

Court of Justice EU, 8 September 2022, RTL v Grupo Pestana



T E L E V I S I O N

## COPYRIGHT - NEIGHBOURING RIGHTS

**No exclusive right for broadcasting organisations regarding cable retransmission**

- [Article 1\(3\) of the Satellite and Cable-directive \(93/83/EEC\) must be interpreted as meaning that it does not provide for an exclusive right for broadcasting organisations to authorise or prohibit cable retransmission, within the meaning of that provision](#)

**Cable retransmission limited to retransmission by an operator of a classic cable network**

- [No “cable retransmission” in case of the simultaneous, unaltered and unabridged distribution of television or radio programmes broadcast by satellite and intended for reception by the public, where that retransmission is carried out by a person other than a cable operator, within the meaning of that directive, such as a hotel, does not constitute cable retransmission.](#)

78. An interpretation which would include in the concept of ‘cable operator’, within the meaning of Article 8(1) of Directive 93/83, any person who carries out a cable retransmission meeting the technical characteristics described in Article 1(3) of that directive, even where that person’s professional activity does not consist in the operation of a traditional cable television distribution network, would in actual fact have the effect of extending the scope of the related right provided for in Article 8(3) of Directive 2006/115, treating it in the same way as the exclusive right of communication to the public, as provided for in Article 3(1) of Directive 2001/29 in favour of authors.

79. In that regard, it is apparent from Article 8(3) of Directive 2006/115 that the exclusive right to authorise or prohibit the communication to the public of the broadcasts of broadcasting organisations may be relied on against third parties only if such communication is made in places accessible to the public against payment of an entrance fee. However, the Court has held that the condition relating to the payment of an entrance fee is not fulfilled where that communication constitutes an additional service included without distinction in the price of a main service of a different nature, such as a hotel accommodation service (see, to that effect, [judgment of 16 February 2017, Verwertungsgesellschaft Rundfunk, C-641/15, EU:C:2017:131](#), paragraphs 23 to 26).

80. As has been stated in paragraph 74 above, Article 8(1) of Directive 93/83 is not intended to affect the scope

of copyright and related rights such as those defined by EU law and by the laws of the Member States.

81. Lastly, the interpretation according to which the concept of ‘cable retransmission,’ within the meaning of Article 1(3) of Directive 93/83, applies only to relations between copyright owners and the holders of related rights, on the one hand, and ‘cable operators’ or ‘cable distributors’, on the other, in the traditional meaning of those terms, is consistent with the objectives pursued by Directive 93/83.

82. As is apparent from the analysis in paragraphs 70 to 73 above, it is common ground that that directive was adopted principally in order to facilitate, in particular, cable retransmission by promoting the granting of authorisations.

83. That finding is borne out by recitals 8 and 10 of Directive 93/83, from which it is apparent, first, that, at the time the directive was adopted, legal certainty, which is a prerequisite for the free movement of broadcasts within the European Union, was missing where programmes transmitted across frontiers were fed into and retransmitted through cable networks and, secondly, that cable operators could not be sure that they had actually acquired all the programme rights covered by such contractual agreements.

84. It must, therefore, be held that establishments such as hotels do not fall within the concepts of ‘cable operator’ or ‘cable distributor’, within the meaning of Directive 93/83.

Source: [ECLI:EU:C:2022:643](#)

**Court of Justice EU, 8 September 2022**

JUDGMENT OF THE COURT (Fifth Chamber)

(E. Regan, I. Jarukaitis, M. Ilešič, D. Gratsias and Z. Csehi)

8 September 2022(\*)

*(Reference for a preliminary ruling – Copyright and related rights – Satellite broadcasting and cable retransmission – Directive 93/83/EEC – Article 1(3) – Concept of ‘cable retransmission’ – Provider of the retransmission not having the status of a cable operator – Simultaneous, unaltered and unabridged distribution of television and radio programmes broadcast by satellite and intended for reception by the public, performed by the operator of a hotel establishment, by means of a satellite dish, a cable and television or radio sets – None)*

In Case C-716/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal de Justiça (Supreme Court, Portugal), made by decision of 10 November 2020, received at the Court on 31 December 2020, in the proceedings

RTL Television GmbH

v

Grupo Pestana S.G.P.S. SA,

SALVOR – Sociedade de Investimento Hoteleiro SA,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, I. Jarukaitis, M. Ilešič (Rapporteur), D. Gratsias and Z. Csehi, Judges,  
 Advocate General: G. Pitruzzella,  
 Registrar: M. Ferreira, principal administrator,  
 having regard to the written procedure and further to the hearing on 1 December 2021,  
 after considering the observations submitted on behalf of:

– RTL Television GmbH, by J.P. de Oliveira Vaz Miranda de Sousa, advogado,  
 – Grupo Pestana S.G.P.S. SA and SALVOR – Sociedade de Investimento Hoteleiro SA, by H. Trocado, advogado,  
 – the European Commission, by É. Gippini Fournier, B. Rechená and J. Samnadda, acting as Agents,  
 after hearing [the Opinion of the Advocate General at the sitting on 10 March 2022](#),  
 gives the following

### Judgment

1. This request for a preliminary ruling concerns the interpretation of Article 1(3) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15).

2. The request has been made in proceedings between, of the one part, RTL Television GmbH ('RTL') and, of the other part, Grupo Pestana, S.G.P.S. SA ('Grupo Pestana') and SALVOR – Sociedade de Investimento Hoteleiro SA ('Salvor') concerning the making available without RTL's authorisation, in the hotel rooms operated by Grupo Pestana and Salvor, of the programmes of an RTL channel.

### Legal context

#### International law

##### The TRIPs Agreement

3. The Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPs Agreement'), signed on 15 April 1994 in Marrakesh and constituting Annex 1C to the Agreement establishing the World Trade Organisation (WTO), was approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

4. Article 9 of the TRIPs Agreement, entitled '*Relation to the Berne Convention*', provides in paragraph 1 thereof:

*'Members shall comply with Articles 1 through 21 of the Berne Convention [for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979 ('the Berne Convention')] and the Appendix thereto. ...'*

5. Article 14 of the TRIPs Agreement, entitled '*Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organisations*', provides in paragraph 3 thereof:

*'Broadcasting organisations shall have the right to prohibit the following acts when undertaken without*

*their authorisation: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organisations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).'*

#### The Berne Convention

6. Article 11 bis(1) of the Berne Convention provides: '*Authors of literary and artistic works shall enjoy the exclusive right of authorising:*

...  
 (ii) *any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one;*

...'

#### The Rome Convention

7. Under Article 3(g) of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome on 26 October 1961 ('the Rome Convention'), '*rebroadcasting*' means, for the purposes of that convention, '*the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation*'.

8. Article 13 of that convention, entitled '*Minimum Rights for Broadcasting Organisations*', is worded as follows:

*'Broadcasting organisations shall enjoy the right to authorise or prohibit:*

(a) *the rebroadcasting of their broadcasts;*

(b) *the fixation of their broadcasts;*

(c) *the reproduction:*

(i) *of fixations, made without their consent, of their broadcasts;*

(ii) *of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;*

(d) *the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.'*

#### European Union law

##### Directive 93/83

9. Recitals 8 to 10, 27 and 28 of Directive 93/83 are worded as follows:

*'(8) Whereas ... legal certainty, which is a prerequisite for the free movement of broadcasts within the Community, is missing where programmes transmitted across frontiers are fed into and retransmitted through cable networks;*

*(9) Whereas the development of the acquisition of rights on a contractual basis by authorisation is already making a vigorous contribution to the creation of the desired European audiovisual area; whereas the*

*continuation of such contractual agreements should be ensured and their smooth application in practice should be promoted wherever possible;*

*(10) Whereas at present cable operators in particular cannot be sure that they have actually acquired all the programme rights covered by such an agreement;*

...

*(27) Whereas the cable retransmission of programmes from other Member States is an act subject to copyright and, as the case may be, rights related to copyright; whereas the cable operator must, therefore, obtain the authorisation from every holder of rights in each part of the programme retransmitted; whereas, pursuant to this Directive, the authorisations should be granted contractually unless a temporary exception is provided for in the case of existing legal licence schemes;*

*(28) Whereas, in order to ensure that the smooth operation of contractual arrangements is not called into question by the intervention of outsiders holding rights in individual parts of the programme, provision should be made, through the obligation to have recourse to a collecting society, for the exclusive collective exercise of the authorisation right to the extent that this is required by the special features of cable retransmission; whereas the authorisation right as such remains intact and only the exercise of this right is regulated to some extent, so that the right to authorise a cable retransmission can still be assigned; whereas this Directive does not affect the exercise of moral rights’.*

10. Article 1 of that directive, entitled ‘Definitions’, provides in paragraph 3:

*‘For the purposes of this Directive, ‘cable retransmission’ means the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public.’*

11. Under Article 2 of Directive 93/83, entitled ‘Broadcasting right’:

*‘Member States shall provide an exclusive right for the author to authorise the communication to the public by satellite of copyright works ...’*

12. Article 8 of that directive, entitled ‘Cable retransmission right’, provides in paragraph 1 thereof:

*‘Member States shall ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators.’*

13. Article 9 of Directive 93/83, entitled ‘Exercise of the cable retransmission right’, states:

*‘1. Member States shall ensure that the right of copyright owners and holders of related rights to grant or refuse authorisation to a cable operator for a cable retransmission may be exercised only through a collecting society.*

*2. Where a rightholder has not transferred the management of his rights to a collecting society, the*

*collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and the collecting society which is deemed to be mandated to manage his rights as the rightholders who have mandated that collecting society and he shall be able to claim those rights within a period, to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter.*

*3. A Member State may provide that, when a rightholder authorises the initial transmission within its territory of a work or other protected subject matter, he shall be deemed to have agreed not to exercise his cable retransmission rights on an individual basis but to exercise them in accordance with the provisions of this Directive.’*

14. Article 10 of that directive, entitled ‘Exercise of the cable retransmission right by broadcasting organisations’, provides:

*‘Member States shall ensure that Article 9 does not apply to the rights exercised by a broadcasting organisation in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights.’*

#### **Directive 2001/29/EC**

15. Recital 23 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) 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.’*

16. Article 1 of that directive, entitled ‘Scope’, provides in paragraph 2 thereof:

*‘... this Directive shall leave intact and shall in no way affect existing Community provisions relating to:*

...

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

...’

17. Article 2 of Directive 2001/29, entitled ‘Reproduction right’, provides:

*‘Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or*

*permanent reproduction by any means and in any form, in whole or in part:*

...

*(e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.'*

18. Article 3 of that directive, entitled 'Right of communication to the public of works and right of making available to the public other subject matter', provides:

*'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.*

*2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:*

...

*(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.*

...'

#### **Directive 2006/115/EC**

19. Recital 16 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 (OJ 2006 L 376, p. 28) states:

*'Member States should be able to provide for more far-reaching protection for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public.'*

20. Article 7 of that directive, entitled 'Fixation right', provides in paragraphs 2 and 3:

*'2. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.*

*3. A cable distributor shall not have the right provided for in paragraph 2 where it merely retransmits by cable the broadcasts of broadcasting organisations.'*

21. Article 8 of that directive, entitled 'Broadcasting and communication to the public', provides in paragraph 3 thereof:

*'Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.'*

22. Article 9 of Directive 2006/115, entitled 'Distribution right', provides in paragraph 1 thereof:

*'Member States shall provide the exclusive right to make available to the public ...:*

...

*(d) for broadcasting organisations, in respect of fixations of their broadcasts as set out in Article 7(2).'*

23. Article 12 of Directive 2006/115, entitled 'Relation between copyright and related rights', provides:

*'Protection of copyright-related rights under this Directive shall leave intact and shall in no way affect the protection of copyright.'*

#### **Portuguese law**

24. Article 176 of the Código do Direito de Autor e dos Direitos Conexos (Portuguese Code of Copyright and Related Rights; 'the CDADC') provides in paragraphs 9 and 10 thereof:

*'9. "Broadcasting organisation" means any organisation which makes audio or visual broadcasts, where broadcast means the transmission of sounds or images, or the representation thereof, separately or cumulatively, whether by wire or wireless means, in particular by radio waves, optical fibres, cable or satellite, intended for reception by the public.*

*10. "Retransmission" means the simultaneous transmission by a broadcasting organisation of a broadcast by another broadcasting organisation.'*

25. Article 187 of the CDADC, entitled 'Rights of broadcasting organisations', provides in paragraph 1 thereof:

*'Broadcasters shall have the right to authorise or prohibit:*

*(a) the retransmission of their broadcasts by radio waves;*

...

*(e) the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.'*

26. Article 3 of Decreto-Lei No 333/97 (Decree-Law No 333/97) of 27 November 1997 (Diário da República I, Series I-A, No 275, of 27 November 1997) is worded as follows:

*'For the purposes of this decree:*

...

*(c) "cable retransmission" means the distribution to the public, transmitted simultaneously and entirely by cable, of an initial transmission of television or radio programmes intended for reception by the public.'*

27. Article 8 of Decree-Law No 333/97, entitled 'Extension to holders of related rights', provides:

*'The provisions of Articles 178, 184 and 187 of the [CDADC] and Articles 6 and 7 of this decree-law shall apply to artists, producers of sound and video recordings and broadcasting organisations with regard to the satellite communication to the public of their performances, sound recordings, video recordings and broadcasts, and with regard to cable retransmission.'*

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

28. RTL, established in Germany, is part of a conglomerate of television-content broadcasters, known under the trade name 'Mediengruppe RTL Deutschland'. The RTL channel is one of the most well-known

German-language television channels, most watched by the German-speaking public in the European Union, and its programmes offer a very wide range of television formats (films, series, shows, documentaries, sporting events, news and current affairs programmes).

29. From a technical point of view, the RTL channel may be received in Germany, Austria and Switzerland via all existing television reception options, namely, satellite, cable, IP, OTT/Internet and terrestrial television. Furthermore, it is a free-to-air channel, there being no fee charged for its reception in private homes, and, in the majority of the reception options, the signal is not encrypted. Moreover, those three countries are the source of all its advertising funding.

30. Given the extension of its satellite signal (ASTRA 19.2° East), technically, the RTL channel can be received in several other European countries, including Portugal, by using a satellite dish.

31. As regards the reception and use of that signal, RTL has already concluded a number of licensing agreements with both cable television operators and certain hotels situated in the European Union, including in Portugal.

32. Grupo Pestana, established in Portugal, is a company which engages in the management of shareholdings of other undertakings. It holds majority shareholdings in companies which in turn own or operate hotel establishments.

33. Grupo Pestana has a direct holding of at least 98.98% in the share capital of Salvor, a company which engages in the business and promotion of the hotel industry by constructing or financing the construction of hotels or through direct or indirect interests in the operation of hotels and similar establishments.

34. By letter of 7 August 2012, the director of the International Department for Distribution and Copyright and Related Rights of Mediengruppe RTL Deutschland required Grupo Pestana to pay the fee for making available to the public several channels belonging to that group, in particular the RTL channel, in the rooms of hotels operated by companies owned by Grupo Pestana.

35. On 12 November 2012, Grupo Pestana replied to that letter, stating, *inter alia*, that, in accordance with Portuguese law, hotels were not required to pay copyright and other fees in the case of mere reception of a television signal.

36. Taking the view that it was entitled to authorise or refuse to authorise the reception and making available of the programmes of the eponymous channel, RTL brought an action against Salvor and Grupo Pestana before the Tribunal da Propriedade Intelectual (Intellectual Property Court, Portugal), asking that court, *inter alia*, to declare that the making available of those programmes required its prior authorisation.

37. In addition, as compensation for the retransmission and/or communication to the public of the RTL channel's broadcasts, RTL claimed, first, that Salvor and Grupo Pestana should be ordered jointly and severally to pay an amount of EUR 0.20 per room per month for the period during which Salvor had made that channel available in the rooms of its hotels, together with interest at the statutory rate, and, secondly, that Grupo Pestana

should be ordered to pay the same compensation for the period during which the hotels operated by the other companies it owns made or make that channel available in their rooms.

38. Lastly, RTL claimed that Grupo Pestana, as parent company, should be ordered to take the appropriate intra-group measures to ensure that the companies in its ownership do not make the RTL channel available in the hotels that those companies operate, without having obtained RTL's prior authorisation.

39. The Tribunal da Propriedade Intelectual (Intellectual Property Court) found that the reception and making available of the RTL channel's broadcasts in the hotel rooms in question constituted an act of communication to the public, within the meaning of Article 187(1)(e) of the CDADC, notwithstanding the fact that no specific consideration was paid by way of remuneration for viewing that channel, such as an entrance fee. However, that court held that the distribution of that channel could not be regarded as a '*retransmission of broadcasts*', since neither the defendants in the main proceedings nor the hotels identified in the action were broadcasting organisations. Consequently, it rejected RTL's claims, in particular those seeking compensation or based on unjust enrichment.

40. The applicant in the main proceedings brought an appeal against that judgment before the Tribunal da Relação de Lisboa (Court of Appeal, Lisbon, Portugal), which upheld the first-instance judgment. That appeal court held, in essence, that the distribution by coaxial cable of the broadcasts of the RTL channel to numerous television sets installed in the rooms of the hotel establishments operated by the defendants in the main proceedings did not constitute a retransmission of broadcasts, in the light of the definition contained in Article 176(10) of the CDADC.

41. The applicant in the main proceedings then brought an appeal in cassation before the referring court, the Supremo Tribunal de Justiça (Supreme Court, Portugal), which was allowed to proceed by that court.

42. According to that court, the essential question to be decided in that appeal is whether the distribution by coaxial cable of the RTL channel's broadcasts in the rooms of the hotels concerned constitutes a retransmission of those broadcasts, which, under Article 187(1)(a) of the CDADC, is subject to authorisation by the broadcasting organisation, in this case RTL.

43. On the one hand, the two lower courts found that there was no retransmission, for the purposes of Article 176(9) and (10) of the CDADC and Article 3(g) of the Rome Convention, since the defendants did not have the status of broadcasting organisation.

44. On the other hand, RTL contended that the right conferred on broadcasting organisations to authorise and prohibit the retransmission of their broadcasts — as provided for in Article 187(1)(a) of the CDADC in conjunction with Articles 3 and 8 of Decree-Law No 333/97 — covers not only the simultaneous transmission of broadcasts, by means of radio signals, in the case where the person transmitting them is a broadcasting organisation other than the organisation from which they

originate, but also the distribution to the public, on a simultaneous basis and entirely by cable, of a primary transmission of television or radio programmes intended for reception by the public, whether or not the person performing that distribution to the public is a broadcasting organisation.

45. In that regard, the referring court is uncertain as to whether the interpretation by the two lower courts of the applicable rules of the CDADC and of Decree-Law No 333/97 is compatible with Directive 93/83, in particular as to whether, notwithstanding the wording of Article 187(1)(a) of the CDADC, the list of rights conferred on broadcasting organisations must be regarded as having been extended, having regard in particular to the provisions of Decree-Law No 333/97 and its original source, Directive 93/83.

46. In those circumstances the Supremo Tribunal de Justiça (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

*‘(1) Must the concept of “cable retransmission”, as provided for in Article 1(3) of [Directive 93/83] be interpreted as meaning that it covers, in addition to the simultaneous transmission by one broadcasting organisation of a broadcast by another broadcasting organisation, the distribution to the public, on a simultaneous basis and entirely by cable, of a primary transmission of television or radio programmes intended for reception by the public (whether or not the person performing that distribution to the public is a broadcasting organisation)?*

*(2) Does the simultaneous distribution of the satellite broadcasts of a television channel, through television sets installed in hotel rooms, and by means of coaxial cable, constitute a “retransmission” of such broadcasts within the meaning of the concept provided for in Article 1(3) of [Directive 93/83]?’*

The request to have the oral procedure reopened

47. Following the delivery of [the Opinion of the Advocate General](#), RTL, by document lodged at the Court Registry on 7 June 2022, requested the Court to order the reopening of the oral part of the procedure, pursuant to Article 83 of the Rules of Procedure of the Court of Justice.

48. In support of its request, RTL argued, in essence, that the Advocate General’s Opinion was based upon an inadequate examination of several aspects of the factual, technological and legal context of the dispute in the main proceedings.

49. It must be borne in mind that, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his or her involvement. The Court is not bound either by the Advocate General’s Opinion or by the reasoning on which it is based (judgment of 12 May 2022, *Schneider Electric and Others*, C-556/20, EU:C:2022:378, paragraph 30 and the case-law cited).

50. In accordance with Article 83 of the Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the opening or 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.

51. However, the Statute of the Court of Justice of the European Union and the Rules of Procedure make no provision for parties to submit observations in response to [the Advocate General’s Opinion \(judgments of 2 April 2020, \*Stim and SAMI\*, C-753/18, EU:C:2020:268, paragraph 22](#) and the case-law cited, and of 3 September 2020, *Supreme Site Services and Others*, C-186/19, EU:C:2020:638, paragraph 37 and the case-law cited).

52. In the present case, RTL’s request that the oral part of the procedure be reopened is intended, essentially, to enable it to respond to the findings made by the Advocate General in his Opinion.

53. In that regard, the Court considers, having heard the Advocate General, that it has all the information necessary to enable it to reply to the questions put by the referring court and that all the arguments necessary for the determination of the present case have been debated between the parties, both in the written and oral procedure before the Court.

54. Consequently, there is no need to order the oral part of the procedure to be reopened.

#### **Consideration of the questions referred**

55. According to settled case-law of the Court, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it (judgment of 26 April 2022, *Landespolizeidirektion Steiermark* (Maximum duration of internal border control), C-368/20 and C-369/20, EU:C:2022:298 paragraph 50 and the case-law cited). Furthermore, the Court may decide to take into consideration rules of EU law to which the national court has made no reference in the wording of its question (judgment of 24 February 2022, *Glavna direksija ‘Pozharna bezopasnost i zashtita na naselenieto’*, C-262/20, EU:C:2022:117, paragraph 33 and the case-law cited).

56. It is apparent from the order for reference that the referring court seeks to ascertain whether Member States are required, under EU law – having regard to the definition of the concept of ‘cable retransmission’ in Article 1(3) of Directive 93/83 – to recognise, in respect of broadcasting organisations, an exclusive right to authorise or prohibit the retransmission of their broadcasts where that retransmission is carried out by means of a cable by an entity which is not a broadcasting

organisation, such as a hotel. Indeed, the referring court considers that, if that question is answered in the affirmative, it will have to interpret national law in such a way as to ensure the effective exercise of such a right.

57. In that regard, it should be noted that, under EU law, Member States are required to provide, in their national law, for a certain number of related rights which a broadcasting organisation such as RTL must be able to exercise.

58. As EU law currently stands and in accordance with the European Union's obligations under international intellectual property law, in particular Article 13 of the Rome Convention and Article 14(3) of the TRIPS Agreement, such rights include:

-the exclusive right to authorise or prohibit reproduction of the fixations of the broadcasts of broadcasting organisations, whether those broadcasts are transmitted by wire or over the air, including by cable, enshrined in Article 2(e) of Directive 2001/29;

-the exclusive right to authorise or prohibit the making available to the public of fixations of the broadcasts of broadcasting organisations, whether those broadcasts are transmitted by wire or over the air, including by cable, in such a way that members of the public may access them from a place and at a time individually chosen by them, enshrined in Article 3(2)(d) of Directive 2001/29;

-the exclusive right to authorise or prohibit the fixation of the broadcasts of broadcasting organisations, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite, enshrined in Article 7(2) of Directive 2006/115;

-the exclusive right to authorise or prohibit the rebroadcasting of the broadcasts of broadcasting organisations by wireless means, as well as the communication to the public of those broadcasts if such communication is made in places accessible to the public against payment of an entrance fee, enshrined in Article 8(3) of Directive 2006/115; and

-the exclusive right to make available to the public, in respect of fixations of the broadcasts of broadcasting organisations as set out in Article 7(2) of Directive 2006/115, as enshrined in Article 9(1)(d) of that directive.

59. Although the factual circumstances referred to in paragraph 56 above clearly do not fulfil the conditions for applying those provisions, the question still remains as to whether an exclusive right, such as that described in that paragraph, might arise, if at all, from the interpretation of Article 1(3) of Directive 93/83, read in conjunction with Article 8(1) thereof.

60. In those circumstances, it must be found that, by its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 1(3) of Directive 93/83, read in conjunction with Article 8(1) thereof, must be interpreted, first, as requiring Member States to provide, in respect of broadcasting organisations, for an exclusive right to authorise or prohibit cable retransmission, within the meaning of that provision, and, secondly, whether the simultaneous, unaltered and unabridged distribution of television or

radio programmes broadcast by satellite and intended for reception by the public constitutes such retransmission, where that transmission is carried out by an establishment such as a hotel.

61. As set out in Article 1(3) of Directive 93/83, the concept of '*cable retransmission*' is defined as the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public.

62. Thus, that concept does not cover deferred, altered or incomplete retransmissions or retransmissions within the same Member State, that is to say, within the Member State in which the initial transmission originates (see, to that effect, [judgment of 1 March 2017, ITV Broadcasting and Others, C-275/15, EU:C:2017:144](#), paragraph 21).

63. As regards, more specifically, the concept of '*retransmission*', it follows from Article 1(3) that it concerns only retransmission by cable or microwave system, the latter taking the place of cable retransmission in some Member States, where the establishment of a cable network is not economically viable, as is apparent from point 11 of the second part of the explanatory memorandum to the Proposal for a Council Directive on the coordination of certain rules concerning copyright and neighbouring rights applicable to satellite broadcasting and cable retransmission, presented by the Commission on 11 September 1991 (COM (1991) 276 final), which was the basis for Directive 93/83. Furthermore, the initial transmission may be by wire or over the air, including by satellite.

64. Furthermore, as the referring court was fully entitled to state, '*cable retransmission*', within the meaning of that provision, does not imply that the entity carrying out that retransmission is a broadcasting organisation.

65. It is true that, from the point of view of international law, the status of 'broadcasting organisation' is required in order for there to be a '*rebroadcasting*' within the meaning of Article 3(g) of the Rome Convention, that concept corresponding, in essence, to the concept of '*rebroadcasting ... by wireless means*' referred to in Article 8(3) of Directive 2006/115.

66. Nevertheless, it is clear that Article 3(g) and Article 13(a) of that convention are not relevant to the interpretation of the concept of '*cable retransmission*', since that convention, like the TRIPS Agreement, concerns exclusively traditional broadcasting by wireless means (see, to that effect, [judgment of 4 September 2014, Commission v Council, C-114/12, EU:C:2014:2151](#), paragraphs 3 and 91).

67. Admittedly, at the date on which it was adopted, Directive 93/83 was intended, in essence, to broaden the concept of an '*organisation other than the original one*' contained in Article 11bis(1)(ii) of the Berne Convention, in order also to include cable operators, albeit in a manner limited to the scope of that directive.

68. Thus, the definition of the concept of '*cable retransmission*' in Article 1(3) of Directive 93/83 is

expressly provided for ‘for the purposes of’ that directive.

69. That said, it is clear from Article 8 of that directive, and from recital 27 thereof, that Directive 93/83 neither requires Member States to introduce a specific cable retransmission right nor defines the scope of any such right. It merely imposes an obligation upon the Member States to ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed (judgment of 3 February 2000, Egeda, C-293/98, EU:C:2000:66, paragraph 24).

70. That directive was adopted principally in order to facilitate, first, satellite broadcasting and, secondly, cable retransmission, by promoting, in Article 9 thereof, the granting of authorisations, by authors and holders of related rights, for a cable retransmission, through collecting societies, it being understood that, in accordance with Article 10 of that directive, Article 9 does not apply to the rights exercised by a broadcasting organisation in respect of its own transmission.

71. In particular, according to Article 8(1) of Directive 93/83, Member States must ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators.

72. In that regard, it is apparent from a combined reading of recitals 8, 9 and 27 of Directive 93/83 that a cable operator must obtain the authorisation from every holder of copyright and related rights in each part of the programme retransmitted and that, unless there is a temporary exception in the case of certain legal licence schemes, that authorisation must be granted contractually, which is the most appropriate means of creating the desired European audiovisual area within a framework that ensures legal certainty.

73. In that context, recital 28 of Directive 93/83 states that the purpose of that directive is to regulate to some extent the exercise of the exclusive right to grant an authorisation, the authorisation right as such remaining intact. Thus, Article 9 of that directive provides, in essence, that Member States must ensure that the right of copyright owners and holders of related rights to grant or refuse authorisation to a cable operator for a cable retransmission may be exercised only through a collecting society. However, Article 10 of Directive 93/83 makes clear that Member States must ensure that Article 9 does not apply to the rights exercised by a broadcasting organisation in respect of its own transmission, cable operators therefore having to negotiate individually with the broadcasting organisation concerned for the purposes of obtaining an authorisation, irrespective of whether the rights concerned are the broadcasting organisation’s own or have been transferred to it by other copyright owners and/or holders of related rights.

74. Although the agreements provided for in Article 8(1) of Directive 93/83 are, therefore, concluded, in

accordance with the detailed rules laid down in Articles 9 and 10 thereof, with cable operators, it follows from those factors that Article 8(1) of that directive does not affect the exact scope of copyright or related rights, which is established under other instruments of EU law, such as Directives 2001/29 and 2006/115, and of national law.

75. As is apparent from recital 16 of Directive 2006/115, it remains open to the Member States to provide for more far-reaching protection, with regard to the broadcasting and communication to the public of transmissions made by broadcasting organisations, than that which must be instituted in accordance with Article 8(3) of that directive. Such an option implies that the Member States may grant broadcasting organisations an exclusive right to authorise or prohibit acts of communication to the public of their transmissions on conditions different from those laid down in Article 8(3), it still being understood that, as provided for in Article 12 of Directive 2006/115, such a right must not affect the protection of copyright in any way (see, to that effect, [judgment of 26 March 2015, C More Entertainment, C-279/13, EU:C:2015:199, paragraph 35](#)).

76. Even if national law provides for an exclusive right for broadcasting organisations to authorise or prohibit cable transmission, Directive 93/83 governs only the exercise of the cable retransmission right in the relationship between copyright owners and holders of related rights, on the one hand, and ‘cable operators’ or ‘cable distributors’, on the other.

77. Furthermore, having regard to the particular circumstances surrounding the origin of Directive 93/83, it must be held that the concepts of ‘cable operator’ or ‘cable distributor’ in that directive designate, as the Advocate General observed in [point 73 of his Opinion](#), the operators of traditional cable networks.

78. An interpretation which would include in the concept of ‘cable operator’, within the meaning of Article 8(1) of Directive 93/83, any person who carries out a cable retransmission meeting the technical characteristics described in Article 1(3) of that directive, even where that person’s professional activity does not consist in the operation of a traditional cable television distribution network, would in actual fact have the effect of extending the scope of the related right provided for in Article 8(3) of Directive 2006/115, treating it in the same way as the exclusive right of communication to the public, as provided for in Article 3(1) of Directive 2001/29 in favour of authors.

79. In that regard, it is apparent from Article 8(3) of Directive 2006/115 that the exclusive right to authorise or prohibit the communication to the public of the broadcasts of broadcasting organisations may be relied on against third parties only if such communication is made in places accessible to the public against payment of an entrance fee. However, the Court has held that the condition relating to the payment of an entrance fee is not fulfilled where that communication constitutes an additional service included without distinction in the price of a main service of a different nature, such as a hotel accommodation service (see, to that effect,



**judgment of 16 February 2017, Verwertungsgesellschaft Rundfunk, C-641/15, EU:C:2017:131**, paragraphs 23 to 26).

80. As has been stated in paragraph 74 above, Article 8(1) of Directive 93/83 is not intended to affect the scope of copyright and related rights such as those defined by EU law and by the laws of the Member States.

81. Lastly, the interpretation according to which the concept of ‘*cable retransmission*,’ within the meaning of Article 1(3) of Directive 93/83, applies only to relations between copyright owners and the holders of related rights, on the one hand, and ‘*cable operators*’ or ‘*cable distributors*’, on the other, in the traditional meaning of those terms, is consistent with the objectives pursued by Directive 93/83.

82. As is apparent from the analysis in paragraphs 70 to 73 above, it is common ground that that directive was adopted principally in order to facilitate, in particular, cable retransmission by promoting the granting of authorisations.

83. That finding is borne out by recitals 8 and 10 of Directive 93/83, from which it is apparent, first, that, at the time the directive was adopted, legal certainty, which is a prerequisite for the free movement of broadcasts within the European Union, was missing where programmes transmitted across frontiers were fed into and retransmitted through cable networks and, secondly, that cable operators could not be sure that they had actually acquired all the programme rights covered by such contractual agreements.

84. It must, therefore, be held that establishments such as hotels do not fall within the concepts of ‘*cable operator*’ or ‘*cable distributor*’, within the meaning of Directive 93/83.

85. In the light of all the foregoing considerations, the answer to the questions referred, as reformulated, is that Article 1(3) of Directive 93/83, read in conjunction with Article 8(1) thereof, must be interpreted as meaning:

-that it does not provide for an exclusive right for broadcasting organisations to authorise or prohibit cable retransmission, within the meaning of that provision, and

-that the simultaneous, unaltered and unabridged distribution of television or radio programmes broadcast by satellite and intended for reception by the public, where that retransmission is carried out by a person other than a cable operator, within the meaning of that directive, such as a hotel, does not constitute cable retransmission.

#### **Costs**

86. 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 (Fifth Chamber) hereby rules:

**Article 1(3) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright**

**applicable to satellite broadcasting and cable retransmission, read in conjunction with Article 8(1) thereof,**

**must be interpreted as meaning:**

**-that it does not provide for an exclusive right for broadcasting organisations to authorise or prohibit cable retransmission, within the meaning of that provision, and**

**-that the simultaneous, unaltered and unabridged distribution of television or radio programmes broadcast by satellite and intended for reception by the public, where that retransmission is carried out by a person other than a cable operator, within the meaning of that directive, such as a hotel, does not constitute cable retransmission.**

#### **OPINION ADVOCATE GENERAL PITRUZZELLA**

delivered on 10 March 2022(1)

Case C-716/20

RTL Television GmbH

v

Grupo Pestana S.G.P.S., S.A.,

SALVOR – Sociedade de Investimento Hoteleiro, S.A.

(Request for a preliminary ruling from the Supremo Tribunal de Justiça (Supreme Court, Portugal))

(Reference for a preliminary ruling – Copyright and related rights – Satellite broadcasting and cable retransmission – Concept of ‘cable retransmission’ – Simultaneous and unabridged distribution to the public by cable of a television programme intended for reception by the public – Distribution by a person other than a broadcasting organisation – Distribution on televisions in hotel rooms)

1. Does a broadcaster have the right to prohibit broadcasting and to charge a fee for the retransmission of its free-to-air programmes, received by a hotel by means of a satellite dish and transmitted by coaxial cable to its rooms for the benefit of its guests? Does this retransmission constitute ‘cable retransmission’ within the meaning of Article 1(3) of Directive 93/83/EEC (2) and can it confer specific rights on the broadcaster where national legislation seems to extend the catalogue of rights conferred by EU law?

#### **I. Legal framework**

##### **A. European Union law**

2. Article 1(3) of Directive 93/83 provides:

‘...’

For the purposes of this Directive, “cable retransmission” means the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public.’

3. Article 8 of Directive 93/83, entitled ‘Cable retransmission right’, states:

‘1. Member States shall ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights

are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators.’

4. Article 9(1) of Directive 93/83, entitled ‘Exercise of the cable retransmission right’, provides:

‘Member States shall ensure that the right of copyright owners and holders of related rights to grant or refuse authorisation to a cable operator for a cable retransmission may be exercised only through a collecting society.’

5. Under Article 3 of Directive 2001/29/EC, (3) entitled ‘Right of communication to the public of works and right of making available to the public other subject matter’:

‘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.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

...

(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.’

6. Article 8 of Directive 2006/115/EC, (4) entitled ‘Broadcasting and communication to the public’, provides at paragraph 3 thereof:

‘3. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.’

## **B. Portuguese law**

7. Pursuant to Article 176(9) and (10) of the Código do Direito de Autor e dos Direitos Conexos (Portuguese Code of Copyright and Related Rights; ‘the CDADC’): (5)

‘9. “Broadcasting organisation” means any organisation which makes audio or visual broadcasts, where broadcast means the transmission of sounds or images, or the representation thereof, separately or cumulatively, whether by wire or wireless means, in particular by radio waves, optical fibres, cable or satellite, intended for reception by the public.

10. “Retransmission” means the simultaneous transmission by a broadcasting organisation of a broadcast by another broadcasting organisation.’

8. Pursuant to Article 187 of the CDADC:

‘(1) Broadcasters shall have the right to authorise or prohibit:

(a) the retransmission of their broadcasts by radio waves;  
 (b) the fixation of their broadcasts on a physical medium, whether those broadcasts are by wire or wireless means;  
 (c) the reproduction of the fixation of their broadcasts, when they have not been authorised or if it is an ephemeral fixation and the purpose of the reproduction is different from the purpose for which it was made;  
 (d) the making available of their broadcasts to the public, by wire or wireless means, including by cable or satellite, in such a way that members of the public may access them from a place and at a time individually chosen by them;

(e) the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

(2) The rights provided for in this article shall not apply to a cable distributor which only retransmits the broadcasts of broadcasting organisations.

(3) A person whose name has been mentioned as such in the broadcast in question, in accordance with established practice, shall be presumed to be a holder of neighbouring rights in a broadcast.’

9. Pursuant to Articles 3 (Definitions) and 8 (Extension to holders of related rights) of Decree-Law No 333/97:

(6)

‘Article 3

For the purposes of this decree:

(a) “satellite” means any artificial device placed in space which allows the transmission of broadcast signals intended for reception by the public;

(b) “communication to the public by satellite” means the act of introducing, under the control and responsibility of the broadcasting organisation, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication which leads to the satellite and returns to earth;

(c) “cable retransmission” means the distribution to the public, transmitted simultaneously and entirely by cable, of an initial transmission of television or radio programmes intended for reception by the public.

...

Article 8

The provisions of Articles 178, 184 and 187 of the CDADC and Articles 6 and 7 of this decree-law shall apply to artists, producers of sound and video recordings and broadcasting organisations with regard to the satellite communication to the public of their performances, sound recordings, video recordings and broadcasts, and with regard to cable retransmission.’

## **II. The facts giving rise to the dispute in the main proceedings and the questions referred for a preliminary ruling**

10. RTL Television GmbH is a company based in Germany which broadcasts radio and television programmes via various channels intended for reception by the general public.

11. The TV programmes are broadcast via its television networks by ‘open signal’ – that is to say, without the

reception of those programmes in private homes being subject to the payment of a fee.

12. RTL Television ('RTL'), one of the television channels owned by the abovementioned company, operates in the territory of several Member States and offers viewers a range of television programmes (films, series, shows, documentaries, sporting events, news and current affairs programmes).

13. Although intended for audiences in Germany, Austria and Switzerland, the programmes can be picked up by satellite signal throughout Europe, and therefore also in Portugal, simply by using a satellite dish.

14. RTL has concluded various licensing agreements with TV operators and hotels located in different EU Member States.

15. Grupo Pestana S.G.P.S. ('Grupo Pestana') is the parent company of one of the largest Portuguese groups operating in the hotel sector, which includes the subsidiary Salvor, Sociedade de Investimento Hoteleiro, S.A. ('Salvor'). Salvor, in which Grupo Pestana has a 98.8% stake, operates several hotels in Portugal, and in particular the 'D. João II' and 'Alvor Praia' hotels.

16. As RTL points out, the 'D. João II' and 'Alvor Praia' hotels, at least from May 2013 until February 2014, received RTL satellite broadcasts via satellite dishes installed in the hotels, and transmitted them, by coaxial cable, to televisions installed in the rooms.

17. For that reason, RTL brought an action before the Tribunal de Propriedade Intelectual (Intellectual Property Court, Portugal) against Grupo Pestana and Salvor seeking a declaration that the reception and retransmission of RTL broadcasts in the rooms of the 'D. João II' and 'Alvor Praia' hotels constituted an act of communication to the public of RTL broadcasts within the meaning of Article 187(1)(e) of the CDADC and an act of retransmission of those broadcasts within the meaning of Articles 3 and 8 of Decree-Law No 333/97, and as such was subject to prior authorisation by RTL.

18. Specifically, RTL stated that, under Article 187(1)(e) of the CDADC, in the event of communication to the public of protected works, broadcasters have a series of rights, such as to authorise or prohibit the communication to the public of their broadcasts.

19. According to RTL, those rights were further extended by the provisions of Article 8 of Decree-Law No 333/97, under which broadcasting organisations have the right to authorise or prohibit the cable retransmission of their broadcasts, as set out in Article 3(c), and thus in the case of 'distribution to the public, transmitted simultaneously and entirely by cable, of an initial transmission of television or radio programmes intended for reception by the public'.

20. However, the Tribunal de Propriedade Intelectual (Intellectual Property Court) dismissed RTL's action, observing that the transmission of RTL television broadcasts in hotel rooms belonging to Grupo Pestana and Salvor could be considered an act of communication to the public, but that the conditions for the exercise of the exclusive right provided for in Article 187(1)(e) of the CDADC had not been fulfilled.

21. The same court also observed that the case at issue could not be regarded as an act of retransmission, since it had not been performed by a broadcaster.

22. RTL challenged the judgment of the Tribunal de Propriedade Intelectual (Intellectual Property Court) before the Tribunal da Relação de Lisboa (Court of Appeal, Lisbon, Portugal).

23. The Tribunal da Relação de Lisboa (Court of Appeal, Lisbon) upheld the judgment at first instance and rejected the claims made by RTL.

24. RTL brought an appeal in cassation against the judgment of the Tribunal da Relação de Lisboa (Court of Appeal, Lisbon) before the Tribunal Supremo de Justiça (Supreme Court, Portugal), which stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Must the concept of "cable retransmission", as provided for in Article 1(3) of [Directive 93/83], be interpreted as meaning that it covers, in addition to the simultaneous transmission by one broadcasting organisation of a broadcast by another broadcasting organisation, the distribution to the public, on a simultaneous basis and entirely by cable, of a primary transmission of television or radio programmes intended for reception by the public (whether or not the person performing that distribution to the public is a broadcasting organisation)?

(2) Does the simultaneous distribution of the satellite broadcasts of a television channel, through television sets installed in hotel rooms, and by means of coaxial cable, constitute a retransmission of such broadcasts within the meaning of the concept provided for in Article 1(3) of [Directive 93/83]?'

### III. Legal analysis

#### A. Preliminary observations

25. The two questions referred for a preliminary ruling by the referring court can be summed up, in essence, in a single question: does a broadcaster have the right to prohibit broadcasting and to charge a fee for the retransmission of its programmes, received by a hotel by means of a satellite dish and transmitted by coaxial cable to its hotel rooms for the benefit of its guests?

26. The claim made by the applicant in the main proceedings is based on the assumption that the Portuguese legislation extends the broadcaster's rights in relation to third parties who perform acts of communication to the public on the basis of EU law, where such retransmission takes place 'by cable'.

27. In other words, Portuguese law, in implementing Directive 93/83, introduced the right for broadcasters to be able to prohibit the retransmission and, in any event, to demand the payment of a fee in situations where a person retransmits a broadcaster's free-to-air programmes 'by cable'.

28. According to that interpretation by RTL, followed with certain reservations by the national court, the Portuguese legislature appears to have introduced a concept of 'cable distributor' different from the one that can be construed from EU law: namely, anyone who carries out that activity on a professional basis using conventional cable networks would, under that

interpretation, be placed on the same footing as entities such as hotels, which, by picking up the free-to-air signal via a satellite dish, reproduce the signal by coaxial cable in their hotel rooms.

29. The question therefore revolves around the concept of ‘cable retransmission’, and more importantly, who can be considered a ‘cable distributor’, that is to say, whether it is necessary for that person to be a broadcasting organisation, whether it is sufficient for it to use any ‘cable’ technology, or conversely whether – and this seems to me to be the best option – it must be a ‘professional cable distributor’ operating via traditional cable networks.

30. In my view, situations such as the one at issue in the present case, as the Commission argued convincingly in its written observations and at the hearing, fall into the category of communication to the public, under the conditions laid down by EU law so that the retransmission of a free-to-air television programme can give rise to specific rights in favour of broadcasters.

31. As a preliminary point, it seems worth clarifying, in line with the case-law of the Court, that two categories of persons can assert intellectual property rights relating to television broadcasts: first, the authors of the works concerned and, secondly, the broadcasters. (7)

32. Broadcasters can invoke the right of fixation of their broadcasts which is provided for in Article 7(2) of Directive 2006/115, the right of communication of their broadcasts to the public, within the meaning of Article 8(3) of that directive, or the right to reproduce fixations of their broadcasts which is confirmed by Article 2(e) Directive 2001/29. (8)

33. In the interests of clarity, I will examine the legal questions behind the proposed answers to the two questions referred for a preliminary ruling together, given how closely they are connected, and will propose a single, detailed answer.

34. My analysis will begin with a brief description of the purpose and nature of Directive 93/83 and its historical and technological context. After considering the concepts of ‘cable’, ‘cable retransmission’ and ‘cable distributor’, I will briefly examine the various directives cited and the relevant case-law of the Court of Justice.

35. This will bring me to the heart of the matter – namely, the relationship between the concepts of ‘cable retransmission’ and ‘communication to the public’ – so that I can assess the case at issue in these proceedings.

### **1. Purpose and context of Directive 93/83**

36. The provisions of Directive 93/83, adopted in response to the advent of new technology for ‘cable operators’, should be placed in their specific historical and technological context and read in the light of the case-law of the Court of Justice, in order to be interpreted systematically and coherently in relation to European rules on intellectual property.

37. Directive 93/83 on satellite broadcasting and cable retransmission ‘has a certain and quite limited ambit, namely to foster pan-European broadcasting services by facilitating satellite broadcasting and cable retransmission of radio and television programmes.’ (9)

38. In other words, the directive was intended to facilitate satellite broadcasting and cable retransmission by encouraging the granting of licences for the cable retransmission of a programme by collecting societies (Article 9 of the directive). (10)

39. Therefore, its objective is not to confer rights, but to enable full use to be made of the new communications technology (satellite and cable) introduced at the time, and in particular, to address certain shortcomings in the contractual system within the market for the granting of cross-border licences in the case of cable retransmission. (11)

40. More specifically, it is clear from Article 8 of Directive 93/83 that the directive does not require the Member States to establish a specific cable retransmission right or define the scope of any such right. It simply provides an obligation for Member States to ensure that the cable retransmission of broadcasts from other Member States takes place in their territory in accordance with existing copyright and related rights.

41. The directive in question also provides for minimal harmonisation in the sense that it does not preclude forms of contractual negotiation of rights related to satellite and cable broadcasting operations. (12)

42. Indeed, the Court has clarified that Directive 93/83 ‘provides for minimal harmonisation of certain aspects of protection of copyright and related rights solely in the case of communication to the public by satellite or cable retransmission of programmes from other Member States’. (13)

43. As already mentioned, the regulated and harmonised aspects relate to encouraging the granting of licences for the cable retransmission of a programme by a collecting society.

44. However, as we will see, this does not mean that in implementing Directive 93/83, concepts of EU law can be assigned a different meaning from their established one, or that it can be inferred from this that rights may be conferred contrary to the systematic interpretation of the directive itself.

### **B. Questions referred for a preliminary ruling**

#### **1. The concept of ‘cable distributor’**

45. According to Article 1(3) of Directive 93/83, ‘cable retransmission’ means the retransmission of an initial transmission from one Member State to another through a cable system. Furthermore, that retransmission must be simultaneous, unaltered and unabridged compared with the initial transmission which may, in turn, be transmitted by wire or by wireless means, over the air or by satellite. Lastly, it is specified that the object of the initial transmission, and therefore of the retransmission, must consist of radio and television programmes intended for reception by the public.

46. According to Articles 8 and 9, the conditions for exercising the cable retransmission right must be fulfilled by a ‘cable distributor’.

47. However, Directive 93/83 does not define the concepts of ‘cable’ or ‘cable distributor’, taking them for granted, so it is not possible to determine which organisations may carry out ‘cable retransmission’.

48. Although the Court has not addressed that issue directly in a judgment before, the words of Advocate General Saugmandsgaard Øe in his Opinion in the ITV 2 case (ITV Broadcasting and Others, C-275/15, EU:C:2016:649) seem cogent and in line with the interpretation proposed.

49. The comments made by Advocate General Øe related to a different dispute than the one in the present case, in which it was not broadcasters' rights that were at issue, but copyright, and the provisions of EU law cited in the judgment were not exactly the same as those contained in Directive 93/83. (14)

50. Nevertheless, the reasoning followed may, in my view, still be relevant in the present case, in so far as it offers a convincing interpretation of the concepts of 'cable' and 'cable distributor' which is valid for the entire corpus of rules on copyright and related rights.

51. The concept 'cable' appears not only in Directive 2001/29, but is also used in certain of the directives on which Directive 2001/29 is based, namely Directives 92/100, 93/83 and 93/98.

52. Given the requirements of unity of the EU legal order and its coherence, Advocate General Saugmandsgaard Øe states that 'the concepts used by that body of directives must have the same meaning, unless the EU legislature has expressed a different intention in a specific legislative context'. (15)

53. Since none of the abovementioned directives defines the concept of 'cable', that concept should be interpreted in the light of its (technological) context and the objectives pursued by the directives.

54. Advocate General Saugmandsgaard Øe goes on to say that 'as regards the context in which the concept of "cable" occurs, it should be observed that that concept is used, in all the directives in question, in the light of other technologies, in particular "satellite" broadcasting. The words "by wire or over the air, including by cable or satellite", in Article 2(e) and Article 3(2)(d) of Directive 2001/29, give the impression, moreover, that the concepts of "cable" and "satellite" are, respectively, the sub-categories of the wider concepts of "wire" and "over the air".' (16)

55. Directive 93/83 also makes a clear distinction between 'satellite broadcasting' and 'cable retransmission'. Therefore, I am persuaded by Advocate General Saugmandsgaard Øe's argument that, in relation to the objectives of Directive 2001/29, it must be assumed that the EU legislature was fully aware of the choice of the terminology used in that directive. In other words, if the EU legislature had intended to give the concept of 'cable' within the meaning of Directive 2001/29 a technologically neutral meaning, it must be considered that it would have chosen a more general concept, or that it would at least have made clear that the concept of 'cable' included other technologies. (17)

56. Advocate General Saugmandsgaard Øe concludes on this point: 'The foregoing considerations as a whole support the conclusion that the concept of "cable", used in Article 9 of Directive 2001/29, is restricted to traditional cable networks operated by conventional cable service providers.' (18)

57. I consider that this argument may also be transposed to the present case: although the objectives of Directive 2001/29 are different (19) from those of Directive 93/83, I would point out that Directive 93/83 is intended to enable full use to be made of the new communications technology (satellite and cable) introduced at the time, and in particular, to address certain shortcomings in the contractual system within the market for the granting of cross-border licences in the case of cable retransmission.

58. In view of the technological and historical context and the purposes of the directives, it is not, therefore, a case of establishing the meaning of a concept of EU law by making it impervious to technological change, but of interpreting the system in which the concepts of 'cable' and 'cable retransmission' are used in the various directives, in order to conclude that a 'cable distributor' can only be an entity that uses the traditional cable network for professional purposes, as opposed to the satellite network in the summa divisio of Directive 93/83.

59. As regards the first question referred for a preliminary ruling, therefore, I consider that this may stem from terminological confusion of the concept of 'retransmission' in the various sources cited by the referring court.

60. There seems to me to be no doubt that 'cable retransmission' can also be performed by persons other than broadcasting organisations: it is sufficient that they are '(professional) cable distributors'.

61. However, this does not alter the terms of the question for a resolution of the case at hand. Moreover, it inevitably shifts the focus to the second question referred for a preliminary ruling: as argued above, the term 'cable distributor' must be interpreted in the traditional sense, taking into account the prevailing technology at the time of the adoption of Directive 93/83, and in particular, traditional cable networks and their professional distributors.

## **2. The concept of 'act of communication to the public' for retransmission in hotels**

62. In my view, we need to examine the concept of 'act of communication to the public', which, as we will see, is better suited to the present case than the concept of 'cable retransmission' referred to in Article 1(3) of Directive 93/83.

63. It is on the basis of this concept that EU law, in the case of retransmission by other parties, grants rights to authors and, under certain conditions, to broadcasters.

64. As regards the case-law on communication to the public by hotels, the Court held in Egeda (20) that the fact that a hotel establishment receives satellite or terrestrial television signals and distributes them by cable to the various rooms of that hotel is an act of communication to the public.

65. Even since the entry into force of Directive 2001/29, various judgments have determined that a hotel which has televisions or radios in its hotel rooms to which it transmits programme-carrying signals is effecting a communication to the public. (21)

66. In line with the Commission's observations, I consider that the activity of a hotel which transmits the

signal received to hotel rooms for the benefit of guests can be considered a communication of works to the public within the meaning of Article 3 of Directive 2001/29, in respect of the authors.

67. However, with regard to the broadcasters, that activity must be considered within the meaning of Article 8(3) of Directive 2006/115. (22)

68. Therefore, although the hotel's activity can be considered a communication to the public, the conditions laid down in EU law and in the case-law of the Court (23) for the exercise of rights by broadcasters can essentially be likened to the specific economic advantage enjoyed by the person retransmitting the television programme broadcast free-to-air by the broadcasting organisation (for example, the entrance fee).

### 3. Categorisation of the present case and answer to the questions referred for a preliminary ruling

69. Having clarified the concepts of 'cable retransmission' and 'cable distributor' in EU law and summarised the concept of 'communication to the public', I will make a few comments on the argument put forward by the applicant in the main proceedings, with particular reference to the conditions laid down in order for a communication to the public by a hotel to give rise to rights in favour of the broadcaster.

70. This will lead us to the conclusion that the present case can be regarded as a communication to the public, rather than a cable retransmission.

71. The applicant in the main proceedings is mistaken in its interpretation that the retransmission of free-to-air television programmes by hotels for the benefit of guests staying in the rooms is both a communication to the public and a cable retransmission, with the result that the broadcasters may enjoy specific rights by treating those hotels as a 'cable distributor'.

72. The mistake probably stems from two misinterpretations of the relevant provisions of EU law and a probable misinterpretation of national law in the light of EU law – although this will need to be examined by the national court.

73. In the first place, the concept of 'cable retransmission' in Directive 93/83, as the Commission made clear in its observations and as set out above in the context of a systematic interpretation, is historical and fixed, and refers to the retransmission performed by a person who is a professional cable operator via traditional cable networks.

74. In the second place, the conditions for the remuneration of an act of communication to the public, as seen in the preceding paragraph, do not lie in the 'subjective' circumstance of the economic or entrepreneurial nature of the person that retransmits a free-to-air transmission (in this case, a hotel group), but in the specific economic advantage that that person derives from the retransmission (the 'objective' circumstance).

75. In the third place, in my opinion, without prejudice to the competence of the national court to draw the appropriate conclusions in this specific case, RTL's interpretation that Portuguese law extends the concept of

'cable retransmission' provided for in Directive 93/83 and that therefore, in view of the minimal harmonisation sought by that directive, broadcasting organisations enjoy specific rights not recognised by the directive in respect of entities such as hotels, regarded as 'cable distributors', is not the only possible interpretation and is not in conformity with EU law.

76. According to RTL, the *Verwertungsgesellschaft Rundfunk* judgment (24) should be interpreted broadly, in so far as it encourages Member States to introduce additional rights to remunerate situations such as the one at issue. In Portugal, this is covered by the provisions cited in the order for reference by the national court.

77. I do not agree with RTL's conclusions.

78. I consider that the granting of additional rights to broadcasters compared with those provided for in EU law should have been more explicit, and more importantly, based on reasons that can be found in the systematic interpretation of the body of rules contained in EU law.

79. Using this cumbersome mechanism of categorising the case as cable retransmission within the meaning of Directive 93/83 in order to treat hotels as traditional cable operators does not, in my view, have the desired effect.

80. Although in principle EU law does not preclude national legislatures from introducing – with well-defined mechanisms for individual and collective management which do not distort the markets – additional rights to those provided for, what national law certainly cannot do is to give a different meaning to concepts defined by EU law.

81. It may be possible – as I believe is already the case – to conclude agreements between broadcasters and other persons on the basis of contractual freedom. Moreover, it is apparent from the documents before the Court that this has already happened. However, it does not mean that the existence of individual rights in this sense can be inferred from EU law, nor that national provisions can do so solely by reference to concepts of EU law to which a different content is assigned.

82. In the present case, it is clear that the hotel does not derive any specific economic advantage from the retransmission in hotel rooms of free-to-air television programmes for the benefit of guests, since experience shows that this has no bearing on the price charged for the room.

83. As is clear from *Verwertungsgesellschaft Rundfunk*, (25) the communication of television and radio programmes by means of television sets installed in hotel rooms does not constitute a communication made in a place accessible to the public against payment of an entrance fee, since the price of a hotel room constitutes the consideration for the accommodation service, to which, according to the hotel category, certain additional services are added, such as the communication of TV and radio broadcasts by means of receiving equipment in the rooms, which are normally included in the price of the overnight stay. (26)

84. Lastly, the argument put forward by RTL in its observations, and emphatically reiterated at the hearing,

that the interpretation proposed – as also supported by the Commission – risks causing serious harm to the copyright system in Europe, is unfounded.

85. First, the claims made by RTL as a broadcaster have no impact on the rights of authors, who – as we saw earlier and as we already know – come under separate rules in EU law to the rights of broadcasting organisations (when they are not also technically the authors of the programmes, but broadcast free-to-air television programmes, as in the present case).

86. Secondly, even if the rights of broadcasters are taken into account, it is known that the rights arising from the retransmission of television programmes vary considerably in the system of EU law, depending on the chosen business model: the pay TV system involves a specific type of remuneration by private and commercial users (although normally to a different extent), whereas in free-to-air retransmission, the broadcaster is remunerated through advertising revenues.

87. The transmission of ‘pay TV’ channels, for which the guest is normally required to pay a specific room supplement and which therefore results in the recognition of economic rights (a fee) for the broadcaster, is a different case altogether. (27)

88. It would be a mistake to confuse these two business models.

89. Indeed, it is by following the interpretation proposed by RTL that the risk of misinterpretation arises, in so far as it goes beyond the situation described here: cable retransmission is done solely by professional cable operators, while communication to the public – regardless of the retransmission system – provides remuneration for the broadcasters, depending on the business model adopted under the conditions clearly laid down in EU law and the case-law of the Court.

90. Rather, this would be a situation in which the mere fact that the person who retransmits free-to-air television programmes by coaxial cable within a building also carries out a business activity essentially makes them comparable to a professional cable operator. It is extremely difficult to distinguish between persons who are a business from those who provide a public service, or private citizens who carry out business activities.

91. Lastly, the existence of specific agreements under which certain broadcasting organisations may have obtained, by contractual means, remuneration for the retransmission of free-to-air programmes by hotel groups does not alter the terms of the question or challenge the soundness of the interpretation proposed.

92. Such agreements can always be negotiated and are not prohibited under EU law. However, it cannot be inferred from this that EU law recognises certain rights for broadcasting organisations, or that national laws may recognise them, by attributing different meanings to concepts defined in EU law.

#### **4. The consequences for the referring court**

93. I will make a few final points about the domestic law involved in this case, explaining some of the concepts already mentioned.

94. Having clarified the terms in which, in my opinion, EU law must be interpreted, a number of points are still

to be made to assist the referring court in determining whether or not the law of the Member State in which the main proceedings are held is in conformity with EU law. 95. It will be for the referring court to apply the principles of EU law to the national law and thus determine whether it can be interpreted in conformity with EU law.

96. Although in principle the Member States do indeed have discretion to introduce more favourable provisions into domestic law to protect both authors and broadcasting organisations (within the limits established by EU law), in keeping with the previous points I observe the following.

97. Directive 93/83 does not confer specific rights on broadcasters but has other purposes, namely to facilitate satellite broadcasting and cable retransmission by encouraging the granting of licences for the cable retransmission of a programme by collecting societies.

98. The concepts of ‘cable’, ‘cable retransmission’ and ‘cable distributor’, although not explicitly defined in Directive 93/83, can be inferred from the purposes of the directive, from its historical and technological context, and from the overall scheme of the relevant directives.

As a result, they must be regarded as concepts of EU law.

99. For those reasons, the national provisions of a Member State cannot assign a different meaning to those concepts, not even in order to extend the catalogue of rights for broadcasting organisations.

100. I consider, therefore, without prejudice to the competence of the national court to apply the principles described above to national law, that it is possible and indeed desirable to interpret Portuguese law in conformity with EU law, in that, without prejudice to the possibility of granting additional rights to broadcasting organisations, within the limits established by EU law, it does not attribute – by way of interpretation or otherwise – a different content to concepts already defined by EU law.

#### **IV. Conclusion**

101. On the basis of all the foregoing considerations, I propose that the Court should answer as follows the questions referred for a preliminary ruling by the Supremo Tribunal de Justiça (Supreme Court, Portugal): The concept of ‘cable retransmission’ referred to in Article 1(3) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission refers to the retransmission of an initial transmission by cable distributors, which effect such retransmission as professional operators in the context of a conventional cable network.

The simultaneous distribution by coaxial cable of the transmissions of a television channel broadcast by satellite, by means of the various television sets installed in hotel rooms, does not constitute a ‘cable retransmission’ within the meaning of Article 1(3) of Directive 93/83, since the hotel cannot be regarded as a cable distributor within the meaning of that directive.

## SOURCES

- 1 Original language: Italian.
- 2 Council Directive of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15).
- 3 Directive 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).
- 4 Directive of the European Parliament and of the Council 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28).
- 5 Decree-Law No 63/85 approving the Código do Direito de Autor e dos Direitos Conexos (Diário da República No 61, Series I, 14 March 1985, available at <https://dre.pt/web/guest/legislacao-consolidada/-/lc/34475475/view>).
- 6 Decree-Law No 333 of 27 November 1997, which transposes into domestic law Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (Diário da República No 275, Series I-A, 27 November 1997, available at <https://dre.pt/web/guest/pesquisa/-/search/406485/details/normal?q=Decreto-Lei+n.%C2%BA%20333%2F97>).
- 7 See judgment of 4 October 2011, Football Association Premier League and Others (C-403/08 and C-429/08, EU:C:2011:631, paragraph 148).
- 8 See judgment of 4 October 2011, Football Association Premier League and Others (C-403/08 and C-429/08, EU:C:2011:631, paragraph 150).
- 9 Rosén, J., ‘The satellite and cable directive’, in EU Copyright Law: A Commentary, Edward Elgar Publishing, 2014, p. 206.
- 10 Stamatoudi, I.A., and Torremans, P., EU Copyright Law: A Commentary, Edward Elgar Publishing, 2014, p. 408.
- 11 Kur, A., Dreier, T., and Luginbuehl, S., European Intellectual Property Law, Elgar, 2019, pp. 304-305.
- 12 See recitals 33, 34 and 35.
- 13 See judgment of 1 March 2017, ITV Broadcasting and Others (C-275/15, EU:C:2017:144, paragraph 21).
- 14 The referring court asked, in essence, whether the concept of ‘cable’ in Article 9 of Directive 2001/29 was linked to a particular technology, restricted to traditional cable networks operated by conventional cable service providers, or alternatively whether it had a technologically neutral meaning which could include functionally similar services transmitted via the internet.
- 15 See Opinion in ITV Broadcasting and Others (C-275/15, EU:C:2016:649, point 70).
- 16 See Opinion of Advocate General Saugmandsgaard Øe in ITV Broadcasting and Others (C-275/15, EU:C:2016:649, point 72).
- 17 See Opinion in ITV Broadcasting and Others (C-275/15, EU:C:2016:649, point 73).
- 18 See Opinion in ITV Broadcasting and Others (C-275/15, EU:C:2016:649, point 74).
- 19 To respond, at EU level, to the challenges of protecting copyright and related rights presented by the new information society services made possible by the internet.
- 20 See judgment of 3 February 2000 (C-293/98, EU:C:2000:66, paragraph 29).
- 21 See the Commission’s observations, paragraph 70 and the case-law cited.
- 22 Article 8(3) of Directive 2006/115 provides that: ‘Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.’
- 23 See judgment of 16 February 2017, Verwertungsgesellschaft Rundfunk (C-641/15, EU:C:2017:131).
- 24 Judgment of 16 February 2017 (C-641/15, EU:C:2017:131).
- 25 See judgment of 16 February 2017 (C-641/15, EU:C:2017:131).
- 26 See judgment of 16 February 2017, Verwertungsgesellschaft Rundfunk (C-641/15, EU:C:2017:131, paragraphs 24 and 27).
- 27 As provided for in Article 3(2)(d) of Directive 2001/29. The hotels in question distribute RTL’s satellite broadcasts not on a ‘deferred’ basis, but simultaneously, by coaxial cable, to the various television sets installed in the hotel rooms. Therefore, it is not a question of making fixations of performances available to the public by a broadcaster comparable to a video-on-demand service.