European Court of Justice, 11 December 2008, Kanal 5 and TV 4 v STIM

COPYRIGHT – ABUSE OF A DOMINANT POSITION

A remuneration model according to which the amount of the royalties corresponds to the use is not abuse of a dominant position

- **When the amount of the royalties corresponds partly to the revenue of those channels, provided that that part is proportionate overall to the quantity of musical works protected by copyright actually broadcast or likely to be broadcast**

Article 82 EC is to be interpreted as meaning that a copyright management organisation with a dominant position on a substantial part of the common market does not abuse that position where, with respect to remuneration paid for the television broadcast of musical works protected by copyright, it applies to commercial television channels a remuneration model according to which the amount of the royalties corresponds partly to the revenue of those channels, provided that that part is proportionate overall to the quantity of musical works protected by copyright actually broadcast or likely to be broadcast, unless another method enables the use of those works and the audience to be identified more precisely without however resulting in a disproportionate increase in the costs incurred for the management of contracts and the supervision of the use of those works.

Using a different remuneration model for commercial companies and public service undertakings is abuse of a dominant position

- **If it applies with respect to those companies dissimilar conditions to equivalent services and if it places them as a result at a competitive disadvantage, unless such a practice may be objectively justified**

Article 82 EC is to be interpreted as meaning that, by calculating the royalties with respect to remuneration paid for the broadcast of musical works protected by copyright in a different manner according to whether the companies concerned are commercial companies or public service undertakings, a copyright management organisation is likely to exploit in an abusive manner its dominant position within the meaning of that article if it applies with respect to those companies dissimilar conditions to equivalent services and if it places them as a result at a competitive disadvantage, unless such a practice may be objectively justified.

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European Court of Justice, 11 December 2008
(K. Lenaerts, R. Silva de Lapuerta, E. Juhász, G. Arestis and J. Malenovský)
JUDGMENT OF THE COURT (Fourth Chamber)
11 December 2008 (*)
(Copyright – Copyright management organisation enjoying a de facto monopoly – Collection of royalties relating to the broadcast of musical works – Method of calculating those royalties – Dominant position – Abuse)
In Case C-52/07,
REFERENCE for a preliminary ruling under Article 234 EC, from the Marknadsdomstolen (Sweden), made by decision of 2 February 2007, received at the Court on 6 February 2007, in the proceedings
Kanal 5 Ltd,
TV 4 AB
v
Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa,
THE COURT (Fourth Chamber),
composed of K. Lenaerts, President of the of Chamber, R. Silva de Lapuerta (Rapporteur), E. Juhász, G. Arestis and J. Malenovský, Judges,
Advocate General: V. Trstenjak,
Registrar: C. Strömholm, Administrator,
having regard to the written procedure and further to the hearing on 12 June 2008,
after considering the observations submitted on behalf of:
– Kanal 5 Ltd and TV 4 AB, by C. Wetter, P. Karlsson, advokater, and M. Johansson, jur. kand.,
– Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa, by A. Calissendorff, L. Johansson, E. Arbrandt, and subsequently by K. Cederlund and M. Jonson, advokater,
– the Polish Government, by E. Ośniecka-Tamecka, acting as Agent,
– the Government of the United Kingdom of Great Britain and Northern Ireland, by T. Harris, acting as Agent and M. Gray, Barrister,
– the Commission of the European Communities, by F. Arbault, acting as Agent, assisted by U. Öberg, avocat,
after hearing the **Opinion of the Advocate General** at the sitting on 11 September 2008,
gives the following
Judgment
1 This request for a preliminary ruling concerns the interpretation of Article 82 EC.
2 The reference was made in the course of proceedings between Kanal 5 Ltd ('Kanal 5') and TV 4 AB ('TV 4') and Föreningen Svenska Tonsättares In-

ternationella Musikbyrå (STIM) upa (Swedish Copyright Management Organisation) ('STIM') concerning the remuneration model it applies relating to the broadcast of musical works protected by copyright.

Legal context

3 In Sweden, copyright is governed by Law 1960:729 on copyright in literary and artistic works (lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk).

4 Under Article 42(a) and (e) of that law, the broadcasting companies using works protected by copyright may conclude an extended licence agreement with the copyright management organisation and then be granted a general right to broadcast those works.

5 Article 23 of Law 1993:20 on Competition (konkurrenslagen (1993:20), 'the KL') provides:

'The Konkurrensverket (Swedish Competition Authority) may order an undertaking to put an end to the infringement of a prohibition laid down in Articles 6 and 19 of this Law or of Articles 81 EC and 82 EC.

If the Konkurrensverket decides not to order such a measure, any undertaking which is harmed by the infringement may bring proceedings before the Marknadsdomstolen. …'

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

6 Kanal 5 and TV 4 are commercial broadcasting companies.

7 STIM is an association which enjoys a de facto monopoly in Sweden over the market for making available copyright-protected music for television broadcast.

8 The members of STIM are composers and music publishers.

9 They sign an affiliation agreement with STIM by which they transfer to the latter the right to remuneration for public performances (performing rights) and recording and duplication (mechanical rights) of their work.

10 As regards the collection of performing rights, STIM imposes on Kanal 5 and TV 4 the payment of remuneration corresponding to a percentage of their revenue deriving from television broadcasts directed at the general public and/or subscription sales.

11 Those percentages vary according to the amount of music broadcast.

12 As regards the public service channel Sveriges Television ('SVT'), it pays STIM a lump sum, the amount of which is agreed in advance.

13 In October 2004, Kanal 5 and TV 4 brought an application for an injunction before the Konkurrensverket, pursuant to the first paragraph of Article 23 of the KL, on the ground that, in their view, STIM was abusing its dominant position.

14 By decision of 28 April 2005, the Konkurrensverket dismissed that application on the ground that insufficient grounds existed to justify the opening of an investigation.

15 Kanal 5 and TV 4 brought an action before the referring court against STIM under the second paragraph of Article 23 KL.

16 It is in that context that the Marknadsdomstolen (The Market Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 82 EC to be interpreted as meaning that a practice constitutes abuse of a dominant position where a copyright management organisation which has a de facto monopoly position in a Member State applies to or imposes in respect of commercial television channels a remuneration model for the right to make available music in television broadcasts directed at the general public which involves the remuneration being calculated as a proportion of the television channels' revenue from such television broadcasts by those channels?

(2) Is Article 82 EC to be interpreted as meaning that a practice constitutes abuse of a dominant position where a copyright management organisation which has a de facto monopoly position in a Member State applies to or imposes in respect of commercial television channels a remuneration model for the right to make available music in television broadcasts directed at the general public which involves the remuneration being calculated as a proportion of the television channels' revenue from such television broadcasts by those channels, where there is no clear link between the revenue and what the copyright management organisation makes available, that is, authorisation to perform copyright-protected music, as is often the case with, for example, news and sports broadcasts and where revenue increases as a result of development of programme charts, investments in technology and customised solutions?

(3) Is the answer to Question A or B affected by the fact that it is possible to identify and quantify both the music performed and viewing?

(4) Is the answer to Question A or B affected by the fact that the remuneration model (revenue model) is not applied in a similar manner in respect of a public service company?'

The questions referred for a preliminary ruling

The first, second and third questions

17 By its first three questions, which it is appropriate to examine together, the referring court asks essentially, first, whether the fact that a copyright management organisation which enjoys a de facto monopoly in a Member State on the market for making available music protected by copyright for television broadcasts applies, in respect of the remuneration paid for that service, a remuneration model according to which the amount of royalties is calculated on the basis of the revenue of companies broadcasting those works and the amount of music broadcast, constitutes an abuse of a dominant position prohibited by Article 82 EC and, second, whether the fact that another method would enable the use of those works and the audience to be identified and quantified more precisely may have an effect on that classification.

18 Pursuant to the first paragraph of Article 82 EC, it is incompatible with the common market and prohibited in so far as trade between the Member States may

be affected by it, for one or more undertakings to abuse a dominant position within the common market or a substantial part of it.

19 In examining whether an undertaking holds a dominant position within the meaning of the first paragraph of Article 82 EC, it is of fundamental importance to define the market in question and to define the substantial part of the common market in which the undertaking may be able to engage in abuses which hinder effective competition (Case C-7/97 Bronner [1997] ECR I-7791, paragraph 32).

20 As regards the market in question in the main proceedings, the referring court indicates that that market is the Swedish market for making available music protected by copyright for television broadcast.

21 The referring court also states that STIM enjoys a de facto monopoly on that market.

22 It follows that STIM has a dominant position on the market concerned in the main proceedings (see, to that effect, Bronner, paragraph 35) and that, since that dominant positions extends over the territory of a Member State it is capable of constituting a substantial part of the common market (see, to that effect, Case C-203/96 Dusseldorp and Others [1998] ECR I-4075, paragraph 60; Bronner, paragraph 36; Case C-340/99 TNT Traco [2001] ECR I-4109, paragraph 43; and Case C-462/99 Connect Austria [2003] ECR I-5197, paragraph 79).

23 Finally, the referring court states that trade between the Member States is affected on account of the fact that the remuneration model at issue in the main proceedings concerns the use of musical works the authors of which are nationals and foreigners, that some of the purchasers of advertising space from Kanal 5 and TV 4 are established in Member States other than the Kingdom of Sweden and that Kanal 5 broadcasts from the United Kingdom.

24 In those circumstances it is necessary to examine whether the fact that STIM applies the remuneration model to Kanal 5 and TV 4 constitutes abuse of its dominant position within the meaning of the first paragraph of Article 82 EC.

25 The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (Case 85/76 Hoffman-La Roche v Commission [1979] ECR 461, paragraph 91, and Case C-62/86 AKZO v Commission [1991] ECR I-3359, paragraph 69).

26 Although the fact that an undertaking is in a dominant position cannot deprive it of its right to protect its own commercial interests if they are attacked, and such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be accepted if its purpose is specifically to strengthen that dominant position and abuse it (see, Case 27/76 United Brands and United Brands Continentaal v Commission [1978] ECR 207, paragraph 189, and Joined Cases C-468/06 to C-478/06 Sot. Lélos kai Sia and Others [2008] ECR I-0000, paragraph 50).

27 In that context, it is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition (United Brands and United Brands Continentaal v Commission, paragraph 249).

28 According to the case-law of the Court, such an abuse might lie in the imposition of a price which is excessive in relation to the economic value of the service provided (see Case 26/75 General Motors Continental v Commission [1975] ECR 1367, paragraph 12, and United Brands and United Brands Continentaal v Commission, paragraph 250).

29 In the case in the main proceedings, it is therefore appropriate to ascertain whether the royalties levied by STIM are reasonable in relation to the economic value of the service provided by that organisation, which consists in making the repertoire of music protected by copyright that it manages available to the broadcasting companies which have concluded licensing agreements with it.

30 In so far as those royalties are intended to remunerate composers of musical works protected by copyright with respect to the television broadcast of those works, it is necessary to take into consideration the particular nature of that right.

31 In that context, it is appropriate to seek an appropriate balance between the interest of composers of music protected by copyright to receive remuneration for the television broadcast of those works and those of the television broadcasting companies to be able to broadcast those workers under reasonable conditions.

32 As regards royalties collected with respect to remuneration for an author's rights over the public performance of recorded musical works in a discotheque, the amount of which was calculated on the basis of the discotheque's turnover, the Court held that such royalties were to be regarded as a normal exploitation of copyright and that the collection of those royalties did not in itself constitute an abuse within the meaning of Article 82 EC (see, to that effect, Case 402/87 Basset [1987] ECR 1747, paragraphs 15, 16, 18 and 21).

33 So far as concerns the abusive nature of similar rates of royalties, the amount of which also corresponded to a percentage of the turnover of a discotheque, the Court held that the fact that a flat-rate royalty is charged can be criticised by reference to the prohibition contained in Article 82 EC only if other methods might be capable of attaining the same legitimate aim, namely the protection of the interests of authors, composers and publishers of music, without

thereby increasing the costs of managing contracts and monitoring the use of protected musical works (see, Case 395/87 Tournier [1989] ECR 2521, paragraph 45).

34 Likewise, the application by STIM of the remuneration model at issue in the main proceedings does not in itself constitute an abuse within the meaning of Article 82 EC and must, in principle, be regarded as a normal exploitation of copyright.

35 It cannot be denied that, by collecting royalties with respect to remuneration paid for the television broadcast of musical works protected by copyright, STIM pursues a legitimate aim, namely, safeguarding the rights and interests of its members vis-à-vis users of their musical works (see, to that effect, Tournier, paragraph 31).

36 Furthermore, those royalties, which represent the consideration paid for the use of musical works protected by copyright for the purposes of television broadcast, must, in particular, be analysed with respect to the value of that use in trade.

37 In that connection, in so far as such royalties are calculated on the basis of the revenue of the television broadcasting societies, they are, in principle, reasonable in relation to the economic value of the service provided by STIM.

38 Furthermore, the owner of the copyright and the person claiming through him have a legitimate interest in calculating the fees due in respect of the authorisation to exhibit the film on the basis of the actual or probable number of performances (see, to that effect, Case 62/79 Coditel and Others [1980] ECR 881, paragraph 13, and Tournier, paragraph 12).

39 The remuneration model applied by STIM takes account of the number of musical works protected by copyright actually broadcast, because, as is apparent from the order for reference, the amount of those royalties varies in accordance not only with the revenue of the television broadcasting companies but also with the amount of music broadcast.

40 However, it is conceivable that, in certain circumstances, the application of such a remuneration model may amount to an abuse, in particular when another method exists which enables the use of those works and the audience to be identified and quantified more precisely and that method is capable of achieving the same legitimate aim, which is the protection of the interests of composers and music editors, without however leading to a disproportionate increase in the costs incurred for the management of the contracts and the supervision of the use of musical works protected by copyright.

41 Accordingly, the answer to the first, second and third questions must be that Article 82 EC is to be interpreted as meaning that a copyright management organisation with a dominant position on a substantial part of the common market does not abuse that position where, with respect to remuneration paid for the television broadcast of musical works protected by copyright, it applies to commercial television channels a remuneration model according to which the amount of the royalties corresponds partly to the revenue of those channels, provided that that part is proportionate overall to the quantity of musical works protected by copyright actually broadcast or likely to be broadcast, unless another method enables the use of those works and the audience to be identified more precisely without however resulting in a disproportionate increase in the costs incurred for the management of contracts and the supervision of the use of those works.

The fourth question

42 By its fourth question, the referring court asks essentially whether the fact that a copyright management organisation calculates the royalties paid with respect to remuneration due for the television broadcast of musical works protected by copyright differently according to whether the broadcasting companies are commercial or public constitutes an abuse of a dominant position within the meaning of Article 82 EC.

43 According to point (c) of the second paragraph of Article 82 EC an abuse may consist, inter alia, in applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage.

44 As regards the existence of such a practice in the dispute in the main proceedings, it is for the referring court to examine, first, whether, by calculating in a different manner the royalties due by Kanal 5 and TV 4 on one hand and SVT on the other, with respect to the remuneration for the television broadcast of musical works protected by copyright, STIM applies in their regard dissimilar conditions to equivalent services and, second, whether those television companies are, by reason of that fact, placed at a competitive disadvantage.

45 In the course of that examination, the referring court will have to take account of the fact that, unlike Kanal 5 and TV 4, SVT does not have either advertising revenue or revenue relating to subscription contracts and of the fact that the royalties paid by SVT are collected without taking account of the quantity of musical works protected by copyright actually broadcast.

46 Furthermore, the national court must also ascertain whether Kanal 5 and TV 4, or either of those two companies, is a competitor of SVT on the same market.

47 Finally, in order to determine whether the fact that a copyright management organisation calculates royalties paid with respect to remuneration due for the broadcast of musical works protected by copyright in a different manner according to whether they are commercial companies or public service undertakings constitutes an abuse within the meaning of Article 82 EC, the referring court must consider whether such a practice may be objectively justified (see, to that effect, United Brands and United Brands Continentaal v Commission, paragraph 184; Tournier, paragraphs 38 and 46; Case C-95/04P British Airways v Commission [2007] ECR I-2331, paragraph 69; and Sot. Lélos kai Sia and Others, paragraph 39). Such justification may arise, in particular, from the task and method of financing of public service undertakings.

48 Accordingly, the answer to the fourth question must be that Article 82 EC is to be interpreted as meaning that, by calculating the royalties with respect to remuneration paid for the broadcast of musical works protected by copyright in a different manner according to whether the companies concerned are commercial companies or public service undertakings, a copyright management organisation is likely to exploit in an abusive manner its dominant position within the meaning of that article if it applies with respect to those companies dissimilar conditions to equivalent services and if it places them as a result at a competitive disadvantage, unless such a practice may be objectively justified.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Fourth Chamber) hereby rules:

1. Article 82 EC must be interpreted as meaning that a copyright management organisation with a dominant position on a substantial part of the common market does not abuse that position where, with respect to remuneration paid for the television broadcast of musical works protected by copyright, it applies to commercial television channels a remuneration model according to which the amount of the royalties corresponds partly to the revenue of those channels, provided that that part is proportionate overall to the quantity of musical works protected by copyright actually broadcast or likely to be broadcast, unless another method enables the use of those works and the audience to be identified more precisely without however resulting in a disproportionate increase in the costs incurred for the management of contracts and the supervision of the use of those works.

2. Article 82 EC must be interpreted as meaning that, by calculating the royalties with respect to remuneration paid for the broadcast of musical works protected by copyright in a different manner according to whether the companies concerned are commercial companies or public service undertakings, a copyright management organisation is likely to exploit in an abusive manner its dominant position within the meaning of that article if it applies with respect to those companies dissimilar conditions to equivalent services and if it places them as a result at a competitive disadvantage, unless such a practice may be objectively justified.

OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 11 September 2008 (1)
Case C-52/07
Kanal 5 Ltd
TV 4 AB
v
Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa

(Reference for a preliminary ruling from the Marknadsdomstolen (Sweden))

(Article 82 EC – Dominant position – Abuse – Copyright management organisation – Organisation in a de facto monopoly position – Television broadcasts – Method for calculating royalties)

I – Introduction

1. The present reference for a preliminary ruling concerns the royalty claimed by a Swedish copyright management organisation from television channels in return for the use of copyright-protected musical works taken from the repertoire managed by that organisation. The questions have arisen in proceedings between private television channels and the Swedish management organisation. In those proceedings, the private television channels seek an order restraining the copyright management organisation from using certain calculation methods in the calculation of the royalty. The national court wishes to establish whether the use of certain methods in the calculation of that royalty constitutes an abuse of a dominant position for the purposes of Article 82 EC.

II – Legal framework

A – Community law

2. Under Article 82 EC, any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it is prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

B – National law

3. In Sweden, copyright law is framed by the lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk (Law on copyright in literary and artistic works or 'Law on copyright'). That law confers on the composer of a musical work an exclusive right by which he may control the public performance of his musical work ('performance rights') and the recording and reproduction thereof ('mechanical rights'). In principle, third parties may not perform, record or reproduce a composer's work without his authorisation (in the form of a licence). For the issue of a licence, the composer may charge a royalty.

4. Special provision exists under Swedish copyright law for television channels. Under Articles 42(a) and 42(e) of the Law on copyright, television channels may agree an 'extended collective licence' with a copyright management organisation representing a substantial number of Swedish authors in the field con-

cerned. If a television channel holds such an 'extended collective licence', the Swedish Government may grant that organisation a general right to use the relevant works subject to copyright. In that case, the authorisation of individual authors is no longer required.

5. Article 23 of the konkurrenslagen (1993:20) ('KL') (Law on competition) provides that the Konkurrensverket (Swedish Competition Authority) may order an undertaking to terminate an infringement of Article 82 EC. It provides, further, that an undertaking affected by an infringement may have recourse to the Marknadsdomstolen (Market Court) if the Konkurrensverket declines to resolve the undertaking's complaint.

III – Facts, main proceedings and questions referred for a preliminary ruling

A – Facts

6. Kanal 5 Ltd ('Kanal 5') and TV 4 AB ('TV 4') are private television channels. Sveriges Television ('SVT') is a public service television channel.

7. The Föreningen Svenska Tonsättares Internationella Musikbyrå upa ('STIM') is a copyright management organisation. The members of STIM are composers of musical works and music publishers. Upon joining the society, members assign to STIM their claims to royalties charged to television channels for the use of their works. STIM asserts those claims against television channels and distributes the royalties received amongst its members.

8. STIM has entered into reciprocal agreements with sister organisations in other Member States and non-member countries. Under those agreements, STIM may collect royalties in Sweden both in relation to its own repertoire (2) and those of sister organisations.

9. In setting the royalty amount, STIM applies three different methods to television channels:

– Kanal 5 and TV 4 are required by STIM to pay royalties according to the principal tariff. Under that tariff, STIM charges a proportion of the television channels' income from advertising or, in the alternative, from advertising and viewer subscriptions ('advertising and subscription revenues'). That proportion is not fixed, but rather is set reflecting the share of music broadcast by a channel in the course of a year. Although that proportion may rise and fall in accordance with that share, it is always much lower than and not equal to it. (3) In addition, certain deductions are made to take account of marketing expenses. (4)

The annual share of music is the proportion of annual broadcast time during which the channel uses copyright-protected musical works. It is calculated on the basis of reports submitted to STIM by Kanal 5 and TV 4. Those reports afford a determination of how much time a protected musical work was used in the various broadcasts. The annual share of music is calculated retrospectively in respect of the entire year.

– SVT is required by STIM to pay royalties calculated according to a different method. SVT is financed primarily through public charges and has barely any advertising revenue. For that reason, notional advertising revenues are calculated for SVT. (5) STIM charges SVT a proportion of those notional advertising revenues, taking account of SVT's annual music share. However, the annual share of music in relation to SVT is a predicted figure issued in advance. No retrospective account is taken of the actual share of music broadcast.

– The minimum tariff is applied by STIM to smaller channels which have not yet achieved a very high turnover. This rate takes account of the number of hours of music broadcast per year and also the actual viewing of a particular channel. Actual viewing is calculated as a number of persons per day. (6)

B – Main proceedings and questions referred for a preliminary ruling

10. Kanal 5 and TV 4 applied to the Konkurrensverket in October 2004 seeking an order against STIM in relation to its abuse of its dominant position. However, the Konkurrensverket considered that no grounds existed on which to conclude an infringement of Article 82 EC. Thereupon, Kanal 5 and TV 4 brought proceedings before the Marknadsdomstolen ('the national court') seeking an injunction restraining STIM from applying certain calculation methods in the setting of royalties. The injunctions sought by Kanal 5 and TV 4 are formulated in part in general terms without reference to the calculation method currently applied by STIM.

11. The national court held that the relevant product and geographical market is the Swedish market in making copyright-protected musical works available for television and that, on account of its de facto monopoly in the relevant market, STIM is in a dominant position. It further held that STIM's conduct is capable of affecting trade between Member States. In its order for reference, the national court makes reference to the fact, first, that the calculation method is also applied to royalties relating to the use of copyright-protected music composed by nationals of other Member States. In addition, some of the undertakings which have purchased advertising space with Kanal 5 and TV 4 are established in other Member States. Lastly, it observes that Kanal 5 broadcasts from the United Kingdom.

12. In view of the above, the national court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 82 EC to be interpreted as meaning that a practice constitutes abuse of a dominant position where a copyright management organisation which has a de facto monopoly position in a Member State applies to or imposes in respect of commercial television channels a remuneration model for the right to make available music in television broadcasts directed at the general public which involves the remuneration being calculated as a proportion of the television channels' revenue from such television broadcasts by those channels?

(2) Is Article 82 EC to be interpreted as meaning that a practice constitutes abuse of a dominant position where a copyright management organisation which has a de facto monopoly position in a Member State applies to or imposes in respect of commercial television channels a remuneration model for the right to make

available music in television broadcasts directed at the general public which involves the remuneration being calculated as a proportion of the television channels' revenue from such television broadcasts by those channels, where there is no clear link between the revenue and what the copyright management organisation makes available, that is, authorisation to perform copyright-protected music, as is often the case with, for example, news and sports broadcasts and where revenue increases as a result of development of programme charts, investments in technology and customised solutions?

(3) Is the answer to Question 1 or 2 affected by the fact that it is possible to identify and quantify both the music performed and viewing?

(4) Is the answer to Question 1 or 2 affected by the fact that the remuneration model (revenue model) is not applied in a similar manner in respect of a public service company?'

IV – Procedure before the Court

13. The reference for a preliminary ruling was lodged at the Court on 6 February 2007. During the written procedure, written observations were lodged by Kanal 5 and TV 4, STIM, the United Kingdom Government, the Polish Government and the Commission of the European Communities. Kanal 5, STIM, the United Kingdom Government and the Commission attended the hearing on 12 June 2008 and elaborated on their written observations.

V – Arguments of the parties

14. Kanal 5 and TV 4 take the view that the calculation methods applied by STIM constitute an abuse of its dominant position. STIM imposes disproportionate sales prices, limits production, markets and technical developments to the prejudice of consumers and discriminates between television channels.

15. In relation to the first, second and third questions, Kanal 5 and TV 4 argue essentially that no adequate connection exists linking the benefit conferred by STIM and the advertising and subscription revenues generated by a television channel. In that connection, they argue that most of the television channels' advertising revenues are generated during prime time, when the share of music is relatively low. The proportion of music in news and sports broadcasts is also low. Although the use of a lump-sum method for royalties may be appropriate for reducing the costs involved in collective management of the royalties, STIM's calculation methods must take account of technical means of identifying and quantifying the broadcast of copyright-protected musical works and viewing levels.

16. In relation to the fourth question, Kanal 5 and TV 4 argue that the application of different royalty tariffs is discriminatory. They add that Kanal 5, TV 4 and SVT are purchasers in the Swedish market for television broadcasts of copyright-protected musical works.

17. STIM takes the view that the answer to the questions referred may be found in the doctrine of acte clair. It argues that Article 82 EC is inapplicable to the present case because the exercise of an exclusive copyright relates to the substance of the copyright. It is thus outside the scope of Article 82 EC. In that connection, STIM refers to Articles 295 EC and 307 EC, read together with the Article 11bis of the Berne Convention. (7)

18. In terms of substance, STIM observes, in relation to the first, second and third questions, that its calculation method reflects all key aspects. It is based on objective and transparent criteria and is simple and easy to apply. It takes account of the television channels' annual music share, potential viewing share and the economic context in which copyright is used. It is also flexible and facilitates market access for new, smaller channels. Lastly, it reflects accurately the value of copyright. Therefore, the existence of technical means of quantification of use of copyright-protected musical works does not make the currently used calculation method abusive.

19. In relation to the fourth question, STIM contends that the use of a different calculation method does not give rise to discrimination. Kanal 5 and TV 4 are not placed at a competitive disadvantage quite simply because they operate in different markets. A distinction must be drawn between the market for public television and that for pay television. The market for public television must in turn be divided into public service channels, financed by State-levied fees, and private channels, financed by advertising revenues. The fact that SVT is financed by State-levied fees is further evidence of there being no difference in treatment.

20. The Polish Government argues in relation to the first, second and third questions that the use of a calculation method such as that currently applied by STIM does not in itself constitute an abuse of a dominant position, provided that the royalty amount reflects the economic value of using copyright-protected musical works and the services of the copyright management organisation. In that connection, identification and quantification of the music are of crucial importance.

21. In relation to the fourth question, the Polish Government observes that the application of different calculation methods to private television channels, on the one hand, and public service television channels, on the other, may constitute unlawful discrimination if it leads to unequal conditions being imposed in respect of the same services without justification.

22. The United Kingdom Government remarks in relation to the first, second and third questions that the use of a calculation method under which the royalty is calculated as a proportion of advertising and subscription revenues does not in itself constitute abuse of a dominant position. Rather, it is a normal exercise of copyright. Whether or not the calculation method has a sufficient link to the use of copyright-protected musical works is a question of fact which falls to be determined by the national court. Further, the United Kingdom Government indicates that the disadvantages of a generalised approach may be compensated for by advantages in terms of efficiency.

23. In relation to the fourth question, the United Kingdom Government submits that the national court must establish whether Kanal 5 and TV 4 are in compe-

tition with SVT. Further, the national court must determine whether there is discrimination.

24. The Commission argues in relation to the first, second and third questions that the use of a calculation method under which the royalty is calculated as a proportion of advertising and subscription revenues is not an abuse per se. It is difficult to establish the value which the use of copyright-protected musical works may have for viewers and television channels. In the field of copyright, it is legitimate to link royalties, at least in part, to actual or potential viewing figures and to the economic value of that use for television channels. It is also difficult to establish a causal link between the use of copyright-protected musical works and the economic success of a television programme or channel. In principle, a reasonable connection may be presumed to exist between viewing figures and advertising and subscription revenues. Viewing figures may vary from one broadcast to another, however.

25. In the view of the Commission, a calculation method under which royalties amount to a proportion of turnover must take account of the extent to which copyright-protected musical works are used. The greater the possibility of identifying and quantifying the musical works and audience, the more likely it is that an economic value may be established. However, the fact that it is technically possible to effect a highly detailed analysis does not make the use of a less detailed method abusive. In that connection, account must be taken of the reliability and costs involved in a more detailed analysis.

26. In relation to the fourth question, the Commission observes that the national court must establish, first, whether Kanal 5 and TV 4 are in competition with SVT. Next, it must determine whether there is discrimination. The use of a particular calculation model is in no way discriminatory if it is intended to bring SVT's position closer to that of private television channels in simulating notional advertising and subscription revenues. However, the national court must examine whether discrimination arises because no retrospective account is taken of the actual share of music broadcast by SVT.

VI – Legal appraisal

A – Preliminary observations

27. The questions referred concern an area of ever-growing social and economic importance. The tariff structure governing the royalties which collecting societies charge the users of rights managed by those organisations is a particularly sensitive area in the collective management of copyright. In the past, it has often led to disputes between collecting societies and their users. The Court has already had occasion to consider the compatibility of calculation methods used by collecting societies with Article 82 EC.

28. The questions referred by the national court in the present case are in certain respects similar to the questions which the Court had to answer in the 'discotheque cases'. (8) However, the present case differs from the discotheque cases in that during their broadcasting hours television channels make use of copyright-protected musical works less than discotheques do during their opening hours.

29. The questions referred are admissible. Admittedly, STIM contends that the questions referred may be resolved by reference to the Court's case-law. However, even if that contention is correct, this does not render the questions inadmissible. (9)

30. The national court held that the relevant product and geographical market is the Swedish market in making copyright-protected musical works available for television and that STIM holds a dominant position on that market on account of its de facto monopoly. It further held that STIM's conduct is capable of affecting trade between Member States. The questions referred in the present case therefore relate solely to the interpretation of the concept of abusive conduct for the purposes of Article 82 EC. (10)

31. By its first three questions, the national court seeks to establish whether a copyright management organisation in a dominant position on the market behaves in an abusive manner if, vis-à-vis private television channels such as Kanal 5 and TV 4, it applies certain calculation methods in calculating the royalty due in return for the benefit it confers. It is noteworthy in that connection that the national court has not asked whether a given calculation method is an abuse because it results in excessively high royalties. Instead, its questions seek to establish whether the use of those calculation methods gives rise to abuse where there is not a sufficient link between the benefits conferred by the copyright management organisation and the royalty charged.

32. It is also noteworthy that the national court couched its questions in very general terms, without referring to the calculation method currently applied by STIM. This might be on procedural grounds, as the subject of preliminary ruling proceedings in accordance with subparagraph (a) of the first paragraph of Article 234 EC is simply the interpretation of primary Community law and not assessment of facts at national level. (11) However, the injunctions sought by Kanal 5 and TV 4 in the main proceedings are in part phrased in general terms without making reference to the calculation method currently applied by STIM. In that connection, regard must be had to the fact that STIM is free to set the calculation method as it sees fit. In those circumstances, the possibility cannot be ruled out that the injunctions which Kanal 5 and TV 4 seek not only relate to the calculation method currently applied by STIM, but aim to prohibit in general STIM's use of certain types of calculation methods. This aspect must be borne in mind in the interpretation of the questions referred.

33. By its fourth question, the national court wishes to establish whether the application of different calculation methods in relation to private television channels such as Kanal 5 and TV 4, on the one hand, and to public service television channels such as SVT, on the other, constitutes abuse of a dominant position.

B – The first question

34. By its first question, the national court seeks to establish whether the use of a calculation method under which the royalty is calculated as a proportion of the revenue earned by television channels through television broadcasts directed at the general public constitutes abuse of a dominant position for the purposes of Article 82 EC. It follows from a combined reading of the first and second questions that, by its first question, the national court seeks to establish whether a calculation method is abusive on the sole ground that it sets royalties as a proportion of television channels' revenue. (12)

35. Article 82 EC does not prohibit undertakings from holding a dominant position on a market. It does, however, place a special responsibility on undertakings in a dominant position, in requiring them not to abuse their dominant position. (13) The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and through recourse to methods which, different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition. (14)

36. Admittedly, an undertaking in a dominant position is entitled also to pursue its own interests. However, such an undertaking engages in abusive conduct when it makes use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition. (15)

37. Article 82 EC contains a non-exhaustive list of how an undertaking may abuse a dominant position, including directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions (subparagraph (a) of the second paragraph of Article 82 EC); limiting the production, markets or technical development to the prejudice of consumers (subparagraph (b) of the second paragraph of Article 82 EC); and applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage (subparagraph (c) of the second paragraph of Article 82 EC).

38. As the present case relates to the issue of whether the use of a particular form of calculation method is abusive, it appears primarily to concern the situation referred to in subparagraph (a) of the second paragraph of Article 82 EC, that is to say, directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions. Kanal 5 and TV 4 raise arguments also in relation to subparagraphs (b) and (c) of the second paragraph of Article 82 EC. However, as their arguments allege royalties which are unfair for the purposes of subparagraph (a) of the second paragraph of Article 82 EC, I will examine, first, the situation illustrated by that example. (16)

39. According to settled case-law, imposition of unfair purchase or selling prices or other unfair trading conditions must be presumed, in particular, where the dominant undertaking charges a fee or remuneration which bears no reasonable relation to the economic value of the benefit conferred. (17) That assessment – a difficult exercise to perform (18) – presupposes analysis of the economic value of the benefit conferred, the consideration rendered and the relation between benefit and consideration. Therefore, I will consider below, first (1) the economic value of the benefit conferred by a copyright management organisation such as STIM and (2) the royalty charged, before examining (3) whether those factors bear no reasonable relation to each other.

1. The benefit conferred by STIM

40. The benefit which a copyright management organisation such as STIM confers consists in the grant of a general licence to use the repertoire of copyright-protected musical works managed by that organisation. That is a rather abstract description of the benefit. In order to convey a better picture of its economic value, I should like to provide a short illustration as follows.

41. First of all, account must be had of the fact that the repertoire of a copyright management organisation consists in the individual copyright (19) belonging to its members. In the absence of collective management effected by a copyright management organisation, every rightholder would have to control the use of his works and claim his right to remuneration from users. At the same time, in the absence of a general licence, before using an individual work of music subject to copyright protection, a television channel would have to obtain a licence from the relevant composer or music publisher. The use of copyright-protected musical works on an individual basis would thus become very costly for both composers and television channels management. (20)

42. Collective management through a copyright management organisation and the grant of general licences has advantages, therefore, for composers and television channels. For composers, management is made easier and in certain cases is actually made possible. From the viewpoint of television channels, individual copyright holdings are transformed into a repertoire, the individual items of which can be easily accessed by television channels under the terms of a general licence, without needing first to negotiate an individual licence. (21) Through reciprocal agreements between sister collecting societies, that general licence permits access to the worldwide repertoire of copyright-protected music in other Member States and non-member countries. (22)

2. The royalty

43. In its question, the national court describes the royalty as a proportion of the television channels' revenue earned from television broadcasts directed at the general public. The order for reference indicates that that is to be construed as comprising advertising and subscription revenues.

44. A television channel which is financed by advertising revenues generally makes television broadcasts available to viewers free of charge. The television channel finances its operations through the sale of advertising time, that is to say, it charges a fee for facilitating contact between its advertising clients and viewers and makes a proportion of its broadcasting hours available to those clients for advertising. A television channel which finances its operations through subscription revenues makes its broadcasts available in return for a fee. (23)

45. According to the national court, the remuneration method defines royalties as 'a proportion' of revenue. That phrasing is open-ended. It includes calculation methods providing for a fixed proportion of revenue, under which, for example, a fixed percentage share of revenue is charged. However, it also includes a calculation method under which a fee is charged as a variable proportion of revenue, that is to say, a proportion which varies in accordance with certain criteria. Admittedly, the calculation method currently applied by STIM has a variable component. However, as the question referred by the national court does not appear to be restricted to the calculation method currently applied by STIM, (24) in the following analysis I will consider calculation methods using both fixed and variable proportions.

3. Relation between the royalty and the benefit conferred

46. As stated earlier, (25) for the purposes of subparagraph (a) of the second paragraph of Article 82 EC, unfair selling prices or other unfair trading conditions are imposed if a royalty is charged which bears no reasonable relation to the economic value of the benefit conferred. Before considering the relation of the royalty to the benefit in the case of (a) a calculation method incorporating a fixed proportion and (b) a calculation method incorporating a variable proportion, I should like first to indicate the test which is applicable in the present case.

47. First, the present case does not concern an assessment of the equitableness of a remuneration, as regulated under provisions of national copyright law, which provide that an author is entitled to equitable remuneration. Instead, it involves a framework review for the purposes of competition law. (26) Therefore, it is not the Court's task in the present case to establish whether a specific form of remuneration is equitable for the purposes of copyright law. (27) Rather, the question at issue is whether, in applying a particular calculation method, a copyright management organisation goes beyond the limits permitted under competition law. (28)

48. Secondly, it must be pointed out that the Community's competence in the area of copyright is limited. Thus, for example, in SENA, (29) where the Court was called upon to interpret, for the purposes of copyright, the concept of equitable remuneration in Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, (30) it demonstrated considerable restraint. In that judgment, the Court held that, in the absence of a definition in the directive of the concept of equitable remuneration, it cannot be the task of the Court to lay down criteria for determining what constitutes equitable remuneration. (31)

49. The abovementioned points must be taken into account in the framework review for the purposes of competition law. With respect to the content and value of a copyright, in my view the Court must, as a rule, show restraint. In the absence of Community rules, those matters lie within the competence of the Member States. (32) However, the question whether a calculation method leads to a situation where no reasonable relation exists between the use of copyright-protected material and the royalty for the use thereof lies, in my view, within the scope of the competition law framework review under Article 82 EC.

(a) Fixed proportion of revenue

50. In Basset, (33) the Court considered a calculation method based on a fixed proportion of revenue. In that case, a French copyright management organisation charged a royalty to discotheque operators, calculated as a fixed percentage of revenue. The Court did not regard the use of such a calculation method in that case as abuse of a dominant position. Instead, it held that such form of royalty must be regarded as a normal exploitation of copyright and, therefore, the fact that a copyright management organisation utilises the possibilities made available to it by national legislation in that regard may not be regarded as abusive conduct. (34)

51. Even though in that case the Court was not expressly faced with the question whether the use of a calculation method based on a fixed proportion of revenue should be considered abuse of a dominant position, I interpret that judgment as implicitly refusing to hold such a calculation method to be abuse of a dominant position in that case.

52. That judgment cannot simply be transposed 'as is' to the present case, however. In determining whether abuse of a dominant position has occurred, it is necessary to consider all the circumstances of the individual case. (35) The considerable differences in the use of copyright-protected musical works in the activities of a discotheque and those of a television channel weigh against simply transposing the Court's judgment in Basset in its entirety to the circumstances of the present case. In the case of a discotheque, the use of copyright-protected musical works is an essential feature of its activities. For that reason, it may be presumed that discotheques are dependent on the use of musical works for their operation and that, as a rule, throughout their business hours they make intensive use of musical works. The matter is different in the case of television channels. They of course broadcast music. However, the extent to which copyright-protected works are used can vary between different channels, broadcast times and programmes.

53. The use of a calculation method incorporating a fixed proportion of revenue in relation to television channels would therefore lead to the royalty amount no

longer being tied to the actual use of copyright-protected musical works. In that scenario, television channels which made little or no use of copyright-protected musical works would be obliged to pay a royalty which bore no relation – or at least no sufficient relation – to the economic value of the benefit conferred by STIM. Thus, some users would be disproportionately burdened compared with other users who made greater use of copyright-protected musical works. (36)

54. Therefore, in relation to television channels, the use of a calculation method incorporating a fixed proportion of revenue is liable to result in a substantial disparity between the economic value of the benefit conferred by the copyright management organisation and the royalty charged by it.

55. In principle, at this point the question should also be considered whether there is an alternative calculation method which is more suitable for reflecting the relation between the royalty and the economic value of the benefit than a calculation method based on a fixed proportion of revenue. (37) In the present case, this can be presumed to be so, since STIM applies a calculation method incorporating a variable proportion of revenue.

56. In principle, it should be considered as well whether the use of a calculation method incorporating a fixed proportion of revenue in preference to a method incorporating a variable proportion of revenue may be justified on grounds of efficiency gains. (38) However, as the use of a calculation method incorporating a fixed proportion of revenue in relation to television channels would lead to a substantial disparity between the value of the benefit and the royalty, justification on grounds of efficiency gains appears to be precluded in the present case.

57. Accordingly, the use of a calculation method incorporating a fixed proportion of revenue in relation to television channels must be regarded as abuse of a dominant position for the purposes of Article 82 EC.

(b) Variable proportion of revenue

58. If, by contrast, a calculation method incorporating a variable proportion of revenue is involved, the extent of use of copyright-protected musical works may, in principle, be taken into account through the variable. (39) Thus, use of a calculation method incorporating a variable proportion of revenue may in itself constitute abuse of a dominant position if the very fact of linking royalties to the television channels' advertising and subscription revenues is liable to distort substantially the relation between the economic value of the benefit provided by the copyright management organisation and the royalty charged.

59. Admittedly, in principle, the possibility may not be ruled out that an undertaking in a dominant position acts in an abusive manner when it links the prices for its products to the revenue which its customers achieve through the use thereof. (40) Here, however, account must be taken of the specific circumstances of the case, (41) particularly the special features of the benefit conferred by collecting societies.

60. First, it must be observed that, ultimately, behind STIM's repertoire is the individual copyright held by each author. In licensing the use of copyright, it is entirely normal practice to charge a royalty amounting to a proportion of the revenue earned by the product for which the copyright-protected material is used. (42) This underscores copyright's suitability for exploitation (43) and the notion that an author should have a reasonable proportion of the turnover which is procured through the use of his work. (44)

61. Admittedly, in United Brands and United Brands Continentaal v Commission, (45) the Court found that a comparison of price and costs can be used to determine whether the remuneration is disproportionate. Such an approach assumes implicitly that the value of the benefit conferred may be determined on the basis of the production costs. That is not possible with copyright, however, because of the evident difficulty in calculating production costs incurred in creating a musical work and in drawing any conclusions as to the value of the benefit conferred. (46)

62. Nor, in my view, is it possible to argue that the situation would be otherwise if the right licensed did not constitute the main feature of the product. For example, in relation to the licensing of patents and know-how, such royalty arrangements are not uncommon, even where the final product comprises not only the patent but also additional elements (for example, materials, design, etc.). (47)

63. Secondly, the difficulty in determining the economic value of the benefit conferred by collecting societies must be borne in mind. (48) Given the structure of the system, as described above, (49) there is no market in Sweden in which prices are determined by the interplay of supply and demand. (50) Where an assessment is being made of whether the amount of a royalty constitutes abuse of a dominant position, a comparison may of course be drawn with royalty amounts in other Member States (geographical market comparison). (51) Where, however, it is necessary to determine the lawfulness of a particular calculation method, as in the present case, it is not possible, in my view, simply to make that comparison without further analysis. (52)

64. Since the calculation method, first, is not uncommon, (53) secondly, employs a criterion which is linked to the value of the copyright (54) and, thirdly, given the difficulties in determining the economic value of the benefit conferred by a copyright management organisation, I cannot see anything abusive about setting royalties as a proportion of television channels' advertising and subscription revenue. This view appears to me also to be in keeping with the Court's case-law, which held in Basset (55) that a calculation method based on a proportion of revenue must be regarded as a normal exploitation of copyright. In that regard, I consider that judgment to be wholly applicable to the present case.

65. This finding is not affected by the fact that other types of links may be applied in other Member States. A calculation method incorporating a variable propor-

tion of revenue reflects the copyright's inherent suitability for exploitation and the notion that authors are entitled to a reasonable share of the turnover procured through the use of their works. It is of course perfectly conceivable that other calculation methods might emphasise other aspects. (56) However, in the present case, it is not for the Court to determine the calculation method which is best suited to reconciling the interests of authors and television channels. (57)

66. A calculation method based on a variable proportion of television channels' advertising and subscription revenues must nevertheless take account of the extent to which copyright-protected musical works are used.

4. Conclusion

67. In conclusion, the use of a calculation method under which a fixed proportion of television channels' advertising and subscription revenues is charged as a royalty constitutes abusive conduct for the purposes of Article 82 EC. By contrast, charging a variable proportion is not in itself abusive. Such a calculation method may become abusive, however, if it does not take sufficient account of the extent of the use made of copyright-protected musical works.

C – The second and third questions

68. By its second question, the national court seeks to establish whether it is abuse of a dominant position to apply to television channels a calculation method incorporating a variable proportion of revenue, where in that method there is no clear link between the revenues generated and the benefit conferred by the copyright management organisation. According to the national court, there is no such link, inter alia, in the case of news and sports broadcasts and where the television channels' revenues increase as a result of an expansion in programming, investments in technology and the development of customised solutions. The national court's third question seeks to have clarified whether the answers to the first and second questions are affected by the possibility of identifying and quantifying both the music performed and viewing levels.

69. I understand these two questions referred by the national court as seeking to establish whether a calculation method is made abusive by the fact that it either does not take account of the extent to which television channels make use of copyright-protected musical works or does not take account of the extent to which the use of such of works contributes to revenue. It seems to me impossible to treat separately the question of the extent to which account must be taken of the possibility of identifying and quantifying the music broadcast and that of viewing figures. (58)

70. As I observed above, (59) the possibility cannot be ruled out that the national court's questions refer not only to the calculation method currently applied by STIM, but also to other calculation methods developed in a different manner which it might apply in future. Thus, I will answer the national court's questions, first (1), in the light of the calculation method currently applied by STIM. Thereafter (2), I will examine the extent to which those questions may also be answered in relation to other, potential calculation methods developed in a different manner.

1. Calculation method such as that currently applied by STIM

71. I observed above (60) that a calculation method may constitute an abuse of a dominant position for the purposes of Article 82 EC if it does not take sufficient account of the extent to which use is made of copyright-protected musical works.

72. Whether or not that is the case is primarily a question of fact. Therefore, I must point out at the outset that the role of the Court in the present preliminary reference proceedings is limited to giving an interpretation of Article 82 EC. The Court has no jurisdiction to give a ruling on the facts in an individual case or to apply the rules of Community law which it has interpreted to national measures or situations. Those questions fall within the exclusive jurisdiction of the national courts. (61)

73. Before examining the individual points in the questions referred by the national court, I wish to set out the steps the national court must take in exercising the framework competition law review.

74. First, the national court must examine whether there are indications that a calculation method such as that currently applied by STIM leads to a significant disproportion between the royalty and the economic value of the benefit conferred. (62) That, in my view, can be confirmed only if there is an alternative calculation method which affords a more detailed calculation of the economic value of the copyright.

75. If the national court finds that such an alternative calculation method exists, it must, secondly, weigh up the advantages and disadvantages of the two calculation methods. The mere fact that a more detailed alternative calculation method exists does not necessarily imply that the use of the more generalised calculation method is abusive. Application of a more generalised calculation method may be justified on grounds of efficiency gains, (63) in particular, in the form of cost savings in the management of contracts and the monitoring of the use of copyright-protected musical works. (64)

76. In that connection, a number of factors may be taken into account, including how straightforward it is to apply the more generalised calculation method or, on a related point, what additional costs are involved in the use of the more detailed calculation method. A calculation method which is based on objective, easily identifiable criteria will, as a rule, be more straightforward to apply than one which is based on subjective criteria falling within the discretion of one of the two parties and is difficult for the other party to verify. It may also be of relevance in that connection whether the data required are already available because they are already needed for other purposes or whether they must be obtained especially for the purposes of calculating royalties. The assessment of the efficiency of a calculation method may also have to take account of the litigation to which it is liable to give rise, how durable it is and the possible need for readjustments.

77. I do not believe, however, that efficiency gains can provide unconditional justification for the use of a more generalised calculation method. Admittedly, in Tournier, (65) the Court held that, for the purposes of Article 82 EC, the flat-rate calculation method can only be criticised if other methods might be capable of attaining the same legitimate aim, namely the protection of the interests of authors, composers and publishers of music, without thereby increasing the costs of managing contracts and monitoring the use of copyright-protected musical works. In my view, however, that cannot be construed as meaning that only those alternative calculation methods which do not increase the costs of managing contracts and monitoring the use of copyright-protected musical works should be considered. On the contrary, I consider that the more generalised method may constitute an abuse, even though it may be less cost-intensive than the alternative, more detailed method, where the cost savings bear no relation to the distortions caused by the more generalised method which could be avoided with the more detailed method.

78. Account must of course be taken, in applying Article 82 EC, of the objective of ensuring that composers obtain equitable remuneration. The interests of consumers must also be considered, however. (66) Equitable remuneration for composers provides incentive for the creation of musical works (67) and can therefore only be in consumers' interest. The application of a more generalised calculation method leads to lower cost savings. If those cost savings operate to the benefit of composers, they will lead to higher royalties and provide stronger incentive to create artistic works.

79. At the same time, consumers also have an interest in receiving high-quality television channels at the lowest possible price. If the use of a flat-rate calculation method leads to a significant disproportion between the benefit conferred by a copyright management organisation and the royalties paid, this can lead to higher production costs for television channels and operate indirectly to the disadvantage of consumers. The advantages and disadvantages in applying a more generalised and a more detailed calculation method must be weighed up.

80. I will now examine to what extent a calculation method such as that currently applied by STIM may be regarded as constituting abuse of a dominant position for the purposes of Article 82 EC because it takes no or insufficient account of (a) the amount of time that copyright-protected musical works are used during particular broadcasts, or (b) the viewing figures. Further, I shall examine (c) whether such a calculation method may constitute an abuse if it does not take into account the fact that a television channel's revenue may increase for reasons unrelated to the use of copyright-protected musical works.

(a) Identification and quantification of the use of copyright-protected musical works

81. A calculation method such as that currently applied by STIM involves setting a percentage amount which varies according to the amount of time the television channel broadcasts music each year. It thus takes account of the amount of time during which use is made of copyright-protected musical works each year.

82. However, in calculating, first, the yearly music share and then applying the relevant percentage by reference to the proportion of music to Kanal 5 and TV 4's annual revenue, that method fails to take account of the fact that advertising and subscription revenues may vary according to the programme and broadcast time.

83. The national court will need to examine, first, whether advertising revenues vary considerably according to programme and broadcast time. (68) It will also have to examine whether certain programmes on a television channel usually yield high advertising revenues whilst making only limited use of copyright-protected musical works. If the national court finds that those two criteria are satisfied, the use of a calculation method such as that currently applied by STIM may result in a considerable disproportion between the benefit conferred by the copyright management organisation and the royalties charged.

84. Similar considerations apply to subscriptionrevenues. If certain programmes on a television channel are particularly important for subscribers but make only limited use of copyright-protected musical works, the application of the calculation method at issue may lead to a disproportion between the royalties charged and the benefit conferred by the copyright management organisation.

85. If the national court finds that there is a disproportion, it will have to ascertain whether it is technically possible to allocate advertising and subscription revenues more accurately, for example, by reference to scheduling and programming, individually or by genre. (69) Where it is technically possible, the national court will have to weigh up the advantages to be gained from a more detailed allocation as against the efficiency gains resulting from the more generalised calculation method.

86. In that connection, the national court will have to take account, inter alia, of the abovementioned criteria. (70) In weighing up the advantages and disadvantages, it will have to bear in mind, in particular, the fact that a calculation method based on annual advertising and subscription revenues is probably considerably more straightforward to apply than a calculation method in which revenues are allocated in a more detailed manner. Further, it appears to me that it will have to be remembered that the number of television channels appears to be limited, although they do attract a relatively large audience and that, in the case of programming aimed at the general public, adequate monitoring opportunities appear to be available.

(b) Identification and quantification of viewing figures

87. The extent to which use is made of a copyright-protected musical work also depends on the number of individuals who enjoy the use of it. A distinction must be drawn here between the question whether a calculation method such as that currently applied by STIM takes account in any way at all of that aspect of the use

made of copyright-protected musical works and the question whether it takes sufficient account of it.

88. In relation to the first question, it must be noted that a calculation method such as that currently applied by STIM does not take direct account of actual viewing figures for television channels. However, the national court will have to examine whether such a calculation method directly or indirectly takes account of potential or anticipated viewing figures and whether, in that context, advertising and subscription revenues are proportionate to the anticipated viewing figures. (71)

89. If the national court finds that advertising and subscription revenues are proportionate to potential or anticipated viewing figures, the question arises whether a calculation method such as that currently applied by STIM may be regarded as an abuse of a dominant position solely on the ground that it does not take account of actual viewing figures. I do not think it can. I consider that those two criteria (actual or potential/anticipated viewing figures) refer to different aspects of copyright. The reference to actual viewing figures places greater emphasis on the extent to which a copyright-protected musical work is used (up), whereas the reference to potential or anticipated viewing figures expresses more firmly the suitability of copyright for exploitation and the notion that authors should obtain a reasonable share of the turnover achieved through the use of their work. (72)

90. Those two aspects do not relate to the degree of detail in the calculation method, as discussed above, (73) but rather to the content of copyright and what gives it its value. As I stated above, (74) as Community law now stands, I do not consider it to be for the Court to establish the preferable approach; nor can that be the subject of the framework review for the purposes of competition law to be carried out in the present proceedings. Accordingly, so long as a calculation method such as that currently used by STIM establishes a sufficiently close link with potential or anticipated viewing figures, I do not consider it an abuse in itself that it does not take account of actual viewing figures.

91. However, in relation to the second question, whether there is sufficient identification of viewing figures, I believe that a calculation method such as that currently applied by STIM does not take account of the fact that viewing figures may vary according to the programme and broadcast time.

92. If the national court holds that advertisingrevenues vary according to the programme and broadcast time, with the result that there is a correlation between revenue and viewing figures, and if it finds that certain programmes regularly have high viewing figures but make only limited use of copyright-protected musical works, the application of such a calculation method may result in a disproportion between the royalties charged and the benefit conferred by the copyright management organisation.

93. Similar considerations apply to subscriptionrevenues. If certain programmes attract higher numbers of viewers but make only limited use of copyright-protected musical works, the application of a calculation method such as that currently used by STIM may result in a disproportion between the royalties charged and the benefit conferred by the copyright management organisation.

94. If the national court finds that there is a significant disproportion, it will have to examine whether it is technically possible to allocate viewing figures more accurately, for example, according to particular broadcast times, individual programmes or particular genres of programmes. (75) If it is technically possible, the national court will, as explained above, (76) have to weigh up the advantages and disadvantages of the more detailed and less detailed calculation methods.

(c) Consideration of other factors resulting in increased revenue

95. A calculation method such as that currently applied by STIM does not distinguish between increases in revenue as a result of the use of copyright-protected musical works and those due to other factors unrelated to music, such as an expansion in programming, investment in technology and the development of customised solutions.

96. However, I do not consider that the use of a calculation method which takes sufficient account of the extent to which use is made of copyright-protected musical works must be deemed to constitute an abuse of a dominant position solely because it does not take account of whether an increase in revenue is to be attributed to factors other than the use of copyright-protected musical works.

97. First, it is likely to be difficult to determine what factors lead to an increase in viewing figures and the television channel's revenue. The success of a television channel or a programme depends on many different factors. I do not consider it possible to establish with a sufficient degree of precision which particular factor contributes to economic success and, if so, to what extent.

98. It is undisputed that the use of copyright-protected musical works can influence the success of a programme or a television channel. In that regard, it will hardly be possible in practice to adduce proof that increased viewing figures and improved revenue do not result from the use of copyright-protected musical works, particularly since the utility value will vary from one individual viewer to another. For that reason alone, I consider it highly doubtful that a method exists which is capable of establishing this factor with sufficient accuracy. (77)

99. Moreover, it would have to be examined whether an alternative calculation method, if it were technically possible, would lead to costs so excessive that the advantages of its use would be completely disproportionate to its disadvantages.

100. Secondly, it must be pointed out that, in the field of copyright and intellectual property, it is not uncommon, in connection with the grant of a copyright licence, to charge a royalty amounting to a proportion of the turnover achieved through the use of the product made using the right in question. (78) Support for that view can be found in Basset, (79) where the Court did

not find an abuse of a dominant position where a copyright management organisation charged a royalty corresponding to a proportion of the revenue generated by discotheques without taking into account the extent to which revenue related to factors other than the use of copyright-protected musical works. In my view, the Court's ruling there may be transposed to the present case. (80)

(d) Conclusion

101. I draw the following conclusions from the foregoing. Where a national court finds that the application of a calculation method under which royalties are calculated as a variable proportion of television channels' advertising and subscription revenues results in a disproportion between the benefit conferred by a copyright management organisation, on the one hand, and the royalty it charges, on the other, the use of such a method constitutes abuse of a dominant position where there is an alternative calculation method which affords a more detailed quantification of use in the calculation of the royalty and the application of the less detailed calculation method is not justified by efficiency gains, particularly in the form of cost savings in the management of contracts and monitoring of the use of copyright-protected musical works.

102. The application of such a calculation method cannot be regarded as an abuse of a dominant position for the purposes of Article 82 EC solely on the ground that it does not take account of actual viewing figures, so long as it may be presumed that the calculation method takes adequate account of potential or anticipated viewing figures.

103. So long as such a calculation method takes sufficient account of the extent of use made of copyright-protected musical works, it cannot be held to be abusive on the sole ground that it does not take account of the extent to which other factors than that use result in increased revenues.

104. If and in so far as the national court also finds that a calculation method such as that currently applied by STIM leads to further disproportions between the benefit conferred by STIM and the royalty charged, for example, because it does not take account of the nature of the use made of copyright-protected musical works, in that respect, too, it will have to exercise the competition law framework review discussed above. (81)

2. Other possible calculation methods

105. In so far as the national court's second and third questions seek to establish whether calculation methods other than the one currently applied by STIM meet the requirements of Article 82 EC, I wish to draw attention to the following. The many different possible ways of drawing up calculation methods make it impossible to assess in the abstract whether a calculation method which does not take account of the criteria referred to by the national court constitutes an abuse of a dominant position for the purposes of Article 82 EC. However, if the national court finds that the calculation method leads to distortions, it is incumbent on that court to apply the principles set out above. (82)

D – The fourth question

106. By its fourth question, the national court seeks to ascertain whether the application of a calculation method on terms different from the principal tariff (83) to the public service television channel SVT is capable of constituting an abuse of a dominant position for the purposes of Article 82 EC.

107. In that regard, subparagraph (c) of the second paragraph of Article 82 EC appears to me to be of particular relevance. The specific prohibition of discrimination in subparagraph (c) of the second paragraph of Article 82 EC forms part of the system for ensuring, in accordance with Article 3(1)(g) EC, that competition is not distorted in the internal market. The commercial behaviour of the undertaking in a dominant position may not distort competition on an upstream or a downstream market, in other words between suppliers or customers of that undertaking. Co-contractors of that undertaking must not be favoured or disfavoured in the area of the competition which they practise amongst themselves. (84)

108. For subparagraph (c) of the second paragraph of Article 82 EC to apply, two conditions must be fulfilled. First (1), the dominant undertaking must apply dissimilar conditions to equivalent transactions. Secondly (2), the trading parties to those transactions must be placed thereby at a competitive disadvantage.

1. Dissimilar conditions for equivalent transactions

109. Equivalent transactions suffer a difference in treatment if amongst trading parties there is no relation between the respective values of the benefit and the consideration. Therefore, the national court must determine whether STIM charges dissimilar royalties for equivalent transactions.

110. As regards the benefit, it must be noted that the benefit conferred on Kanal 5 and TV 4 and also SVT consists in the use of copyright-protected musical works from the repertoire managed by STIM. The extent of the use made of those works varies from one television channel to another.

111. The national court must also ascertain whether STIM charges dissimilar royalties. It must be observed, as a preliminary point, that the tariff applied to Kanal 5 and TV 4 is different from that applied to SVT. The order for reference indicates, however, that SVT derives negligible revenue from advertising and none from subscriptions. (85) Therefore, the unequal treatment may be attributable to the fact that in SVT's case a calculation method is used in which notional advertising and subscription revenues are simulated. That by itself does not constitute unlawful discrimination if, in terms of the relation between the value of the benefit and the consideration, that approach leads to results comparable to those reached under the principal tariff applicable to Kanal 5 and TV 4.

112. However, since the yearly music share for SVT is determined in advance, that is to say, on the basis of a prediction, whereas in the case of Kanal 5 and TV 4 the determination is retrospective, the national court will have to ascertain whether that distinction is liable to result in adverse differential treatment. This is highly

likely, in particular, where the actual volume of copyright-protected musical works used by SVT is greater than was predicted at the start of the year. (86)

2. Competitive relationship

113. The second condition imposed under subparagraph (c) of the second paragraph of Article 82 EC is that Kanal 5 and TV 4 must be placed at a competitive disadvantage as a result of a difference in treatment. The competitive position of Kanal 5 and TV 4 has to be hindered in relation to that of SVT. (87) That presupposes that Kanal 5 and TV 4 are in competition with SVT.

114. In that connection, the relevant issue is not the relationship between SVT, Kanal 5 and TV 4 in the upstream market governing supply and demand for a general licence to broadcast copyright-protected musical works, but rather their relationship in the downstream television market. The national court will have to ascertain whether Kanal 5 and SVT and/or TV 4 and SVT are competing undertakings in that market. That assessment calls for an appraisal of the facts in the main proceedings before the national court. The Court has no jurisdiction to give a ruling on the facts in an individual case or to apply the rules of Community law which it has interpreted to national measures or situations, since those questions fall within the exclusive jurisdiction of the national court. (88)

3. Conclusion

115. The application of dissimilar calculation methods to a public service television channel, on the one hand, and private television channels, on the other, may constitute an abuse for the purposes of Article 82 EC if as a result thereof the public service television channel is placed at an advantage in relation to the private television channels and the public service channel and at least one of the private channels are in competition with each other.

VII – Conclusion

116. In the light of the foregoing observations, I propose that the Court should reply to the questions referred as follows:

(1) Article 82 EC is to be interpreted as meaning that a copyright management organisation which has a de facto monopoly position in a Member State and which in relation to private television channels applies a calculation method for the use of copyright-protected musical works from the repertoire it manages under which the royalty amounts to a fixed proportion of the television channels' advertising and subscription revenues abuses its dominant position. However, the application of a calculation method under which the royalty amounts to a variable proportion of revenue does not constitute an abuse, provided that such a calculation method takes account of the extent to which a television channel makes use of copyright-protected musical works.

(2) Application of a calculation method may constitute abuse of a dominant position for the purposes of Article 82 EC if there is an alternative calculation method which enables the royalty to be calculated taking better account of the extent of use of copyright-protected musical works if the use of the currently used, less detailed calculation method is not justified on grounds of efficiency gains, particularly in the form of cost savings in the management of contracts and monitoring of the use of copyright-protected musical works.

The application of a calculation method may not be held to be abusive for the purposes of Article 82 EC on the sole ground that the method does not take into account the extent to which increases in revenue result from factors other than the use of copyright-protected musical works.

(3) The application of a calculation method does not necessarily constitute an abuse of a dominant position for the purposes of Article 82 EC on the sole ground that it does not take account of actual viewing figures, so long as sufficient account is taken of potential or anticipated viewing figures.

(4) The application of dissimilar calculation methods to a public service television channel, on the one hand, and private television channels, on the other, constitutes an abuse of a dominant position for the purposes of Article 82 EC if, first, it leads to a situation where the public service television channel pays a lower royalty to the copyright management organisation than private television channels for an equivalent transaction and, secondly, there is a competitive relationship between the public service channel and one of the private channels.

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1 – Original language: Slovenian.

2 – In this connection, it must be mentioned that, with respect to the broadcast of Kanal 5 via satellite, the British copyright management organisation, the Performing Rights Society, undertakes the collection of royalties in relation to the use of copyright-protected musical works.

3 – Thus, for a music share of between 1% and 10%, the royalty percentage applied to advertising revenues is 0.2% and to subscription revenues 0.15%; for a music share of between 51% and 55%, the royalty percentage applied to advertising revenues is 4.7% and to subscription revenues 3.48%.

4 – Kanal 5 and TV 4 receive a deduction amounting to 10% of marketing expenses. TV 4 receives an additional deduction because it must pay licence fees to the Swedish State for the right to broadcast via the cable network.

5 – This calculation model also takes account of notional marketing expenses.

6 – These figures are produced by the organisation Mediamätning i Skandinavien AB ('MMS'). MMS is an organisation owned by television channels and other interested parties.

7 – Berne Convention for the Protection of Literary and Artistic Works (Paris version of 24 July 1971), as amended on 28 September 1979 (available at http://www.wipo.int/treaties/en/ip/berne/index.html).

8 – Case 402/85 Basset [1987] ECR 1747; Joined Cases 110/88, 241/88 and 242/88 Lucazeau and Others

[1989] ECR 2811; and Case 395/87 Tournier [1989] ECR 2521.

9 – Admittedly, if a question of interpretation relevant to the main proceedings is capable of resolution by reference to the Court's previous case-law, the requirement for a national court to refer that question of interpretation to the Court of Justice may be dispensed with. That does not, however, affect the power of a national court to make a reference; see Case 283/81 Cilfit and Others [1982] ECR 3415, paragraph 15.

10 – Since STIM contends that Article 82 EC is inapplicable in the present proceedings, regard must be had to the fact, first, that no express positive law provision exists restricting the application of competition law to copyright. Nor do Articles 295 EC and 307 EC, read together with Article 11bis of the Berne Convention, lead to a different conclusion. The determination of a calculation method for royalties concerns the exercise of copyright. No possibility of conflict between Article 82 EC and Article 11bis of the Berne Convention arises for consideration – irrespective of whether or not STIM may rely on that convention pursuant to Article 307 EC in the present case – for the simple reason that Article 11bis of the Berne Convention merely guarantees a right to obtain equitable remuneration. That minimum guarantee is not called into question by a framework review of royalties for the purposes of competition law. The Court has, moreover, upheld the applicability of Article 82 EC to calculation methods employed by collecting societies (see, in particular Basset, Lucazeau and Others, and Tournier, all cited in footnote 8) and the question whether Article 82 EC applies to such calculation methods has gone largely unquestioned in the legal literature (Faull, J. and Nikpay, A., The EC Law of Competition, Oxford University Press, 2nd edition, 2007, points 8.234 to 8.236; Liaskos, E.-P., La gestion collective des droits d'auteurs dans la perspective du droit communautaire, Bruylant, 2004, point 699). However, particular restraint is called for in applying Article 82 EC to copyright; on this, see below, points 47 to 49 of this Opinion.

11 – In that regard, questions referred for a preliminary ruling are always drafted in a somewhat abstract manner, removed to a certain extent from the main proceedings.

12 – The second question repeats the first, supplementing it, however, with specific criteria (see point 12 of this Opinion). I interpret the second question as meaning that the national court seeks to ascertain whether a calculation method which does not take account of those criteria is abusive (see point 69 of this Opinion).

13 – Case 322/81 Michelin v Commission [1983] ECR 3461, paragraph 57.

14 – Case C-62/86 AKZO v Commission [1991] ECR I-3359, paragraph 69, and Case 85/76 Hoffmann-La Roche v Commission [1979] ECR 461, paragraph 91.

15 – Case 27/76 United Brands and United Brands Continentaal v Commission [1978] ECR 207, paragraphs 248 to 257.

16 – This relates only to the first, second and third questions. The fourth question concerns the situation mentioned in subparagraph (c) of the second paragraph of Article 82 EC.

17 – See United Brands and United Brands Continentaal v Commission, cited in footnote 15, paragraphs 248 to 257, and Case 26/75 General Motors Continental v Commission [1975] ECR 1367, paragraphs 11 and 12.

18 – Whish, R., Competition Law, Reed Elsevier, 5th edition, 2003, p. 195; Faull, J. and Nikpay, A., cited in footnote 10, point 3.298.

19 – On the position of intellectual property in Community law, see Reinbothe, J., 'Der Stellenwert des geistigen Eigentums im Binnenmarkt', in Schwarze, J. and Becker, J. (eds), Geistiges Eigentum und Kultur im Spannungsfeld von nationaler Regelungskompetenz und europäischem Wirtschafts- und Wettbewerbsrecht, Nomos, 1998, p. 31 et seq.

20 – Therefore, it should be recalled that copyright use is in many cases only possible once participating authors and music publishers have been brought together in a copyright management organisation; see Dworkin, G., 'Monopoly, non-participating rightowners, relationship authors/producers, Copyright Tribunal', in Jehoram, H.C. (ed.), Collective Administration of Copyrights in Europe, Kluwer – Deventer, 1995, p. 12. Wünschmann, C., Die kollektive Verwertung von Urheber- und Leistungsschutzrechten nach europäischem Wettbewerbsrecht, Nomos, 2000, p. 20 et seq., observes that transaction costs can be prohibitively high and that monitoring and use of copyright are particularly difficult due to their 'diffuse mass use'. For details on this point, see Mestmäcker, E.-J., 'Geistiges Eigentum und Kultur im Spannungsfeld von nationaler Regelungskompetenz und europäischem Wirtschafts- und Wettbewerbsrecht aus Sicht der Verwertungsgesellschaften', in Schwarze, J. and Becker, J. (eds), Geistiges Eigentum und Kultur im Spannungsfeld von nationaler Regelungskompetenz und europäischem Wirtschafts- und Wettbewerbsrecht, Nomos, 1998, p. 55.

21 – See Vinje, T. and Niiranen, O., 'The Application of Competition Law to Collecting Societies in a Borderless Digital Environment', in Ehlermann, C.D. (ed.), European Competition Law Annual 2005: The Interaction between Competition Law and Intellectual Property Law, Hart, 2007, p. 402; Wünschmann, C., cited in footnote 20, p. 19; and Trampuz, M., Avtorsko pravo, Cankarjeva zalozba, 2000, p. 73.

22 – Wünschmann, C., cited in footnote 20, p. 25. In that regard, however, account must be taken of the fact that, by Decision COMP/36.698 – CISAC of 16 July 2008, the Commission prohibited European collecting societies from restricting competition by limiting their ability to offer services outside their domestic territory. That decision allows them, however, to maintain their existing system of bilateral agreements and to keep their right to set levels of royalty payments. As that decision was not published, I refer to Commission Press Release IP/08/1165 of 16 July 2008 and its MEMO/08/511 of the same date.

23 – Purchasers in this case are generally cable channel operators or comparable undertakings which bundle television channels into different packages and market them to end consumers.
24 – See point 32 of this Opinion.
25 – See point 39 of this Opinion.
26 – As I indicated earlier (points 35 to 37 of this Opinion), Article 82 EC does not imply that a dominant undertaking is completely deprived of its economic freedom to act.
27 – Wünschmann, C., cited in footnote 20, p. 163, observes that it is for national mechanisms to control the remuneration arrangements set by monopoly undertakings.
28 – Faull, J. and Nikpay, A., cited in footnote 10, point 3.294, observe that in this area restraint on the part of the competition authorities and courts is called for, with intervention taking place only where there is clear detriment to consumer interests.
29 – Case C-245/00 [2003] ECR I-1251.
30 – OJ 1992 L 346, p. 61.
31 – SENA, cited in footnote 29, paragraphs 34 to 36 and 40 to 46. On the (limited) mandate of the European Community to legislate in matters of copyright, see Reinbothe, J., cited in footnote 19, p. 33.
32 – Faull, J. and Nikpay, A., cited in footnote 10, points 8.35 to 8.37, observe that the exact scope of copyright may vary, the specific object of copyright protection may not always be clearly identified and the protection afforded by copyright may differ between Member States.
33 – Cited in footnote 8, paragraph 5.
34 – Basset, cited in footnote 8, paragraphs 16 and 18. In paragraph 19 of that judgment, however, the Court indicated that abuse is conceivable where a copyright management organisation charges an unfairly high royalty rate.
35 – Case C-95/04 P British Airways v Commission [2007] ECR I-2331, paragraph 67, and Case T-203/01 Michelin v Commission [2003] ECR II-4071, paragraph 73.
36 – For a similar view, see Temple Lang, J., 'Media, Multimedia and European Community Law', International Antitrust Law & Policy, 1997, p. 377, at p. 424.
37 – For a detailed examination, see point 74 of this Opinion.
38 – For a detailed examination, see points 75 to 77 of this Opinion.
39 – In that case, the assessment of whether the use of such a calculation method constitutes an abusive practice depends on the criteria which are reflected in the variable. As the national court has raised such matters in its second and third questions, I refer to my answer to the second and third questions (points 68 to 105 of this Opinion).
40 – In United Brands and United Brands Continentaal v Commission, cited in footnote 15, paragraphs 227 to 233, the Court indicated that the interplay of supply and demand should, owing to its nature, only be applied to each stage of the market where it is really manifest. Those mechanisms of the market are adversely affected if the price is calculated by leaving out one stage of the market and taking account of the law of supply and demand as between the vendor and the ultimate consumer and not as between the vendor and the purchaser.
41 – British Airways v Commission, cited in footnote 35, paragraph 67, and Michelin v Commission, cited in footnote 35, paragraph 73.
42 – See Bellamy & Child, European Community Law of Competition, Sweet & Maxwell, 6th edition, 2008, point 10.109, and Temple Lang, J., cited in footnote 36, p. 425. That conduct is completely normal practice in the case of, for example, publishing contracts with authors or record contracts with musicians.
43 – See Mestmäcker, E.-J., cited in footnote 20, p. 55.
44 – Becker, J., 'Governmental and judicial control over licensing and tariffs', Collective Administration of Copyrights in Europe, Kluwer – Deventer, 1995, p. 44.
45 – Cited in footnote 15, paragraphs 239 to 241.
46 – See point 53 of the Opinion of Advocate General Jacobs in Tournier, cited in footnote 8, and in Lucazeau and Others, cited in footnote 8; Allendesalazar, R. and Vallina, R., 'Collecting Societies: The Usual Suspects', in Ehlermann, C.D. (ed.), European Competition Law Annual 2005: The Interaction between Competition Law and Intellectual Property Law, Hart, 2007; and Liaskos, E.-P., cited in footnote 10, point 704 et seq. This is illustrated, inter alia, by the fact that use of a musical work, once it has been created, does not result in any additional costs to the composer.
47 – Support for this view may be found, for example, in paragraph 156 of the Commission guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (OJ 2004 C 101, p. 2). There it is stated that, as a general rule, it is not restrictive of competition for royalties to be calculated on the basis of the price of the final product, provided that it incorporates the licensed technology. I take this as evidence that such a remuneration model is common in intellectual property law. If the cumulative application of royalty fees in relation to a given product leads to a disproportionate result, then in my view the problem must be resolved by adjusting the amount of the fees, without necessarily dissociating those fees from the revenue.
48 – Becker, J., cited in footnote 44, p. 44; Liaskos, E.-P., cited in footnote 10, point 699.
49 – Points 40 to 42 of this Opinion.
50 – One method for determining the economic value of a product would be to take the average price for that product (economic value taken as the average, objectively- et price). In the present case, however, because of the exclusive position of collecting societies, there is no competition capable of influencing prices. See, in general on this problem, Faull, J. and Nikpay, A., cited in footnote 10, point 3.293.
51 – Tournier, cited in footnote 8, paragraph 38.
52 – In that connection, it must be borne in mind that the Court must show restraint, for the reasons I set out above in point 48 of this Opinion, when the calculation method employed in one Member State relies on a criterion with a plausible link to copyright, whereas the

calculation method employed in another Member State relies on a different criterion also having a plausible link to copyright and leads to a different result.
53 – Bellamy & Child, cited in footnote 42, point 9-065, indicate that account should be taken of the common use made of a practice in the industries concerned.
54 – It must be noted, in that regard, that although, as observed in points 40 to 42 of this Opinion, no negotiations take place for the licensing of individual items subject to copyright because the general licence for the repertoire managed by STIM means that the television channels do not need to negotiate licences for the use of individual copyright-protected musical works, the fact remains that if such negotiations were to take place to determine the value of the general licence, it would not be unusual for composers to demand a share of the turnover achieved. In my view, this assessment is not affected merely because copyright is managed by a copyright management organisation.
55 – Cited in footnote 8, paragraphs 16 and 18.
56 – However, since Kanal 5 and TV 4 state that it would be possible also to refer to the television channels' profits, I have strong doubts that such an alternative method would convey accurately the value of the benefit conferred by a copyright management organisation. In that case, the calculation of the value of the benefit would incorporate not only the turnover, but also all of the costs incurred by the television channels. I do not see how a television channel's cost structure might assist in determining the economic value of the benefit conferred by a copyright management organisation.
Moreover, Kanal 5 and TV 4 are incorrect to assert that STIM does not share in the television channels' economic risk. Since the royalties paid to STIM depend on the television channels' advertising and subscription revenues, a drop in those revenues will have a direct and immediate impact on the royalties paid to STIM.
57 – See points 47 and 48 of this Opinion.
58 – In so far as the third question refers to the first question, I refer to the answer I gave to the latter.
59 – Point 32 of this Opinion.
60 – Points 52 to 57 of this Opinion.
61 – See Case C-451/03 Servizi Ausiliari Dottori Commercialisti [2006] ECR I-2941, paragraph 68 et seq.; Case 13/68 Salgoil [1968] ECR 453, 459; Case 51/74 Van der Hulst [1975] ECR 79, paragraph 12; Case C-320/88 Shipping and Forwarding Enterprise Safe [1990] ECR I-285, paragraph 11; Joined Cases C-175/98 and C-177/98 Lirussi and Bizzaro [1999] ECR I-6881, paragraph 38; and Case C-282/00 RAR [2003] ECR I-4741, paragraph 47.
62 – Basset, cited in footnote 8, paragraph 18.
63 – Tournier, cited in footnote 8, paragraph 45.
64 – Ibid.
65 – Ibid.
66 – See Bellamy & Child, cited in footnote 42, point 9.065, and Case 6/72 Europemballage and Continental Can v Commission [1973] ECR 215, paragraph 26.
67 – Liaskos, E.-P., cited in footnote 10, point 699.
68 – Certain programmes are particularly attractive for advertising purposes, for example, because they attract a greater number of viewers. As a rule, such programmes generate higher advertising revenues for television channels.
69 – This will probably be more difficult with subscription revenues than with advertising revenues; I refer, in this connection, to footnote 75.
70 – Points 75 to 77 of this Opinion.
71 – With respect to advertising revenues, in my view there is good reason to believe that a strong correlation exists between anticipated viewing figures and the level of those revenues. Similarly, in relation to subscription revenues, it is probable that revenues rise in proportion to the anticipated or potential audience.
72 – See points 58 to 61 of this Opinion.
73 – See point 74 of this Opinion.
74 – Points 47 to 49 of this Opinion.
75 – In that connection, regard must be had to the fact that, in the case of television channels financed entirely through subscription revenues, unlike those financed through advertising revenues, there is no specific correlation between revenues and viewing figures in terms of programming and scheduling. The national court must thus examine whether subscription revenues may be allocated more accurately, for example, by establishing actual viewing figures for individual broadcast times or individual programmes.
76 – See points 75 to 77 of this Opinion.
77 – I consider that those factors are better taken into account through gross shares in royalties. In that connection, it must be noted that the proportion applied to advertising and subscription revenues is considerably lower than the music share. However, as the national court did not ask whether a royalty amount such as that charged by STIM is excessively high, that issue need not be examined here in any greater detail.
78 – See points 60 to 64 of this Opinion.
79 – Cited in footnote 8, paragraphs 16 and 18.
80 – In that connection, it must be noted that the revenues generated by discotheques do not depend solely on the use of copyright-protected musical works, but also on other factors such as a discotheque's location, advertising, clientele and layout, the latter of which have only a limited link to the use of copyright-protected musical works.
81 – In the consideration given to the nature of use, it will be necessary, in particular, to determine whether a distinction based on the nature of use (for example, between programmes using copyright-protected musical works only as background music or programmes the main purpose of which is the broadcast of copyright-protected musical works) can be based on sufficiently objective criteria. It will be necessary to consider, inter alia, whether such an alternative method increases costs. In that connection, it may be necessary to ascertain whether the copyright management organisation makes a similar distinction in its internal operations. Lastly, it will be necessary to weigh up the advantages and disadvantages.
82 – Points 74 to 79 of this Opinion.

83 – In that connection, see point 9 of this Opinion.
84 – British Airways v Commission, cited in footnote 35, paragraph 143.
85 – SVT is financed through public charges. Unlike advertising and subscription revenues, the amount of those public charges does not necessarily allow conclusions to be drawn concerning the extent of use made of copyright-protected musical works.
86 – SVT's public service obligation is incapable of justifying a difference in treatment between Kanal 5 and TV 4, on the one hand, and SVT, on the other, for the simple reason that, as was indicated by STIM at the hearing, the only ground for the dissimilar treatment is the fact that SVT has hardly any advertising revenues and no subscription revenues.
87 – British Airways v Commission, cited in footnote 35, paragraph 144, and Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 Suiker Unie and Others v Commission [1975] ECR 1663, paragraphs 523 and 524.
88 – See Servizi Ausiliari Dottori Commercialisti, cited in footnote 61, paragraph 68 et seq.; Van der Hulst, cited in footnote 61, paragraph 12; Shipping and Forwarding Enterprise Safe, cited in footnote 61, paragraph 11; Lirussi and Bizzaro, cited in footnote 61, paragraph 38; and RAR, cited in footnote 61, paragraph 47.