JUDGMENT OF THE COURT (Fourth Chamber)

11 December 2008 *

In Case C-52/07,

REFERENCE for a preliminary ruling under Article 234 EC, from the Marknadsdomstolen (Sweden), made by decision of 2 February 2007, received at the Court on 6 February 2007, in the proceedings

Kanal 5 Ltd,

TV 4 AB

v

Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the of Chamber, R. Silva de Lapuerta (Rapporteur), E. Juhász, G. Arestis and J. Malenovský, Judges,

* Language of the case: Swedish.

Advocate General: V. Trstenjak,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 12 June 2008,

after considering the observations submitted on behalf of:

— Kanal 5 Ltd and TV 4 AB, by C. Wetter, P. Karlsson, advokater, and M. Johansson, jur. kand.,

— Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa, by A. Calissendorff, L. Johansson, E. Arbrandt, and subsequently by K. Cederlund and M. Jonson, advokater,

— the Polish Government, by E. Ośniecka-Tamecka, acting as Agent,

— the Government of the United Kingdom of Great Britain and Northern Ireland, by T. Harris, acting as Agent and M. Gray, Barrister,

— the Commission of the European Communities, by F. Arbault, acting as Agent, assisted by U. Öberg, avocat,

after hearing the Opinion of the Advocate General at the sitting on 11 September 2008,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 82 EC.

2 The reference was made in the course of proceedings between Kanal 5 Ltd ('Kanal 5') and TV 4 AB ('TV 4') and Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa (Swedish Copyright Management Organisation) ('STIM') concerning the remuneration model it applies relating to the broadcast of musical works protected by copyright.

Legal context

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

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

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

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

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

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

6 Kanal 5 and TV 4 are commercial broadcasting companies.

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

8 The members of STIM are composers and music publishers.

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

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

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

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

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

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

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

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

'(1) Is Article 82 EC to be interpreted as meaning that a practice constitutes abuse of a dominant position where a copyright management organisation which has a

de facto monopoly position in a Member State applies to or imposes in respect of commercial television channels a remuneration model for the right to make available music in television broadcasts directed at the general public which involves the remuneration being calculated as a proportion of the television channels' revenue from such television broadcasts by those channels?

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

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

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

The questions referred for a preliminary ruling

The first, second and third questions

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

18 Pursuant to the first paragraph of Article 82 EC, it is incompatible with the common market and prohibited in so far as trade between the Member States may be affected by it, for one or more undertakings to abuse a dominant position within the common market or a substantial part of it.

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

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

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

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

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

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

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

26 Although the fact that an undertaking is in a dominant position cannot deprive it of its right to protect its own commercial interests if they are attacked, and such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be accepted if its purpose is specifically to strengthen that dominant position and abuse it (see, Case 27/76 *United Brands and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraph 189, and Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia and Others* [2008] ECR I-7139, paragraph 50).

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

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

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

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

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

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

33 So far as concerns the abusive nature of similar rates of royalties, the amount of which also corresponded to a percentage of the turnover of a discotheque, the Court held that the fact that a flat-rate royalty is charged can be criticised by reference to the prohibition contained in Article 82 EC only if other methods might be capable of attaining the same legitimate aim, namely the protection of the interests of authors, composers and publishers of music, without thereby increasing the costs of managing contracts and monitoring the use of protected musical works (see, Case 395/87 *Tournier* [1989] ECR 2521, paragraph 45).

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

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

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

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

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

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

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

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

The fourth question

42 By its fourth question, the referring court asks essentially whether the fact that a copyright management organisation calculates the royalties paid with respect to remuneration due for the television broadcast of musical works protected by copyright

differently according to whether the broadcasting companies are commercial or public constitutes an abuse of a dominant position within the meaning of Article 82 EC.

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

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

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

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

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

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

Costs

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

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

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

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

[Signatures]