

Court of Justice EU, 27 February 2014, OSA



COPYRIGHT

“Communication” to the public by providing access to works via television and radio devices in rooms of spa establishment

- First of all, the concept of ‘communication’ must be construed as referring to any transmission of the protected works, irrespective of the technical means or process used (Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others [2011] ECR I-9083, paragraph 193).

- Patients of a spa establishment constitute a new public

The spa establishment is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its patients. In the absence of that intervention, its patients would not, in principle, be able to enjoy the broadcast work (see, to that effect, SGAE, paragraphs 41 and 42).

Exemption for communications to the public in spa establishment violates Directive 2001/29

- In view of the foregoing, the answer to the first question is that Article 3(1) of Directive 2001/29 must be interpreted as precluding national legislation which excludes the right of authors to authorise or prohibit the communication of their works, by a spa establishment which is a business, through the intentional distribution of a signal by means of television or radio sets in the bedrooms of the establishment’s patients. Article 5(2)(e), (3)(b) and (5) of that directive is not such as to affect that interpretation.

No direct effect Directive 2001/29 in the relation between management organization and individuals, but national court required to interpret legislation in a manner consistent with the objective of the directive

- In view of the foregoing, the answer to the second question is that Article 3(1) of Directive 2001/29 must be interpreted as meaning that it cannot be relied on by a collecting society in a dispute between individuals for the purpose of setting aside national legislation contrary to that provision. However, the national court hearing such a case is required to interpret that legislation, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive.

Collective society must be regarded as providing a service to the users of protected works (spa establishment)

- It follows that a collecting society, such as OSA, must be regarded as providing a ‘service’ within the meaning of both Article 4(1) of Directive 2006/123 and Article 57 TFEU to the users of protected works, such as the spa establishment at issue in the main proceedings.

Granting collective management of copyright in one Member State to one single collecting society not in violation of EU law

- In the light of all the foregoing, the answer to the third question is that Article 16 of Directive 2006/123, and Articles 56 TFEU and 102 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which reserves the exercise of collective management of copyright in respect of certain protected works in the territory of the Member State concerned to a single collecting society and thereby prevents users of such works, such as the spa establishment in the main proceedings, from benefiting from the services provided by another collecting society established in another Member State.

Indication of abuse of dominant position if collecting society imposes fees which are appreciably higher than those charged in other Member States, or imposes prices which are excessive in relation to the economic value of the service provided

- Article 102 TFEU must be interpreted as meaning that the imposition by the collecting society of fees for its services which are appreciably higher than those charged in other Member States (a comparison of the fee levels having been made on a consistent basis) or the imposition of a price which is excessive in relation to the economic value of the service provided are indicative of an abuse of a dominant position.

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Court of Justice EU, 27 February 2014

(L. Bay Larsen, K. Lenaerts, M. Safjan, J. Malenovský, A. Prechal)

JUDGMENT OF THE COURT (Fourth Chamber)

27 February 2014 (*)

In Case C-351/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Krajský soud v Plzni (Czech Republic), made by decision of 10 April 2012, received at the Court on 24 July 2012, in the proceedings

OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s.

v

Léčebné lázně Mariánské Lázně a.s.,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as a Judge of the Fourth Chamber, M. Safjan, J. Malenovský and A. Prechal (Rapporteur), Judges, Advocate General: E. Sharpston, Registrar: M. Aleksejev, Administrator, having regard to the written procedure and further to the hearing on 26 June 2013, after considering the observations submitted on behalf of:

- OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s., by A. Klech and P. Vojří, advokáti, and by T. Matějčičný, acting as Agent,
 - Léčebné lázně Mariánské Lázně a.s., by R. Šup, advokát,
 - the Czech Government, by M. Smolek and J. Vlácil, acting as Agents,
 - the German Government, by T. Henze and J. Kemper, acting as Agents,
 - the Hungarian Government, by M.Z. Fehér and K. Szijjártó, acting as Agents,
 - the Austrian Government, by A. Posch, acting as Agent,
 - the Polish Government, by B. Majczyna, M. Drwięcki, D. Lutostańska and M. Szpunar, acting as Agents,
 - the European Commission, by P. Ondrůšek, I.V. Rogalski and J. Samnadda, acting as Agents,
- after hearing [the Opinion of the Advocate General at the sitting on 14 November 2013](#),

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 3 and 5 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10), of Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36), and Articles 56 TFEU and 102 TFEU.

2 The request has been made in proceedings between OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. ('OSA'), a musical works copyright collecting society, and Léčebné lázně Mariánské Lázně a.s. ('Léčebné lázně'), a company managing a non-State health establishment providing spa treatment services, concerning the payment of copyright licence fees for the making available of works transmitted by radio or television in its bedrooms.

Legal context

European Union law

3 Recital 23 in the preamble to Directive 2001/29 states:

'This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a

work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.'

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

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

5 Article 5 of Directive 2001/29, entitled 'Exceptions and limitations', provides:

'[...]

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 [entitled "Reproduction right"] in the following cases:

[...]

(e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

[...]

(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;

[[...]]

5. The exceptions and limitations provided for in [paragraphs 2 and 3] shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

6 Article 4 of Directive 2006/123, entitled 'Definitions', provides:

'For the purposes of this Directive, the following definitions shall apply:

1) "service" means any self-employed economic activity, normally provided for remuneration, as referred to in Article [57 TFEU];

[...]

7 Article 16 of Directive 2006/123, entitled 'Freedom to provide services', provides in paragraph 1:

'Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

[...]

8 Under Article 17 of Directive 2006/123, entitled 'Additional derogations from the freedom to provide services':

'Article 16 shall not apply to:

[...]

11) copyright [and] neighbouring rights [...].'

Czech law

9 Under Paragraph 23 of Law No 121/2000 on Copyright ('the Copyright Law'), as in force during the period in question, the radio or television broadcasting of a work means making a work transmitted by radio or television available by means of devices technically suitable for receiving a radio or television transmission. However, it does not include making a work available to patients when providing health care to them in establishments which provide such services.

10 Article 98 of the Copyright Law makes the collective management of copyright subject to the grant of an authorisation. Under paragraph 6(c) of that article, the relevant ministry may grant such an authorisation only if no other person already has such an authorisation for the exercise of the same right in relation to the same subject-matter and, in so far as a work is concerned, for the exercise of the same right in relation to the same kind of work.

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

11 OSA claims from Léčebné lázně the payment of 546 995 Czech crowns (CZK), together with late-payment interest, for having installed radio and television sets in the bedrooms of its spa establishments during the period in question (1 May 2008 to 31 December 2009), through which it made works managed by OSA available to its patients, without entering into a licence agreement with OSA. According to OSA, Article 23 of the Copyright law, in so far as it provides for an exemption from the payment of copyright fees for health care establishments when providing health care, is contrary to Directive 2001/29.

12 Léčebné lázně maintains that it is covered by the exception referred to in Article 23 of the Copyright law and contests the assertion that the provision in question is contrary to Directive 2001/29. It adds that if, however, it were found that the provision in question is indeed contrary to Directive 2001/29, that directive cannot be invoked in a dispute between individuals.

13 Furthermore, Léčebné lázně claims that OSA is abusing its monopoly position in the market, since the amount of the fees set out in its fee scales is disproportionately high in comparison with the fees demanded by the copyright collecting societies ('the collecting societies') in neighbouring countries for the same kind of use of copyright-protected works, which undermines its position in the market and its ability to compete with spa establishments in neighbouring countries. The clientele of its spa establishment is international, and foreign radio and television signals are received there. It claims that its freedom to provide services is restricted and that it would be in its interest to conclude a licence agreement with a collecting society which demands lower copyright fees established in another Member State.

14 In those circumstances, the Krajský soud v Plzni (Plzeň Regional Court) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Must Directive 2001/29 ... be interpreted as meaning that an exception disallowing remuneration to authors for the communication of their work by television or radio transmission by means of television or radio receivers to patients in rooms in a spa establishment which is a business is contrary to Articles 3 and 5 [and, in particular] Article 5(2)(e), (3)(b) and (5)?

2. Is the content of those provisions of the directive concerning the above use of a work unconditional enough and sufficiently precise for ... collecting societies to be able to rely on them before the national courts in a dispute between individuals, if the [Member] State has not transposed the directive correctly in national law?

3. Must Article 56 [TFEU] et seq. and Article 102 [TFEU] (or as the case may be Article 16 of Directive 2006/123 ...) be interpreted as precluding the application of rules of national law which reserve the exercise of collective management of copyright in the territory of the [Member] State to only a single (monopoly) ... collecting society and thereby do not allow recipients of services a free choice of a collecting society from another [Member] State of the European Union?'

The reopening of the oral procedure

15 By document lodged at the Court Registry on 16 December 2013, Léčebné lázně asked the Court to take 'measures of organisation of procedure and inquiry', including the production of a judgment of 14 May 2013 of the Městský soud v Praze (Prague Municipal Court), which was annexed to that document. By that document, Léčebné lázně also requested the reopening of the oral procedure. The reasons given for that request were the fact that the judgment in question is linked to the third question raised by the referring court and the fact that, according to Léčebné lázně, points 28 and 29 of the Opinion of the Advocate General contain erroneous statements.

16 Having regard to its content, that request must be regarded, at the current stage of the proceedings, as a request for the reopening of the oral procedure within the meaning of Article 83 of the Rules of Procedure of the Court.

17 Under that provision, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

18 In that respect, first of all, it must be pointed out that the referring court's first question, to which points 28 and 29 of the Advocate General's Opinion relate, has been debated at length before the Court by the interested parties. In those circumstances, the Court is

of the view that it has all the information necessary to enable it to answer that question.

19 Furthermore, the judgment delivered by the Městský soud v Praze cannot be considered as a new fact which is of such a nature as to be a decisive factor for the answer to be given by the Court to the referring court's third question.

20 Lastly, it is not claimed that the present case must be decided on the basis of an argument which has not been debated before the Court.

21 Accordingly, the Court, after hearing the Advocate General, considers it appropriate to reject the request to reopen the oral procedure.

Consideration of the questions referred

The first question

22 By its first question, the referring court asks, in essence, whether Article 3(1) of Directive 2001/29 must be interpreted as precluding national legislation which excludes the right of authors to authorise or prohibit the communication of their works, by a spa establishment which is a business, through the intentional distribution of a signal by means of television or radio sets in the bedrooms of the establishment's patients. In addition, it raises the issue whether Article 5(2)(e), (3)(b) and (5) of that directive is such as to affect the interpretation of Article 3(1) in such a context.

23 In that respect, it must be noted that the principal objective of Directive 2001/29 is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication to the public. It follows that the concept of 'communication to the public' in Article 3(1) of that directive must be interpreted broadly, as recital 23 in the preamble to the directive indeed expressly states (Case C-607/11 *ITV Broadcasting and Others* [2013] ECR, paragraph 20 and the case-law cited).

24 As OSA, the Czech government and the European Commission rightly point out, there is an act of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, when the operator of a spa establishment, such as that at issue in the main proceedings, gives its patients access to the broadcast works via television or radio sets by distributing in the patients' rooms the signal carrying the protected works.

25 First of all, the concept of 'communication' must be construed as referring to any transmission of the protected works, irrespective of the technical means or process used (Joined [Cases C-403/08 and C-429/08 Football Association Premier League and Others](#) [2011] ECR I-9083, paragraph 193).

26 Therefore, the operator of a spa establishment carries out a communication when it deliberately transmits protected works, by intentionally distributing a signal through television or radio sets, in the rooms of the patients of that establishment (see, to that effect, *Football Association Premier League and Others*, paragraph 196, and Case C-162/10 *Phonographic Performance (Ireland)* [2012] ECR, paragraph 40).

27 Furthermore, it must be noted that the term 'public' in Article 3(1) of Directive 2001/29 refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons (*ITV Broadcasting and Others*, paragraph 32).

28 As regards that last criterion specifically, the cumulative effect of making the works available to potential recipients should be taken into account. It is in particular relevant in that respect to ascertain the number of persons who have access to the same work at the same time and successively ([Case C-306/05 SGAE](#) [2006] ECR I-11519, paragraph 39, and [ITV Broadcasting and Others](#), paragraph 33).

29 As the Advocate General noted in point 28 of her Opinion, a spa establishment is likely to accommodate, both at the same time and successively, an indeterminate but fairly large number of people who can receive broadcasts in their rooms.

30 Contrary to what is claimed by *Léčebné lázně*, the mere fact that the patients of a spa establishment generally stay for a longer period than the guests of a hotel does not invalidate that finding, since the making available of the works to such patients is likely, as a result of its cumulative effects, to concern a fairly large number of people.

31 It must also be pointed out that, in order for there to be a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29, it is also necessary for the work broadcast to be transmitted to a new public, that is to say, to a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public (*Football Association Premier League and Others*, paragraph 197 and the case-law cited).

32 Like the guests of a hotel, the patients of a spa establishment constitute such a new public. The spa establishment is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its patients. In the absence of that intervention, its patients would not, in principle, be able to enjoy the broadcast work (see, to that effect, *SGAE*, paragraphs 41 and 42).

33 It follows that communication by a spa establishment, such as that at issue in the main proceedings, of protected works through the intentional distribution of a signal by means of television or radio sets in the bedrooms of its patients constitutes a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29.

34 That interpretation is not invalidated by *Léčebné lázně's* argument that an act of communication such as that at issue in the main proceedings has the same characteristics as a communication of protected works by a dentist at his dental practice, in respect of which the Court held, in [Case C-135/10 SCF](#) [2012] ECR, that it did not constitute a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29.

35 In that respect, it suffices to note that the principles developed in *SCF* are not relevant in the present case,

since SCF does not concern the copyright referred to in Article 3(1) of Directive 2001/29, but rather the right to remuneration of performers and producers of phonograms provided for in Article 8(2) of 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 (OJ 1992 L 346, p. 61).

36 Since a communication of protected rights such as that at issue in the main proceedings constitutes a 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, it is clear from the wording of that provision that the national legislation must provide authors with the exclusive right to authorise or prohibit such communication, unless that communication is covered by an exception or a limitation provided for in Directive 2001/29.

37 In that respect, it is necessary, in particular, to examine whether Article 5(2)(e), (3)(b), and (5) of that directive, to which the referring court expressly refers, may form the basis of such an exception or limitation.

38 First, Article 5(2)(e) of Directive 2001/29, as can be seen from its wording, only forms the basis for an exception or limitation to the reproduction right, provided for in Article 2 of that directive. It cannot therefore form the basis for an exception or limitation to the exclusive right to authorise or prohibit any communication to the public of their works, provided for in Article 3(1) of that directive.

39 Secondly, Article 5(3)(b) of Directive 2001/29 provides that Member States may provide for exceptions or limitations to the rights provided for in Article 3 in respect of uses, for the benefit of people with a disability, which are directly related to the disability and are of a non-commercial nature, to the extent required by the specific disability. There is nothing in the documents before the Court to indicate that all the conditions laid down in Article 5(3)(b) are met in a case such as that in the main proceedings.

40 Lastly, Article 5(5) of Directive 2001/29 does not provide for exceptions or limitations that the Member States may establish in respect of the rights referred to, in particular, in Article 3(1) of that directive but merely states the scope of the exceptions and limitations provided for in the paragraphs preceding Article 5(5).

41 In view of the foregoing, the answer to the first question is that Article 3(1) of Directive 2001/29 must be interpreted as precluding national legislation which excludes the right of authors to authorise or prohibit the communication of their works, by a spa establishment which is a business, through the intentional distribution of a signal by means of television or radio sets in the bedrooms of the establishment's patients. Article 5(2)(e), (3)(b) and (5) of that directive is not such as to affect that interpretation.

The second question

42 By its second question, the referring court asks, in essence, whether Article 3(1) of Directive 2001/29 must be interpreted as meaning that it can be relied on by a collecting society in a dispute between individuals

for the purpose of setting aside national legislation which is contrary to that provision.

43 In that respect, it must be recalled that, according to settled case-law, even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties (Case C-176/12 Association de médiation sociale [2014] ECR, paragraph 36 and the case-law cited).

44 However, the Court has held that a national court, when hearing a case between individuals, is required, when applying the provisions of domestic law, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive (see, to that effect, Association de médiation sociale, paragraph 38 and the case-law cited).

45 Nevertheless, the Court has stated that this principle of interpreting national law in conformity with European Union law has certain limits. Thus the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law *contra legem* (Association de médiation sociale, paragraph 39 and the case-law cited).

46 In addition, since, in the context of the reasons stated for the second question, the referring court raises an issue concerning the real nature of a collecting society such as OSA, referring to Case C-188/89 Foster and Others [1990] ECR I-3313, it must be added that such a collecting society would still not be able to rely on Article 3(1) of Directive 2001/29 in order to set aside national legislation contrary to that provision if it were to be regarded as an emanation of the State.

47 If that were the case, the situation, in circumstance such as those in the main proceedings, would not be that of an individual invoking the direct effect of a provision of a directive against a Member State, but rather the reverse. It is settled case-law that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (Case C-282/10 Dominguez [2012] ECR, paragraph 37 and the case-law cited).

48 In view of the foregoing, the answer to the second question is that Article 3(1) of Directive 2001/29 must be interpreted as meaning that it cannot be relied on by a collecting society in a dispute between individuals for the purpose of setting aside national legislation contrary to that provision. However, the national court hearing such a case is required to interpret that legislation, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive.

The third question Admissibility

49 OSA and the Czech and Austrian governments query the admissibility of the third question. There is no indication in the order for reference that Léčebné lázně sought to contract with a collecting society established in another Member State. Likewise, in their view, the answer to the third question is irrelevant to the resolution of the dispute in the main proceedings. Whatever the answer, it cannot exempt Léčebné lázně from its obligation to pay OSA the fees in question.

50 In that respect, it must be noted that a reference for a preliminary ruling made by a national court may be declared inadmissible only where it is quite obvious that the interpretation of European Union law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-500/10 *Belvedere Costruzioni* [2012] ECR, paragraph 16 and the case-law cited).

51 It is clear from the order for reference that Léčebné lázně relies on the provisions referred to in the referring court's third question in support of its claim that the fees demanded by OSA are disproportionately high in comparison with the fees demanded by collecting societies in neighbouring Member States.

52 In those circumstances, it is not obvious that the interpretation sought is unrelated to the actual facts of the main action or its purpose, or that the problem is hypothetical.

53 Accordingly, the third question is admissible.

Substance

54 By its third question, the referring court asks, in essence, whether Article 16 of Directive 2006/123 and Articles 56 TFEU and/or 102 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which reserves the exercise of collective management of copyright in respect of certain protected works in the territory of the Member State concerned to a single collecting society and thereby prevents users of such works, such as the spa establishment in the main proceedings, from benefiting from the services provided by another collecting society established in another Member State.

55 OSA disputes that the legislation in question prevents a user of the protected works, such as the spa establishment at issue in the main proceedings, from benefiting from the services provided by a collecting society established in another Member State.

56 However, it is not for the Court to make a ruling in that respect. Questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance (see, in particular, Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 27 and the case-law cited).

– Preliminary observations

57 Since both Article 16 of Directive 2006/123 and Article 56 TFEU et seq. concern the freedom to provide

services, it must be examined whether a collecting society, such as OSA, may be regarded as providing a service to a user of protected works, such as the spa establishment at issue in the main proceedings. OSA and the governments which submitted observations to the Court are of the view that it cannot.

58 In that respect, it must be noted that, as can be seen from Article 4(1) of Directive 2006/123, the concept of 'service' referred to in that directive is the same as that referred to in Article 57 TFEU.

59 The activities of collecting societies are subject to the provisions of Article 56 TFEU et seq. relating to the freedom to provide services (see, to that effect, Case 22/79 *Greenwich Film Production* [1979] ECR 3275, paragraph 12, Case 7/82 *GVL v Commission* [1983] ECR 483, paragraph 38; and Joined Cases [C-92/92 and C-326/92 *Phil Collins and Others* \[1993\] ECR I-5145, paragraph 24](#)).

60 That is the case not only as regards the relationship between a collecting society and a copyright holder, as can be seen from the case-law cited in the above paragraph, but also as regards the relationship between a collecting society, such as OSA, and a user of protected works, such as the spa establishment at issue in the main proceedings.

61 Such a collecting society facilitates the acquisition, by that user, of an authorisation for the use of protected works and the payment of fees owed to the copyright holders, with the result that it must be regarded as also providing a service to that user.

62 Furthermore, as the Commission rightly points out, it is of little importance, in that regard, whether it is the copyright holder or the user of the protected works which pays for that service. Article 57 TFEU does not require that the service provided be paid for by those who benefit from it (Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraph 16).

63 It follows that a collecting society, such as OSA, must be regarded as providing a 'service' within the meaning of both Article 4(1) of Directive 2006/123 and Article 57 TFEU to the users of protected works, such as the spa establishment at issue in the main proceedings.

– The interpretation of Article 16 of Directive 2006/123

64 As regards the question whether Article 16 of Directive 2006/123 applies to such a service, it must be observed, first of all, that under Article 17(11) of that directive, Article 16 does not apply to copyright and to neighbouring rights.

65 As the Advocate General pointed out in point 64 of her [Opinion](#), since only services can be excluded from the application of Article 16 of Directive 2006/123, Article 17(11) of that directive must be interpreted as excluding the service relating to copyright referred to in paragraph 63 of the present judgment from the scope of Article 16.

66 It follows that, since Article 16 of Directive 2006/123 is inapplicable, it does not preclude legislation such as that at issue in the main proceedings.

– **The interpretation of Article 56 TFEU**

67 As can be seen from the order for reference, legislation such as that at issue in the main proceedings is liable to prevent a spa establishment, such as that at issue in the main proceedings, from benefiting, as a user of protected works, from the services of a collecting society established in another Member State.

68 Since such a service is of a cross-border nature, Article 56 TFEU is applicable to it (see, to that effect, *Bond van Adverteerders and Others*, paragraph 15).

69 Moreover, legislation such as that at issue in the main proceedings, prohibiting, in practice, the provision of such a service, constitutes a restriction on the freedom to provide services (see, to that effect, [Football Association Premier League and Others](#), paragraph 85).

70 That restriction cannot be justified unless it serves overriding reasons in the public interest, is suitable for securing the attainment of the public interest objective which it pursues and does not go beyond what is necessary in order to attain it (see, inter alia, [Football Association Premier League and Others](#), paragraph 93).

71 As OSA, the governments which submitted observations to the Court, and the Commission rightly point out, the protection of intellectual property rights constitutes such an overriding reason in the public interest (see, to that effect, [Football Association Premier League and Others](#), paragraph 94 and the case-law cited).

72 Furthermore, legislation such as that at issue in the main proceedings – which grants a collecting society, such as OSA, a monopoly over the management of copyright in relation to a category of protected works in the territory of the Member State concerned – must be considered as suitable for protecting intellectual property rights, since it is liable to allow the effective management of those rights and an effective supervision of their respect in that territory.

73 As regards the question whether such legislation goes beyond what is necessary in order to attain the objective of protecting intellectual property rights, it must be pointed out that, as can be seen from the observations submitted to the Court, legislation such as that at issue in the main proceedings forms part of a context of territory-based copyright protection, which also encompasses reciprocal representation agreements.

74 By those agreements, concluded between collecting societies, the societies confer on each other the right to grant, within the territory for which they are responsible, the requisite authorisations for any public performance of protected works of members of the other societies and to subject those authorisations to certain conditions, in conformity with the laws applicable in the territory in question (see, to that effect, Case 395/87 *Tournier* [1989] ECR 2521, paragraph 17, and Joined Cases 110/88, 241/88 and 242/88 *Lucazeau and Others* [1989] ECR 2811, paragraph 11).

75 In that respect, the Court has held that reciprocal representation agreements between the collecting

societies are intended, inter alia, to enable those societies to rely, for the protection of their repertoires in another State, on the organisation established by the collecting society operating there, without being obliged to add to that organisation their own network of contracts with users and their own local monitoring arrangements (see, to that effect, *Tournier*, paragraph 19, and *Lucazeau and Others*, paragraph 13).

76 The observations submitted to the Court have not shown, as regards a communication such as that at issue in the main proceedings, that – as European Union Law stands at present – there is another method allowing the same level of copyright protection as the territory-based protection and thus territory-based supervision of those rights, a method of which legislation such as that at issue in the main proceedings forms a part.

77 Moreover, the debate before the Court has shown that – in circumstances such as those at issue in the main proceedings – to allow a user of protected works to obtain authorisation for the use of those works and pay fees due through any collecting society established in the European Union would, as European Union law stands at present, give rise to significant monitoring problems relating to the use of those works and the payment of the fees due.

78 In those circumstances, it cannot be found that legislation such as that at issue in the main proceedings, because it prevents a user of the protected works – such as the spa establishment at issue in the main proceedings – from benefiting from the services provided by a collecting society established in another Member State, goes beyond what is necessary in order to attain the objective of protecting intellectual property rights.

79 In the light of the foregoing, Article 56 TFEU must be interpreted as not precluding such legislation.

– **The interpretation of Article 102 TFEU**

80 As a preliminary, it must be pointed out, in the first place, that a collecting society, such as OSA, is an undertaking to which Article 102 TFEU applies (see, to that effect, Case 127/73 *BRT* and *Société belge des auteurs, compositeurs et éditeurs* [1974] ECR 313, paragraphs 6 and 7, ‘*BRT II*’).

81 In the second place, Article 106(2) TFEU, which contains specific rules which apply to, inter alia, undertakings entrusted with the operation of services of general economic interest, does not preclude the application of Article 102 TFEU to a collecting society such as OSA. Such a collecting society, to which the State has not assigned any task and which manages private interests, even though it is a case of intellectual property rights protected by law, does not fall within the scope of Article 106(2) TFEU (see, to that effect, *BRT II*, paragraph 23, and *GVL v Commission*, paragraph 32).

82 However, legislation such as that at issue in the main proceedings is liable to fall within the scope of Article 106(1) TFEU. That legislation grants exclusive rights to a collecting society such as OSA as regards the management of copyright relating to a certain

category of works in the territory of the Member State concerned, thereby preventing other undertakings from exercising the economic activity in question in the same territory (see, to that effect, Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 24).

83 As regards the interpretation of Article 102 TFEU in such a context, it is settled case-law that the mere creation of a dominant position through the grant of exclusive rights within the meaning of Article 106(1) TFEU is not in itself incompatible with Article 102 TFEU. A Member State will be in breach of the prohibitions laid down by those two provisions only if the undertaking in question, merely by exercising the exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses (Case C-437/09 *AG2R Prévoyance* [2011] ECR I-973, paragraph 68 and the case-law cited).

84 Therefore, the mere fact that a Member State grants a collecting society, such as OSA, a monopoly over the management of copyright relating to a category of protected works in the territory of that Member State is not, as such, contrary to Article 102 TFEU.

85 However, as can be seen from the order for reference, the third question is intended to allow the referring court to rule on the argument, raised by *Léčebné lázně* in the main proceedings, that the fees demanded by OSA are disproportionately high in comparison to the fees demanded by collecting societies in neighbouring States.

86 In that respect, it must be pointed out that a collecting society, such as OSA, which has a monopoly over the management in the territory of a Member State of copyright relating to a category of protected works, has a dominant position in a substantial part of the internal market within the meaning of Article 102 TFEU (see, to that effect, Case [C-52/07 *Kanal 5 and TV 4* \[2008\] ECR I-9275, paragraph 22](#)).

87 Where such a collecting society imposes fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position within the meaning of Article 102 TFEU. In such a case it is for the collecting society in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States (see, to that effect, *Tournier*, paragraph 38, and *Lucazeau and Others*, point 25).

88 Likewise, such an abuse might lie in the imposition of a price which is excessive in relation to the economic value of the service provided (*Kanal 5 and TV 4*, paragraph 28).

89 Moreover, if such an abuse were found and if it were attributable to the legislation applicable to that collecting society, that legislation would be contrary to

Article 102 TFEU and Article 106(1) TFEU, as is clear from the case-law cited in paragraph 83 above.

90 It is for the referring court to examine, if necessary, whether such a situation exists in the case in the main proceedings.

91 In the light of all the foregoing, the answer to the third question is that Article 16 of Directive 2006/123, and Articles 56 TFEU and 102 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which reserves the exercise of collective management of copyright in respect of certain protected works in the territory of the Member State concerned to a single collecting society and thereby prevents users of such works, such as the spa establishment in the main proceedings, from benefiting from the services provided by another collecting society established in another Member State.

92 However, Article 102 TFEU must be interpreted as meaning that the imposition by the collecting society of fees for its services which are appreciably higher than those charged in other Member States (a comparison of the fee levels having been made on a consistent basis) or the imposition of a price which is excessive in relation to the economic value of the service provided are indicative of an abuse of a dominant position.

Costs

93 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 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as precluding national legislation which excludes the right of authors to authorise or prohibit the communication of their works, by a spa establishment which is a business, through the intentional distribution of a signal by means of television or radio sets in the bedrooms of the establishment's patients. Article 5(2)(e), (3)(b) and (5) of that directive is not such as to affect that interpretation.

2. Article 3(1) of Directive 2001/29 must be interpreted as meaning that it cannot be relied on by a copyright collecting society in a dispute between individuals for the purpose of setting aside national legislation contrary to that provision. However, the national court hearing such a case is required to interpret that legislation, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive.

3. Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, and Articles 56 TFEU and 102 TFEU must be interpreted as not precluding

national legislation, such as that at issue in the main proceedings, which reserves the exercise of collective management of copyright in respect of certain protected works in the territory of the Member State concerned to a single copyright collecting society and thereby prevents users of such works, such as the spa establishment in the main proceedings, from benefiting from the services provided by another collecting society established in another Member State.

However, Article 102 TFEU must be interpreted as meaning that the imposition by that copyright collecting society of fees for its services which are appreciably higher than those charged in other Member States (a comparison of the fee levels having been made on a consistent basis) or the imposition of a price which is excessive in relation to the economic value of the service provided are indicative of an abuse of a dominant position.

OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 14 November 2013 (1)

Case C-351/12

Ochranný svaz autorský pro práva k dílům hudebním, o.s. (OSA)

v

Léčebné lázně Mariánské Lázně a. s.

[Request for a preliminary ruling from the Krajský soud v Plzni (Czech Republic)]

1. Radio and television sets in the bedrooms of a residential health spa establishment in the Czech Republic give access to broadcast works. Under Directive 2001/29, (2) holders of copyright in such works have the exclusive right to authorise their ‘communication to the public’ and may claim fees for doing so. A copyright collecting society with exclusive rights to enter into licence agreements and collect fees on behalf of authors of musical works in the Czech Republic claims fees for such communication to the public by the establishment in question. The establishment objects both that the service in question is not ‘communication to the public’ and that the Czech collecting society’s territorial monopoly infringes the establishment’s right, derived from EU provisions on freedom to provide services, to enter into a licence agreement with a collecting society in another Member State – a problem which, it claims, is exacerbated by the Czech society’s abuse of its national dominant position by charging excessive fees.

2. The Krajský soud v Plzni (Regional Court, Pilsen) wishes to know: whether the service in question constitutes ‘communication to the public’ within the meaning of Directive 2001/29; whether the relevant provisions of that directive are sufficiently precise and unconditional to be relied upon in a dispute between individuals; and whether EU law precludes a Member State from according a single collecting society exclusive rights within its territory.

Relevant EU law

Copyright and related rights

3. Article 3(1) of Directive 2001/29 provides: ‘Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.’

4. Article 5 of Directive 2001/29 provides, in particular:

[...]

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

[...]

(e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

3. Member States may provide for exceptions or limitations to the rights provided for in [Article 3] in the following cases:

[...]

(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;

[...]

5. The exceptions and limitations provided for in [paragraph 3] shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.’

Freedom to provide services

5. Articles 56 et seq. TFEU prohibit (3) any restrictions on freedom to provide services within the Union, in respect of nationals of Member States who are established in a Member State other than that of the person for whom the service is intended. Services are defined in Article 57 TFEU as being ‘normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons’, and as including in particular activities ‘of an industrial character’, ‘of a commercial character’, ‘of craftsmen’ and ‘of the professions’.

6. Those provisions are implemented and clarified by, inter alia, Directive 2006/123, (4) Article 1 of which states:

‘1. This Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services.

2. This Directive does not deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services.

3. This Directive does not deal with the abolition of monopolies providing services nor with aids granted by Member States which are covered by Community rules on competition.

This Directive does not affect the freedom of Member States to define, in conformity with Community law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to.

[...]

7. Article 2 states, inter alia:

[...]

2. *This Directive shall not apply to the following activities:*

(a) *non-economic services of general interest;*

[...]

8. Article 4(1) defines a ‘service’ as ‘any self-employed economic activity, normally provided for remuneration, as referred to in Article [57 TFEU]’.

9. Article 16 of Directive 2006/123 provides, in particular:

‘1. Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

[...]

Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

(a) *non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;*

[...]

2. *Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:*

(a) *an obligation on the provider to have an establishment in their territory;*

(b) *an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law;*

[...]

10. Under Article 17, however, Article 16 is not to apply to, inter alia:

‘1) services of general economic interest which are provided in another Member State ...

[...]

1) copyright [and] neighbouring rights ...’

Rules on competition applying to undertakings

11. Article 102 TFEU provides, in particular:

‘Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal 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;*

[...]

12. Article 106 TFEU provides, in particular:

‘1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules [prohibiting discrimination on grounds of nationality and relating to competition].

2. *Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.*

[...]

Relevant Czech law

13. Under Paragraph 23 of Law No 121/2000 on Copyright (‘the Copyright Law’), ‘operation of the radio or television transmission of a work’ means making a work transmitted by radio or television available by means of devices technically suitable for receiving a radio or television transmission. However, it does not include making a work available to patients when providing health care in health establishments.

(5)

14. In accordance with Paragraph 97(1) of the Copyright Law, a person authorised to exercise collective management is a collecting society. Under Paragraph 98(6)(c) of the same law, authorisation is to be granted to an applicant if, inter alia, no other person is already authorised to exercise that right in relation to the protected subject-matter and, in so far as a work is concerned, in relation to that kind of work. The referring court states that that provision lays down a statutory monopoly in the Czech Republic.

Facts, procedure and questions referred

15. Ochranný svaz autorský pro práva k dílům hudebním, o.s. (Society for the protection of copyright in musical works, ‘OSA’), is an authorised collecting society in the Czech Republic. It acts also on behalf of other collecting societies established in both the Czech Republic and certain other Member States.

16. Léčebné lázně Mariánské Lázně a. s. (Marienbad health spa company, ‘the Spa’), provides, inter alia, inpatient and out-patient care (preventive, curative and rehabilitative) using local natural medicinal springs, together with accommodation and catering.

17. During the period at issue (1 May 2008 to 31 December 2009), television and radio sets were installed in the Spa’s bedrooms, giving access to works managed by OSA. However, the Spa did not have a licence agreement with OSA. OSA claims fees of CZK 546 995 (roughly EUR 21 000), together with interest.

18. The Spa claims to be covered by the exception in Paragraph 23 of the Copyright Law. That provision, it submits, is consistent with Directive 2001/29 but, if it were not, the latter could not be relied upon in litigation

between individuals. Furthermore, it argues, OSA abuses its monopoly position by charging fees higher than those charged in neighbouring Member States. The Spa, whose clientele is international and whose television and radio sets receive foreign broadcasts, is thus placed at a competitive disadvantage vis-à-vis similar establishments in neighbouring Member States.

19. The Krajský soud v Plzni seeks a preliminary ruling on the following questions:

'(1) Must Directive 2001/29 ... be interpreted as meaning that an exception disallowing remuneration to authors for the communication of their work by television or radio transmission by means of television or radio receivers to patients in rooms in a spa establishment which is a business is contrary to Articles 3 and 5 (Article 5(2)(e), (3)(b) and (5))?

(2) Is the content of those provisions of the directive concerning the above use of a work unconditional enough and sufficiently precise for copyright collecting societies to be able to rely on them before the national courts in a dispute between individuals, if the State has not transposed the directive correctly in national law?

(3) Must Article 56 et seq. [TFEU] and Article 102 [TFEU] (or as the case may be Article 16 of Directive 2006/123 ...) be interpreted as precluding the application of rules of national law which reserve the exercise of collective management of copyright in the territory of the State to only a single (monopoly) copyright collecting society and thereby do not allow recipients of services a free choice of a collecting society from another State of the European Union?'

20. Written observations have been submitted by the parties to the main proceedings, by the Austrian, Czech, German, Hungarian and Polish Governments and by the European Commission – all of whom, with the exception of the German Government, also presented oral argument at the hearing on 26 June 2013. That argument was confined, at the Court's request, to the third question, in so far as it relates to the interpretation of Article 56 TFEU.

Assessment

Question 1

21. The primary issue is whether the situation referred to in Paragraph 23 of the Copyright Law (copyright works made available by radio or television transmission to patients being provided with health care in a health establishment) is to be analysed in the same way as that in SGAE (6) (in which the Court found that distribution of a signal via television sets by a hotel to customers staying in its rooms constituted 'communication to the public') or as that in SCF (7) (in which the Court found that 'communication to the public' did not cover free broadcasting of phonograms in a private dental practice for the benefit of patients who exercised no active choice in the matter).

22. It is, of course, for the competent national court to determine whether the situation in the main proceedings – which concerns broadcast works made available in bedrooms in a spa establishment – falls within that of works made available to patients provided with health care in a health establishment

within the meaning of Paragraph 23 of the Copyright Law.

23. Briefly, OSA, the Czech Government and the Commission submit that communication of a work via a television or radio set in a bedroom in a spa establishment constitutes communication to the public. They consider that such circumstances are similar to those in SGAE and differ from those in SCF. The Spa takes the opposite view.

24. I agree with OSA, the Czech Government and the Commission.

25. It is true that, in SCF, the Court was interpreting the expression 'communication to the public' in Article 8(2) of Directive 92/100, (8) not in Article 3(1) of Directive 2001/29. However, in doing so, it relied largely on its judgments in SGAE and in Football Association Premier League and Others, (9) which were concerned with Article 3(1) of Directive 2001/29. Although it distinguished between the two provisions, it did so only to emphasise the even greater significance of the profit-making nature of the operation in the context of Directive 92/100. (10)

26. In that case-law, the Court has set out a number of criteria, derived in part from the interpretation of international agreements binding on the Union and/or its Member States, (11) for ascertaining whether there is 'communication to the public' within the meaning of the directives in issue. Those criteria may be summarised as follows.

27. First, the expression must be interpreted broadly, in such a way as to ensure a high level of protection for rightholders. (12) Second, the specific means of communication is not decisive; what matters is that the public is placed in a position to access the works in issue. (13) Third, the concept of 'public' involves an indeterminate but fairly large number of potential viewers or listeners and, in that regard, account should be taken of the cumulative effect of a number of potential recipients, considered both collectively and successively. (14) Fourth, the public in question must be a 'new' public in the sense that it is different from that contemplated when the original broadcast was authorised (as, for example, when a broadcast intended for private viewing is shown to a large audience). (15) Finally, if the communication involves a profit-making element (for example, if it attracts customers), that is a relevant indication that it falls within the scope not only of the right to equitable remuneration under Article 8 of Directive 1992/100 or 2006/115 but also of the right of communication to the public under Article 3 of Directive 2001/29. (16)

28. Applying those criteria, it seems to me that the provision of television and radio sets in bedrooms in a spa establishment, together with the relevant signal enabling broadcasts to be heard or viewed, must fall within the concept of 'communication to the public' in Article 3(1) of Directive 2001/29 unless, in exceptional circumstances, one or more of the criteria are not met. In particular, a spa establishment is likely to accommodate, both at the same time and successively, an indeterminate but fairly large number of people who

can receive broadcasts in their rooms; and who constitute a new public in the sense that the original authorisation was for broadcasts to individuals hearing or viewing them personally or within their own private or family circles. Furthermore, it seems difficult to deny that the provision of radio and television sets in bedrooms is of a profit-making nature for the establishment, in that their presence seems more likely than their absence to attract clients. The Spa has itself argued that it is placed at a competitive disadvantage if it is required to pay higher fees than establishments in neighbouring countries; any such disadvantage would be exacerbated if it did not provide access to broadcasts at all while competing establishments did.

29. In SCF, the Court found that the relevant criteria were not met where background music was broadcast in the presence of patients at a private dental clinic. In particular: a dentist's patients form a 'determinate circle of potential recipients' rather than an indeterminate group of 'persons at large'; they are few in number at any one time; the broadcasting of background music is unlikely to have any impact on the dentist's income; and patients are exposed to the music without exercising any choice in the matter. (17)

30. None of those considerations appears to apply in a situation such as that in the main proceedings. Spa establishments typically have a broader and less determinate clientele than dentists (and counsel for the Spa described it at the hearing as possibly the largest such establishment in Europe); the availability of access to television and radio broadcasts in bedrooms may well influence a patient's choice of establishment; and in that regard the availability of choice is likely to be significant.

31. Moreover, the television and radio sets are in residents' bedrooms. They are used in the context of enjoyment of the accommodation facilities offered by the Spa, not of its health care treatment. Such a situation is clearly analogous to that of the hotel guests in SGAE.

32. As a secondary matter, it must be considered whether the circumstances of the main proceedings can fall within the exceptions allowed by Article 5(2)(e) or (3)(b) of Directive 2001/29. In my view, they cannot.

33. Article 5(2)(e) is not relevant, as it concerns a possible exception to the reproduction right in Article 2 of the directive, not the right to authorise communication to the public in Article 3. Only the latter is in issue in the main proceedings. In any event, Article 5(2)(e) concerns 'social institutions pursuing non-commercial purposes, such as hospitals or prisons'. A spa establishment run for profit does not meet that definition.

34. Article 5(3)(b) is limited not only to uses of a non-commercial nature but also to uses 'for the benefit of people with a disability, which are directly related to the disability ..., to the extent required by the specific disability'. Nothing in the order for reference or the submissions to the Court suggests any relationship between the availability of television and radio sets in

spa bedrooms and any specific disability from which patients may suffer.

35. In so far as neither of those exceptions can apply, Article 5(5), to which the national court also refers and which merely limits the scope of those exceptions, is of no relevance.

36. I would therefore answer the first question to the effect that a national law exception disallowing remuneration to authors for the communication of their works by means of television or radio receivers to patients in rooms in a spa establishment which is a business is contrary to Directive 2001/29.

Question 2

37. Are the relevant provisions of Directive 2001/29 sufficiently unconditional and precise for collecting societies to rely on them before national courts, if the Member State has not transposed the directive correctly?

38. Briefly, OSA answers the question in the affirmative. Citing *Küçükdeveci*, (18) it considers that a national court hearing such a dispute must set aside any contrary provisions of Article 23 of the Copyright Law.

39. The Spa argues that, according to the criteria in *Foster and Others*, (19) OSA is an emanation of the State: it is subject to State authority or control and has special powers beyond those which result from the normal rules applicable in relations between individuals. It is thus to be equated with the State and may not rely on the effects of the directive.

40. The Czech Government considers that no question of direct effect arises: the conditions for application of the exception in Article 23 of the Copyright Law – broadcasting in a health care facility and in the course of the provision of health care – are not met. Even if a spa is a health care facility under national law, such care is not provided to clients in their bedrooms.

41. The German and Hungarian Governments recall that a directive cannot of itself impose obligations on an individual and cannot be relied upon as such against him by either a public body or another individual.

42. The Commission submits that, in a situation such as that in issue, the national court must interpret national law in accordance with EU law. The fact that the legal effects of the directive must be considered in relation to an individual or to relations between individuals does not alter that requirement.

43. I agree, essentially, with the points made by OSA and the Commission.

44. First, when national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and purpose of any relevant directive, in order to achieve the result sought by the directive. That obligation is inherent in the system of the Treaty on the Functioning of the European Union. It enables those courts to ensure the full effectiveness of EU law when they determine disputes within their jurisdiction.

45. Only if such an approach is not possible – for example, if it would lead to an interpretation *contra legem* – is it necessary to consider whether a relevant

provision of a directive has direct effect and, if so, whether that direct effect may be relied on against a party to the national dispute.

46. It will therefore be for the referring court to do whatever lies within its jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that Directive 2001/29 is fully effective and to achieving an outcome consistent with the objective pursued by it. (20)

47. Second, the Spa's argument that OSA is an emanation of the State does not appear to me to be relevant. It would be only if the Spa could seek to rely on a provision of Directive 2001/29 which had not been implemented in national law that the direct effect of the directive could be relied upon against a State entity. (21) However, it follows from the answer which I propose to the first question that that is not the case. The Spa appears, rather, to be relying on an interpretation of national law which would be inconsistent with the directive. Such an interpretation is not permissible, in the light of the case-law summarised above. (22) In any event, the contention that OSA should be regarded as an emanation of the State seems rather difficult to substantiate, since collecting societies seek to enforce private-law rights of individuals, rather than exercising any form of State authority.

48. The answer to the second question should therefore be to the effect that, if a Member State has failed to implement Directive 2001/29 correctly, a national court hearing a claim for copyright fees against an individual must interpret its domestic law, so far as possible, in the light of the wording and purpose of that directive, in order to achieve the result sought by it.

Question 3

49. The national court asks whether certain EU rules on freedom to provide services and/or on abuse of a dominant position preclude a Member State from reserving the exercise of collective copyright management in its territory to a single collecting society, creating a territorial monopoly which deprives recipients of services of the freedom to choose a collecting society in another Member State.

Admissibility

50. The Commission considers that this question has only a very distant bearing on the dispute in the main proceedings, concerned as it is with the definition of 'communication to the public'. The Czech and Austrian Governments go further: there is no indication that the Spa has sought to contract with a collecting society in another Member State; and, whatever the answer given, it can have no effect on the claim for payment of copyright fees. Those governments consider the question inadmissible. At the hearing, OSA adopted the same position.

51. I do not agree that the Court should decline to answer this question. According to settled case-law, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the circumstances of the case

both the need for a preliminary ruling and the relevance of the questions which it submits. Consequently, where those questions concern the interpretation of EU law, the Court is, in principle, bound to give a ruling. Only exceptionally may it refuse to rule on a question referred, where the interpretation sought obviously bears no relation to the facts or purpose of the main action, where the problem is hypothetical, or where the Court does not have the factual or legal material necessary to give a useful answer. (23)

52. In the present case, such circumstances are absent. The order for reference records that the Spa has argued that OSA abuses its statutory monopoly by charging fees higher than those charged by collecting societies established in neighbouring Member States. To deal with that argument, the referring court must consider the position under EU rules on freedom to provide services and on competition, and it is entitled to seek and obtain guidance from the Court of Justice in that regard.

Substance

53. I shall consider the position with regard first to abuse of a dominant position, then to the provision of services.

– Abuse of a dominant position

54. The referring court asks, in effect, whether Article 102 TFEU precludes a Member State from granting a collecting society a territorial monopoly which restricts choice for recipients of that society's services.

55. As has been pointed out in several submissions to the Court, a statutory monopoly in a Member State may constitute a dominant position within the meaning of Article 102 TFEU. However, the mere creation of such a position through the grant of special or exclusive rights within the meaning of Article 106(1) TFEU is not in itself incompatible with Article 102 TFEU. A Member State breaches the prohibitions in those two provisions only if the undertaking in question is led, merely by exercising those rights, to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses. (24)

56. The abuse which the Spa alleges in the main proceedings is that OSA charges excessive user fees in the absence of competition. Whether those fees are in fact excessive is a matter for the national court to determine. If so (the order for reference includes no statement in that regard), it must draw from its finding whatever consequences are appropriate in the context of the main proceedings. Any finding of abuse of a dominant position will, however, relate primarily to the conduct of OSA and not to the validity of the national legislation under which the monopoly was granted. That legislation would be called in question only if it were shown to lead OSA to commit such an abuse. I agree with the Commission and several of the Member States that nothing in the case-file suggests that the conditions under which the monopoly is granted are such as to lead the collecting society to charge excessive fees. It is, however, for the national court to

reach a final decision on that matter, to the extent that it is raised in the main proceedings.

– **Services**

57. OSA and a number of Member States have submitted that the activities of collecting societies do not fall under the EU rules on freedom to provide services: either they are not ‘services’ at all, in that they represent simply the collective exercise by rightholders of their rights, or they are non-economic services of general interest, excluded from the scope of Directive 2006/123 by virtue of its Article 2(2)(a).

58. I disagree. The activities of collecting societies have consistently been held to be covered by the Treaty rules on freedom to provide services. (25) It is true that it is in the first place to their members (the rightholders on whose behalf they collect fees) that such societies provide services. However, it is artificial to argue that, despite having separate personality, a collecting society is merely the extension of each of its members acting on his or her own behalf. Clearly, such societies do provide a service to rightholders who would otherwise find it difficult to collect fees, particularly for communication to the public of musical works.

59. The fact that such services do not fit neatly into one of the categories listed (non-exhaustively) in Article 57 TFEU or that collecting societies are in principle run on a not-for-profit basis cannot, in my view, alter the situation. Such societies necessarily require some remuneration, if only to cover staff and administrative costs. By that token, I also find it difficult to agree that the activities of collecting societies constitute non-economic services of general interest.

60. Moreover, collecting societies provide services not only to rightholders but also to users, such as the Spa. (26) An honest and diligent user wishing to pay fees to rightholders in respect of communication to the public of their works would find it difficult to do so in the absence of the system of licences for particular repertoires granted by collecting societies.

– **Article 16 of Directive 2006/123**

61. The submissions to the Court are almost unanimous (27) in the view that Article 16 of Directive 2006/123 is not applicable to the situation in the main proceedings, although they differ as to the reasons for its non-applicability. Various: the activities of a collecting society do not constitute ‘services’ within the meaning of Article 4(1) of the directive; they are non-economic services of general interest, excluded under Article 2(2)(a); they are services of general economic interest, excluded from the application of Article 16 by virtue of Article 17(1); and/or they are excluded from the application of Article 16 by virtue of Article 17(11), which excludes copyright and neighbouring rights.

62. I have already considered whether the activities of collecting societies may be regarded as not constituting services at all or as constituting non-economic services of general interest.

63. It does seem to me, however, that the activities in question could be regarded as services of general economic interest (Article 17(1) of Directive 2006/123), which it is for the Member States to define

(Article 1(3) of the same directive) and which are thereby specifically excluded from the application of Article 16, as well as being excluded from the scope of the directive by Article 1(2).

64. In any event, they must in my view be excluded from the application of Article 16 of Directive 2006/123 (the provision on which the referring court seeks guidance) inasmuch as they fall within the field of copyright and neighbouring rights, listed in Article 17(11) of the same directive. Although, on a literal reading, the latter provision concerns only rights, it is clear that it must refer in fact to services relating to those rights, since only services can be excluded from the application of Article 16. Furthermore, Article 1(3) specifies that the directive does not deal with the abolition of monopolies providing services.

– **Article 56 et seq. TFEU**

65. The fact that the services provided by collecting societies are not covered by (Article 16 of) Directive 2006/123 does not exclude them from the more general provisions of Article 56 et seq. TFEU. That being so, it seems undeniable that territorial monopolies limiting the area within which collecting societies may operate restrict their freedom to provide services, a restriction prohibited in principle by those provisions. They also restrict the freedom of both rightholders and users to choose between service providers.

66. The debate before the Court has focussed on whether such restrictions can be justified – whether they pursue a legitimate objective compatible with the Treaties, are justified by overriding reasons of public interest, are suitable for securing the attainment of that objective and do not go beyond what is necessary in order to attain it. (28)

67. Any determination in that regard must be based on findings of fact, which fall in principle outwith the competence of this Court in the context of a preliminary ruling procedure. However, the arguments which have been put forward in the course of both the written and oral procedure allow the Court to provide some guidance to the national court for the purposes of its assessment.

68. As regards the objective pursued, it would be difficult to deny that securing the interests of copyright holders (and users) by ensuring that royalties are collected and managed fairly and efficiently is a legitimate aim, compatible with the Treaties. Indeed, the overwhelming usefulness of collecting societies as such is not in dispute.

69. What must be considered is whether the reasons of public interest put forward in favour of the establishment and/or maintenance of territorial monopolies for such societies are ‘overriding’, in the sense that such monopolies are not only suitable but necessary to secure the objective of fair and efficient collection and management and go no further than the extent to which they are necessary for that purpose.

70. At this point, I think it useful to have in mind the way in which collecting societies operate, with particular regard to musical works, as it has been detailed in the submissions to the Court.

71. Such societies are associations of rightholders which collect fees due to their members in respect of, in particular, any communication to the public of those members' works. They achieve this by granting licences to users who wish to engage in such communication, in respect of defined repertoires comprising a number of musical works or the works of a number of rightholders. They collect fees from licence holders and monitor users or potential users in order to verify whether works are being communicated to the public and, if so, whether the user is in possession of a licence.

72. Typically (though not universally) in the European Union, collecting societies operate (whether by virtue of a statutory or a de facto monopoly) within the territory of a single Member State and may be required to accept as members any rightholders resident or established within that State. In such cases, they monitor and grant licences to users within the same Member State. Where a user wishes to obtain a licence for a repertoire managed by a collecting society established in another Member State, that is possible by means of reciprocal arrangements between such societies, each acting on behalf of the other(s) within its own territory.

73. Arguments in favour of the justification of monopolies have been advanced by OSA and all the Member States participating in the procedure, and contrary arguments by the Spa and, in particular, the Commission.

74. To summarise very briefly the main arguments advanced in favour of justification, it has been stressed that a system of statutory territorial monopolies with reciprocal representation arrangements: provides users with a 'one-stop-shop' within any Member State, eliminating uncertainty as to where to acquire licences and what rights are available under different licences; avoids fragmentation of repertoires, in which collecting societies 'cherry-pick' the most lucrative rightholders and neglect minority or localised cultural interests; provides rightholders with greater bargaining power vis-à-vis users in a given territory and thus helps to avert a 'race to the bottom' as regards the level of licence fees; allows Member States to impose necessary conditions on the management of collecting societies and to submit them to official supervision and control; and reduces costs by avoiding duplication of the resources required not only in administration but also in monitoring of potential infringers within a given territory.

75. Counter-arguments that have been put to the Court are, again very briefly: there is no need for a national 'one-stop-shop' since an EU-wide 'platform' could be established, making all the necessary information available to all potential users; in Member States (such as Sweden and the United Kingdom) in which there is no territorial monopoly, no fragmentation of repertoires is apparent, nor do users experience any difficulty in identifying and obtaining the licences they want; a free choice of service provider for both rightholders and users will lead to effective competition and thus to

fairer rates and more efficient collection, to the benefit of all concerned; there is no need for a statutory monopoly in order to enable Member States to regulate collecting societies effectively; collection costs (which have been found to amount to 15% to 20% of royalties) are in fact increased in the context of reciprocal representation, whereas a collecting society established in one Member State would have no difficulty in monitoring use in other Member States, whether by deployment of its own resources or by recourse to those of a cooperating collecting society established in that other Member State; and the possibility of granting multi-territorial licences would benefit not only users (such as the Spa, which states that it is part of a group operating in several Member States) but rightholders.

76. In many ways, a proper evaluation of those arguments would involve adjudicating between competing allegations of fact, a matter outwith the Court's competence in the context of these proceedings (it is, perhaps, rather a matter for the legislature). I note in that regard that the General Court has recently upheld a challenge to a Commission decision finding, inter alia, that a number of collecting societies had unlawfully coordinated territorial delineations by limiting licences to the domestic territory of each society. (29) In its judgment, the General Court found, in particular, that the Commission had failed to substantiate a number of claims similar to those which it advances in the present proceedings. (30) No appeal has been lodged against that judgment, and the Commission accepted in the present proceedings that it had failed to substantiate its case before the General Court. I do not, however, draw any firm conclusion from the General Court's findings, made in different proceedings and in different circumstances, (31) other than to stress that a thorough examination, going beyond that which the Court is in a position to carry out in the present proceedings, is desirable when reaching a final decision as to the justification for statutory territorial monopolies for collecting societies.

77. Turning to the arguments advanced in the present proceedings, it seems to me, first, that there is nothing in the counter-arguments to cast serious doubt on the suitability of statutory monopolies such as that in issue to secure fair and efficient collection and management of royalty fees. It is true that the Commission claims that they lead to duplication of costs; but counsel for OSA stated at the hearing that costs would normally be shared in the context of reciprocal representation arrangements.

78. What is more clearly at issue is whether such monopolies are necessary for and proportionate to achievement of the objective in view.

79. In those regards, 'much might be said on both sides' (32) – and it does not seem to me that either side has decisively won the argument in the submissions to the Court in the present proceedings.

80. I can, for example, on the one hand, appreciate the cogency of the arguments relating to the paramount desirability of a 'one-stop-shop' within any territory, both for rightholders and for users; on the other hand, it

seems plausible that such a facility could be created at an EU level if all restrictions on freedom to provide services in this domain were abolished. It is, however, by no means established that the latter would necessarily be the case without regulation. Or, while the Commission may well have found no evidence of fragmentation of repertoires, or of neglect of minority-interest music, in the few Member States in which there is currently no statutory monopoly, that does not inexorably mean that such effects are not, in practice, prevented by the existence of statutory or de facto monopolies in the majority of Member States. Or, again, while the need to regulate the activities of collecting societies need not require the imposition of national monopolies, it might be difficult to achieve the desired objective simply by subjecting such societies to a variety of national regulatory measures, according to the Member States in which they exercise their activities.

81. In short, it seems to me that, while a good case has been made for the abolition of statutory territorial monopolies in order to respect the Treaty prohibition of restriction on freedom to provide services, it has not been shown that both such freedom and the fair and efficient collection and management of royalty fees in respect of communication to the public of musical works via fixed radio and television sets can be achieved without an EU-wide regulatory framework. My view is strengthened by the Commission's proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market. That proposal states that 'EU action is necessary under the principle of subsidiarity (Article 5(3) [TUE]) as the legal framework at both national and EU levels has proved to be insufficient to address the problems'. (33)

82. That being so, I take the view that, with regard to communication to the public of musical works via fixed radio and television sets and pending possible EU-wide regulation, it can legitimately be considered that national statutory monopolies for collecting societies pursue a legitimate objective compatible with the Treaties, are justified by overriding reasons of public interest, are suitable for securing the attainment of that objective and do not go beyond what is necessary in order to attain it. I am not dissuaded from that view by the fact that in a small number of Member States such monopolies do not exist. In such cases, the exception does not disprove the rule. It will however be for the national court finally to determine those issues in the light of the facts before it.

Conclusion

83. In the light of all the foregoing considerations, I am of the opinion that the Court should answer the questions raised by the *Krajský soud v Plzni* to the following effect:

(1) An exception disallowing remuneration to authors for the communication of their works by means of television or radio receivers to patients in bedrooms in a spa establishment which is a business is contrary to

the provisions of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

(2) If a Member State has not transposed Directive 2001/29 correctly, national courts are bound to interpret their domestic law, so far as possible, in the light of the wording and purpose of that directive, in order to achieve the result sought by it. In circumstances such as those of the main proceedings, it is not relevant whether the provisions of the directive are sufficiently unconditional and precise for an individual to be able to rely on them against the State or an entity assimilated to the State.

(3) The application of rules of national law which reserve the exercise of collective management of copyright in the territory of the Member State to a single (monopoly) copyright collecting society and thereby do not allow recipients of services a free choice of a collecting society from another Member State is not precluded by Article 102 TFEU or by Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. Such rules are precluded under Article 56 et seq. TFEU only if it is established that they do not pursue a legitimate objective compatible with the Treaties, are not justified by overriding reasons of public interest, are not suitable for securing the attainment of that objective, or go beyond what is necessary in order to attain it.

1 – Original language: English.

2 – Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

3 – Subject to certain qualifications not relevant here.

4 – Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

5 – Until August 2008, the exception covered also making a work available to persons accommodated in the course of the provision of services connected with accommodation.

6 – Case C-306/05 [2006] ECR I-11519, paragraphs 32 to 47.

7 – Case C-135/10 [2012] ECR I-0000, paragraphs 70 to 102.

8 – 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 (OJ 1992 L 346, p. 61); see now Article 8(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) (OJ 2006 L 376, p. 28). That provision (unchanged in 2006) states: 'Member States shall provide a right in order to ensure that a single equitable

remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. ...'

9 – Joined Cases C-403/08 and C-429/08 [2011] ECR I-9083, paragraphs 183 to 207.

10 – See SCF, paragraphs 74, 75 and 89; Football Association Premier League and Others, paragraph 188.

11 – In particular: the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, adopted at Rome on 26 October 1961; the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979; the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the Agreement establishing the World Trade Organisation (WTO) signed at Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 (OJ 1994 L 336, p. 1); and the WIPO (World Intellectual Property Organisation) Performances and Phonograms Treaty adopted on 20 December 1996 and approved by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

12 – See SGAE, paragraph 36; Football Association Premier League and Others, paragraph 186.

13 – See SGAE, paragraphs 43 to 46; Football Association Premier League and Others, paragraphs 192 to 194; SCF, paragraph 82.

14 – See SGAE, paragraphs 37 to 39; SCF, paragraphs 84 to 87.

15 – See SGAE, paragraphs 40 to 42; Football Association Premier League and Others, paragraphs 197 to 199.

16 – See SGAE, paragraph 44; Football Association Premier League and Others, paragraphs 204 to 206; SCF, paragraph 88 et seq.

17 – See paragraphs 95 to 98 of the judgment.

18 – Case C-555/07 [2010] ECR I-365, paragraph 56.

19 – Case C-188/89 [1990] ECR I-3313, paragraphs 16 to 22.

20 – Classic illustrations of these principles include Case C-106/89 Marleasing [1990] ECR I-4135, Joined Cases C-397/01 to C-403/01 Pfeiffer and Others [2004] ECR I-8835 and Case C-212/04 Adeneler and Others [2006] ECR I-6057. More recently, see, for example, Case C-282/10 Dominguez [2012] ECR I-0000, paragraph 23 et seq. and case-law cited; Case C-42/11 Lopes Da Silva Jorge [2012] ECR I-0000, paragraph 53 et seq. and case-law cited.

21 – See, for example, Dominguez, paragraph 32 et seq., in particular paragraphs 38 and 39 and case-law cited.

22 – At points 44 to 46.

23 – See, for a recent example, Case C-492/11 Di Donna [2013] ECR I-0000, paragraphs 24 and 25 and case-law cited.

24 – See, for a recent example, Case C-437/09 AG2R Prévoyance [2011] ECR I-973, paragraphs 67 and 68 and case-law cited.

25 – See Case 22/79 Greenwich Film Production [1979] ECR 3275, paragraph 12; Case 7/82 GVL v Commission [1983] ECR 483, paragraph 38; Joined Cases C-92/92 and C-326/92 Phil Collins and Others [1993] ECR I-5145, paragraph 24.

26 – See Case C-52/07 Kanal 5 and TV4 [2008] ECR I-9275, paragraph 29 of the judgment and points 40 to 42 of Advocate General Trstenjak's Opinion.

27 – The Spa has referred to the provision only briefly, in relation to a judgment of the Czech Constitutional Court.

28 – See, for a recent example of the Court's consistent case-law, Case C-265/12 Citroën Belux [2013] ECR I-0000, paragraph 37.

29 – Case T-442/08 CISAC v Commission [2013] ECR II-0000, concerning Commission Decision C(2008) 3435 final of 16 July 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/C2/38.698 – CISAC).

30 – See paragraph 146 et seq. of the judgment.

31 – The contested decision in Case T-442/08 concerned 'the conditions of management and licensing of copyright relating to public performance rights of musical works solely with respect to exploitation via the internet, satellite and cable retransmission' (paragraph 1 of the judgment). The present case concerns communication to the public via fixed radio and television sets, a situation in which territorial aspects may have greater relevance.

32 – Sir Roger de Coverley, as quoted in *The Spectator*, 20 July 1711.

33 – COM(2012) 372 final, currently before the Parliament and the Council; see point 3.2 of the explanatory memorandum. Although the field covered by the proposal is not exactly the same as that in issue in the present proceedings, it seems to me that the need for concerted action is a relevant consideration in both cases.