the signals devices are made available to the public by Canal+ with the consent of the respective broadcasting organisations.

32. I fully agree with the Court's analysis in the judgment in Airfield concerning the classification of the activity of a satellite package provider as communication to the public by satellite. The only point, at this stage, about which I feel doubtful is the finding that, in the first place, the control and responsibility of the broadcasting organisation, referred to in Article 1(2)(a) of Directive 93/83, relate not to the entire act of communication to the public by satellite, but only to the introduction of signals into the chain of communication and that, in the second place, that control and that responsibility may be shared. (16)

33. In the first place, if, according to the abovementioned provision, the programme-carrying signals must, when they are introduced into the chain of communication, be intended for reception by the public (17) and if that chain must be uninterrupted, control of the introduction of those signals necessarily and automatically means control of the entire act of communication to the public. If another person were to take control of the signals following their introduction into the chain of communication, for example in order to delay the transmission or to alter its destination, the chain of communication would be interrupted.

34. The same applies to responsibility. In an uninterrupted chain of communication, the decision to introduce the signals necessarily leads to their accessibility by the public, so that the broadcasting organisation cannot deny responsibility for the communication to the public of the programmes carried by those signals. That also applies where the signals are encrypted, since in order for there to be a communication to the public by satellite, the means for decrypting those signals must be provided to the public with the consent of the broadcasting organisation, which gives that broadcasting organisation control over that aspect of the act of communication. As that consent is given freely, it also entails responsibility.

35. In the second place, under Article 1(2)(a) of Directive 93/83, the control and responsibility of the broadcasting organisation are a condition that must be satisfied in order for the act in question to be considered to be an act of communication to the public by satellite and benefit from the provisions of that directive, in particular the principle that the broadcasting Member State is the place where that act of communication occurs.

36. As regards control, it seems clear to me that it is not sufficient that the broadcasting organisation should have only partial control. Control must be total in order for the condition to be satisfied.

37. Of course, the requirement of control does not mean that the broadcasting organisation itself is required to carry out all the operations which communication to the public by satellite entails. Control takes material form in contractual arrangements with third-party operators, such as a satellite package provider. Those third parties act as agents of the broadcasting organisation, which retains control of the act of communication.

38. Nor is control required to extend to cover all aspects, even the tiniest details, of the communication. The broadcasting organisation must have control of the elements which are significant from the viewpoint of copyright law, in particular the actual fact of communicating, the precise content of the communication and the target public. Technical matters, on the other hand, such as signal compression or the standard in which the signal will be encrypted are irrelevant and may be determined by the operators to which the broadcasting organisation entrusts the technical implementation of the communication.

39. As regards the responsibility of the broadcasting organisation, it, too, cannot be shared. In Article 1(2)(a) to (c) of Directive 93/83, the EU legislature not only defined an act of 'communication to the public by satellite' as a single act of exploitation, within the meaning of copyright law, and the place of that act, but also designated its author in the person of the broadcasting organisation which takes the initiative for that communication. (18) That organisation is responsible, in particular, to the copyright and related rights holders for the exploitation of the protected objects. That responsibility of the broadcasting organisation is the counterpart of the 'broadcasting State' principle. Directive 93/83 was designed not only to facilitate the transmission of programmes by satellite by removing obstacles linked with the territoriality of copyright, but also to safeguard copyrights and related rights by designating an operator responsible for the entire act of communication to the public by satellite. (19)

40. In an act of communication to the public by satellite, within the meaning of Article 1(2)(a) of Directive 93/83, it is therefore the broadcasting organisation that must have full control and that bears full responsibility for that entire act. (20)

AKM's allegations concerning the applicability of the provisions on communication to the public by satellite to satellite package providers

41. The finding that the activity of a satellite package provider, such as Canal+, comes within communication to the public by satellite (21) allows me to respond to certain arguments put forward by AKM in the present case.

42. In the first place, AKM maintains that, at the time of the adoption of Directive 93/83, the 'satellite packages' economic model did not exist and that the authors of that directive had not envisaged the activity consisting in the provision of such packages. The provisions of that directive, and in particular, the 'broadcasting Member State' principle, should therefore not apply.

43. It may well be the case that the authors of Directive 93/83 were not aware of the satellite package model. However, that does not alter the fact that the activity of providers of such packages is indeed covered by the provisions of that directive devoted to communication to the public by satellite. Such a communication does not necessarily have to be carried out by a broadcasting organisation and it is sufficient that that organisation retains control of the communication. The broadcasting organisation may well entrust certain tasks to another operator, such as a satellite package provider. Nor does the provision of such packages make it necessary to interrupt the chain of communication between the introduction of the programme-carrying signals and their potential reception by the public. As regards encryption and decryption, those provisions require only that they be carried out with the consent of the broadcasting organisation in question. There is thus nothing to prevent those provisions from being applied to an activity consisting in the provision of satellite packages.

44. In the second place, AKM maintains that the activity of a satellite package provider should be treated as retransmission, as defined in Article 1(3) of Directive 93/83. The referring court rejects that argument, on the ground that such retransmission assumes an initial transmission, which is not present in this case. I share that view. If the activity of a satellite package provider forms part of the single act of communication to the public by satellite, the question of an initial transmission and a retransmission cannot arise.

45. Admittedly, it is true that a different conclusion might be drawn on the basis of the new Directive (EU) 2019/789 (22) and that, depending on the method used to introduce the signal into the uplink to the satellite and on whether or not the broadcasting organisation concerned offers, independently and free-to-air, the programmes contained in a satellite package, the activity at issue in the present case might be classified as 'transmission of programmes through direct injection', within the meaning of Article 8(1) of that directive or indeed as 'retransmission' within the meaning of Article 2(2) thereof. That would then imply a tacit amendment of Article 1(2)(a) of Directive 93/83, alongside the express amendment of Article 1(3) of that directive, provided for in Article 9 of Directive 2019/789.

46. However, as the Commission has explained in its observations, Directive 2019/789 is not applicable ratione temporis to the dispute in the main proceedings. In addition, that directive was not mentioned in the request for a preliminary ruling, nor was it discussed between the parties. That directive should not therefore be taken into consideration for the purposes of the answer to be given to the questions referred for a preliminary ruling in the present case.

The question of the responsibility of a satellite package provider for the communication to a new public

47. Although the Court, in its judgment in Airfield, found that the broadcast of television programmes by satellite and their distribution by a satellite package provider constituted a single and indivisible communication to the public by satellite, (23) it then continued its analysis with regard to such a provider's responsibility under copyright. Thus, it developed the idea that, although the satellite package provider is involved in a single and indivisible act of communication to the public by satellite, it is required to obtain, independently of the broadcasting organisation, authorisation from the copyright and related rights holders in respect of the new public to which it has given access to the protected material thus communicated. (24)

48. This analysis by the Court strikes me as problematic, since, in my view, it cannot be reconciled with the single and indivisible nature of the communication to the public by satellite established in the judgment in Airfield, that single and indivisible nature being, in turn, a condition of an act being classified as 'communication to the public by satellite', within the meaning of Directive 93/83. I shall develop that idea in the remainder of this Opinion.

– The concept of 'new public'

49. The Court introduced the concept of 'new public' into its case-law in its judgment of 7 December 2006, SGAE (C-306/05, EU:C:2006:764), where it is defined as 'a public different from the public at which the original act of communication of the work is directed'. (25) The Court took inspiration from the Guide to the Berne Convention, (26) which it interpreted as follows: '… when the author authorises the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme. According to the Guide, if reception is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work and the communication of the programme via a loudspeaker or analogous instrument no longer constitutes simple reception of the programme itself but is an independent act through which the broadcast work is communicated to a new public. As the Guide makes clear, such public

reception falls within the scope of the author's exclusive authorisation right'. (27)

50. The concept of 'new public' was then defined in the Court's case-law as referring to 'a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public'. (28) It is used in that sense to this day. (29)

51. Two significant elements emerge from that definition, read in the light of the passage from the Berne Convention that served as the Court's inspiration when it developed that concept in EU copyright law. First of all, the use of that concept makes sense only where there are two successive communications to the public: (30) the primary communication, also called the 'initial communication', for which the copyright holders gave their authorisation, and the secondary communication, which has its origin in the initial communication and is directed at that new public in question. Next, although that secondary communication is dependent on the initial communication, it constitutes a distinct act of exploitation and for that reason requires a distinct authorisation.

52. The existence of a new public is therefore merely a criterion that makes it possible to establish the existence of a communication to the public that is distinct from the initial communication.

– The public at which a communication to the public by satellite is directed

53. In a direct broadcast by satellite (that is to say, a communication to the public by satellite within the meaning of Directive 93/83), the public is one and indivisible, just like the act whereby the public receives the communication of the protected objects. In a free-to-air broadcast, that public consists of the persons who are in the reception area (the footprint) of the satellite. Where the broadcast is encrypted, the public consists of the persons to whom the means of decryption have been made available by the broadcasting organisation or with its consent.

54. To assert that there are two distinct publics for a single act of communication would amount to a contradiction in terms, since the public is defined specifically by reference to a communication. The public at which that communication is directed is the public for that communication, and any additional public (new public) necessarily implies a new act of communication.

55. It is therefore contradictory to establish, on the one hand, the single and indivisible nature of a communication to the public by satellite and to assert, on the other hand, that there is an additional public for that communication which would not be taken into account by the copyright holders. In a situation like that at issue in the case that gave rise to the judgment in Airfield, and like the situation with which we are concerned in the present case, that is to say, where there is an encrypted broadcast by satellite in which a satellite package provider intervenes, the public consists of the persons to whom that provider makes the means of decryption available in return for payment of the subscription and with the consent of the broadcasting organisations under whose control the programme-carrying signals forming the packages were introduced into the chain of communication.

56. That public was necessarily taken into account by the broadcasting organisations, which gave their consent to the means of decryption being made available to that public. It may indeed by the case that the broadcasting organisations were not sufficiently transparent with the copyright holders and that the latter envisaged a different public from the one for which the communication was actually intended. In such a case, however, the entire communication to the public by satellite is unlawful, as it was made without the authorisation of the rightholders. It is thus incumbent on the broadcasting organisations to obtain that authorisation (31) in the Member State in which the communication originates. Conversely, that does not entitle the rightholders to object, in the receiving Member State, to the activity of the satellite package provider.

57. That conclusion is not altered by the different services supplied by that provider and listed by the Court in the judgment in Airfield.

58. First, as regards the encryption of the signal and the making available to the public of the means of decryption, (32) such a service, where it is provided with the consent of the broadcasting organisation, falls, in accordance with Article 1(2)(c) of Directive 93/83, within the single and indivisible act of communication to the public by satellite. Therefore, although, by allowing the members of the public to decrypt the programmes, the satellite package provider gives those members of the public access to the protected objects, that access is given to the members of the public for the communication to the public by satellite, that is to say, the members of the public that was taken into account by the broadcasting organisations which are at the origin of that communication.

59. Second, as regards the fact that the satellite package provider receives the subscription fee, the Court itself observes that that fee represents the price of access to the communication to the public by satellite (33) and, therefore, that the public in question is the public for that communication.

60. Third, and lastly, as regards the fact that the satellite package provider bundles a number of communications by broadcasting organisations in a new audiovisual product, (34) the following observations are called for. Copyright reasons not in terms of audiovisual products, or of satellite packages, or even of broadcast programmes, but in terms of protected objects, that is to say, works and objects covered by related rights, since it is by reference to those objects that the rightholders exercise their exclusive rights. Consequently, although the inclusion of a programme containing a protected object in a satellite package of a given provider may admittedly influence the price of the authorisation of the communication to the public of that object – as that price may be determined according to the revenue expected from the exploitation of the object in question – it does not in any way constitute an act coming within the exclusive rights guaranteed by copyright. Thus, the

bundling of different programmes from different broadcasting organisations in a satellite package is immaterial from the viewpoint of the existence of an act requiring the authorisation of the copyright holders.

61. Thus, by those acts, contrary to the Court's assertion in the judgment in Airfield, (35) the satellite package provider does not expand the circle of persons having access to the programmes forming those packages by comparison with the persons at whom the communication to the public by satellite carried out under the control and responsibility of the broadcasting organisations from which the programmes emanate was directed. Its activity therefore does not require authorisation from the copyright and related rights holders in respect of any new public.

62. The position would be otherwise only if it were considered that the satellite package provider carries out its own act of communication to its own public. (36) Such an act would therefore not be a communication to the public by satellite within the meaning of Directive 93/83, which is necessarily carried out under the control and responsibility of a broadcasting organisation, but a communication to the public within the meaning of Article 3(1) of Directive 2001/29. In that case, the 'broadcasting Member State' principle established in Article 1(2)(b) of Directive 93/83 would therefore not apply; the act would be deemed to have occurred in the receiving Member State, in accordance with the principle of territoriality of copyright law.

63. However, such a solution would be inconsistent with the findings of the Court in paragraphs 51 to 69 of the judgment in Airfield, concerning the single and indivisible nature of a communication to the public by satellite in which a satellite package provider intervenes. It would also, in my view, be contrary to the letter of Directive 93/83, which requires that a communication which meets the conditions set out in Article 1(2)(a) and (c) of that directive be classified as an act of 'communication to the public by satellite' and thus as a single act occurring in the Member State in which the programme-carrying signal is introduced into the chain of communication.

– **The relationship between free-to-air broadcasting and encrypted broadcasting**

64. Perhaps the confusion arises because some television programmes are broadcast (by satellite) simultaneously and on the same territory both free-to-air and – frequently in higher quality – in encrypted form, reception of which requires an additional payment. It may therefore appear that the encrypted broadcast is a retransmission of the free-to-air broadcast and that it is therefore directed at a new public by comparison with the public at which that second broadcast is directed. That is what the appeal court in the main proceedings seems to have considered.

65. In my view, that is not the case, however. Free-to-air broadcasting is not received in order to be then retransmitted in encrypted form, and the latter (that is to say encrypted broadcasting) may well exist without the former. There are two distinct and independent broadcasts, both of which must be described as primary, and intended for different publics. That is a fortiori the case because encrypted broadcasting is normally carried out in higher quality, notably in high definition, than free-to-air broadcasting. In the case of free-to-air broadcasting, the public consists of all persons in the coverage area, while, in the case of encrypted broadcasting, it is composed of persons who have the means of decryption. There is thus no question of a new public for one of those broadcasts by comparison with the public for the other broadcast. When those broadcasts are carried out in the conditions set out in Article 1(2)(a) and (c) of Directive 93/83, there are two distinct acts of communication to the public by satellite, both of which are attributable to the broadcasting organisation under whose control and responsibility the programme-carrying signal was introduced into the chain of communication.

66. The fact that the signal carrying those two broadcasts may be compressed and multiplexed into a single bundle for the purpose of being sent to the satellite (37) does not alter that conclusion. From the legal viewpoint, the only thing that matters is the communication of a protected object according to a certain technical method, in this instance the satellite, to a specific public. The technical details of the way in which the signal containing that object is sent to the public are irrelevant from that viewpoint.

67. The fact that the satellite package provider includes free-to-air programmes in those packages is merely a commercial communication to its customers, intended to give the impression that a greater number of programmes are available in the package. As regards the free-to-air programmes, however, the satellite package provider acts at most as a provider of technical means enabling them to be received, that is to say, a receiver and possibly a satellite antenna. Conversely, its other services are by no means necessary in order for those programmes to be received. (38)

Conclusion and answer to the first question

68. In accordance with the foregoing, a satellite package provider could be responsible vis-à-vis copyright and related rights holders in respect of the communication to a new public only where its activity would be regarded as an act of communication to the public distinct from the communication to the public by satellite attributable to the broadcasting organisation under whose control and responsibility the programme-carrying signal was introduced into the chain of communication. In that case, the communication to the public by a satellite package provider would take place in the receiving Member State. In my view, which is confirmed in the first part of the judgment in Airfield, that is not the case, in so far as the satellite package provider participates in a single and indivisible act of communication to the public by satellite. No new public is therefore envisaged.

69. I shall not analyse in greater detail the question whether the satellite package provider might possibly be held responsible on grounds other than the communication to a new public, jointly with the broadcasting organisation at the origin of the

communication. While I do not share that idea, it nonetheless has no impact on the answer to the first question. In fact, that question relates not to whether the satellite package provider is responsible vis-à-vis the copyright and related rights holders, but whether it is responsible in the receiving Member State. However, communication to the public by satellite is deemed, under Article 1(2)(b) of Directive 93/83, to have taken place solely in the broadcasting Member State. It is therefore in that Member State that the copyright holders may possibly exercise their rights vis-à-vis the satellite package provider.

70. I therefore propose that the answer to the first question should be that Article 1(2)(b) of Directive 93/83 must be interpreted as meaning that a satellite package provider is not required to obtain, in the Member State in which the protected objects thus communicated are accessible to the public, the authorisation of the copyright and related rights holders in respect of the act of communication to the public by satellite in which that provider participates.

Question 2

71. By its second question, read in the light of the explanations set out in the order for reference, the referring court asks, in essence, whether the 'new public' doctrine must be interpreted as meaning that, where broadcast programmes are freely accessible in the satellite's coverage area in standard definition, the fact that a satellite package provider includes the same programmes in high definition in a package aimed at the public in the same area does not constitute a communication to a new public.

72. That question has been submitted only in case it follows from the Court's answer to the first question that the satellite package provider communicated protected objects to a new public in the receiving Member State. If the Court were to follow my proposed answer to the first question, there would be no need to answer the second question. It is therefore solely in the interest of completeness that I shall make the following comments in respect of the second question.

73. First, as I have already explained, the concept of 'new public' makes sense only where there are two communications to the public linked in such a way that one of them is the primary (initial) communication and the other the secondary communication, dependent on the first. Yet it is hard to imagine that the transmission of a television programme in high definition might constitute the retransmission of a broadcast in standard definition. The author of such a transmission would have to have access to the programme in high definition from a source other than the transmission in standard definition. There would thus not be a secondary communication and the concept of 'new public' would not apply. (39)

74. Second, the image quality may be an important factor of the attractiveness of the work to the public, in particular in the case of audiovisual works, and, consequently, may influence the price that the copyright holders will be able to obtain in exchange for their authorisation to exploit the work. Thus, those copyright holders are entitled to limit their authorisation to a particular quality of broadcast, such as standard-definition broadcasting. The mere fact that the work is accessible, for the same public, in a lower quality image therefore does not automatically release the exploiter of the work from the obligation to obtain authorisation from the copyright holders in order to broadcast it in a higher quality.

75. The argument raised in that respect by Canal+, namely that, in the present case, AKM represents owners of musical works and the audio bandwidth of its television signal is the same in high-definition broadcasting definition and in standard-definition broadcasting, does not, in my view, alter that conclusion. In television programmes, the musical works are normally incorporated in audiovisual works and exploited together with those works, so that their attractiveness may also depend on the overall quality of the televisual image.

76. Having said that, and, being of the view that the 'new public' doctrine is not applicable in the present case, I shall refrain from proposing an answer to the second question.

Conclusion

77. In the light of all of the foregoing considerations, I propose that the Court should answer the questions for a preliminary ruling referred by the Oberster Gerichtshof (Supreme Court, Austria) as follows:

Article 1(2)(b) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission must be interpreted as meaning that a satellite package provider is not required to obtain, in the Member State in which the protected objects thus communicated are accessible to the public, the authorisation of the copyright and related rights holders in respect of the act of communication to the public by satellite in which that provider participates.

Footnotes

1 Original language: French.

2 OJ 1993 L 248, p. 15.

3 Council Directive of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61). That directive was repealed and replaced by Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 (OJ 2006 L 376, p. 28).

4 OJ 2001 L 167, p. 10.

5 Amendments not relevant to the present case.

6 BGBl. I, 105/2018.

7 See recital 7 of Directive 93/83.

8 The collective management organisations which, in practice, most frequently provide that protection represent, by means of cooperation agreements, the interest of both national and foreign rightholders.

9 See, in particular, recitals 3 to 5 of Directive 93/83.

10 Actual reception by the public is not a condition of the existence of the act of communication to the public in copyright law.
11 See, to that effect, judgment in Airfield, paragraph 52.
12 See judgment in Airfield, paragraph 69.
13 See, to that effect, judgment in Airfield, paragraphs 53 to 55.
14 See, to that effect, judgment in Airfield, paragraphs 65 to 67.
15 See, to that effect, judgment in Airfield, paragraphs 60 and 61.
16 See judgment in Airfield, paragraph 56.
17 That is to say, intended for direct reception by the public.
18 Which the Court also seems to recognise in paragraph 75 of the judgment in Airfield.
19 See, to that effect, recital 5 of Directive 93/83. See also: Pollaud-Dulian, F., Le droit d'auteur, Economica, Paris, 2014, p. 765.
20 See, with regard to the control and responsibility of the broadcasting organisation, Dreier, T., in Walter, M.M., and von Lewinski, S., European Copyright Law. A Commentary, Oxford University Press, Oxford, 2010, p. 412 et seq.
21 See points 31 and 32 of this Opinion.
22 Directive of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and ration programmes, and amending Council Directive 93/83/EEC (OJ 2019 L 130, p. 82).
23 See judgment in Airfield, paragraph 69.
24 See judgment in Airfield, paragraphs 71 to 83.
25 Judgment of 7 December 2006, SGAE (C-306/05, EU:C:2006:764, paragraph 40).
26 Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), World Intellectual Property Organisation, Geneva, 1978, p. 80. The guide was prepared by C. Masouyé.
27 Judgment of 7 December 2006, SGAE (C-306/05, EU:C:2006:764, paragraph 41).
28 Judgment of 4 October 2011, Football Association Premier League and Others (C-403/08 and C-429/08, EU:C:2011:631, paragraph 197).
29 See, recently, judgment of 22 June 2021, YouTube and Cyando (C-682/18 and C-683/18, EU:C:2021:503, paragraph 70).
30 Successive in a functional sense, that is to say that one of them is dependent on the other. On the other hand, they may be simultaneous in time.
31 As the Court rightly observed in paragraph 75 of the judgment in Airfield.
32 See judgment in Airfield, paragraph 78.
33 See judgment in Airfield, paragraph 80.
34 See judgment in Airfield, paragraph 81.
35 See judgment in Airfield, paragraph 82.
36 That was the solution recommended in the Opinion of Advocate General Jääskinen in the joined cases of Airfield and Canal Digitaal (C-431/09 and C-432/09, EU:C:2011:157). AKM suggests a similar solution in the present case, drawing an analogy with retransmission by cable.
37 Which the referring court describes as 'group travel'.
38 While it is true that a dedicated means of encryption/decryption, supplied by a satellite package provider, normally works only where an active subscription is in force, that does not alter anything, because the member of the public concerned may also acquire a 'free to air' device to receive free-to-air programmes.
39 I would emphasise that the question of the quality of a television broadcast is separate from the question of the quality in which the public receive that broadcast as a result of the technical equipment which they possess. It is clear that, on a non-compatible television set, a high-definition broadcast will be perceived as a standard-definition broadcast. That is irrelevant, however, since, for the purpose of assessing the existence of an act of communication to the public, it does not matter whether or how the public actually receives that communication.