



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 14 November 2013¹

Case C-351/12

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

v

Léčebné lázně Mariánské Lázně a. s.

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

(Copyright and related rights in the information society — Directive 2001/29/EC — Definition of ‘communication to the public’ — Communication by radio or television receivers to bedrooms in a spa establishment — Direct effect — Freedom to provide services — Exclusive rights accorded to a copyright collecting society in a Member State)

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

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

¹ — Original language: English.

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

Relevant EU law

Copyright and related rights

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

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

‘ ...

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

...

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

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

...

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

...

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

Freedom to provide services

5. Articles 56 et seq. TFEU prohibit³ any restrictions on freedom to provide services within the Union, in respect of nationals of Member States who are established in a Member State other than that of the person for whom the service is intended. Services are defined in Article 57 TFEU as being ‘normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons’, and as including in particular activities ‘of an industrial character’, ‘of a commercial character’, ‘of craftsmen’ and ‘of the professions’.

3 — Subject to certain qualifications not relevant here.

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

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

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

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

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

...’

7. Article 2 states, inter alia:

‘...’

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

(a) non-economic services of general interest;

...’

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

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

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

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

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

...

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

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

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

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

...'

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

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

...

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

Rules on competition applying to undertakings

11. Article 102 TFEU provides, in particular:

'Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

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

...'

12. Article 106 TFEU provides, in particular:

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

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

...'

Relevant Czech law

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

establishments.⁵

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

Facts, procedure and questions referred

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

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

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

18. The Spa claims to be covered by the exception in Paragraph 23 of the Copyright Law. That provision, it submits, is consistent with Directive 2001/29 but, if it were not, the latter could not be relied upon in litigation between individuals. Furthermore, it argues, OSA abuses its monopoly position by charging fees higher than those charged in neighbouring Member States. The Spa, whose clientele is international and whose television and radio sets receive foreign broadcasts, is thus placed at a competitive disadvantage vis-à-vis similar establishments in neighbouring Member States.

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

- (1) Must Directive 2001/29 ... be interpreted as meaning that an exception disallowing remuneration to authors for the communication of their work by television or radio transmission by means of television or radio receivers to patients in rooms in a spa establishment which is a business is contrary to Articles 3 and 5 (Article 5(2)(e), (3)(b) and (5))?
- (2) Is the content of those provisions of the directive concerning the above use of a work unconditional enough and sufficiently precise for copyright collecting societies to be able to rely on them before the national courts in a dispute between individuals, if the State has not transposed the directive correctly in national law?
- (3) Must Article 56 et seq. [TFEU] and Article 102 [TFEU] (or as the case may be Article 16 of Directive 2006/123 ...) be interpreted as precluding the application of rules of national law which reserve the exercise of collective management of copyright in the territory of the State to only a single (monopoly) copyright collecting society and thereby do not allow recipients of services a free choice of a collecting society from another State of the European Union?

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

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

Assessment

Question 1

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

22. It is, of course, for the competent national court to determine whether the situation in the main proceedings – which concerns broadcast works made available in bedrooms in a spa establishment – falls within that of works made available to patients provided with health care in a health establishment within the meaning of Paragraph 23 of the Copyright Law.

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

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

25. It is true that, in *SCF*, the Court was interpreting the expression ‘communication to the public’ in Article 8(2) of Directive 92/100,⁸ not in Article 3(1) of Directive 2001/29. However, in doing so, it relied largely on its judgments in *SGAE* and in *Football Association Premier League and Others*,⁹ which were concerned with Article 3(1) of Directive 2001/29. Although it distinguished between the two provisions, it did so only to emphasise the even greater significance of the profit-making nature of the operation in the context of Directive 92/100.¹⁰

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

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

8 — Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61); see now Article 8(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) (OJ 2006 L 376, p. 28). That provision (unchanged in 2006) states: ‘Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. ...’

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

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

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

27. First, the expression must be interpreted broadly, in such a way as to ensure a high level of protection for rightholders.¹² Second, the specific means of communication is not decisive; what matters is that the public is placed in a position to access the works in issue.¹³ Third, the concept of ‘public’ involves an indeterminate but fairly large number of potential viewers or listeners and, in that regard, account should be taken of the cumulative effect of a number of potential recipients, considered both collectively and successively.¹⁴ Fourth, the public in question must be a ‘new’ public in the sense that it is different from that contemplated when the original broadcast was authorised (as, for example, when a broadcast intended for private viewing is shown to a large audience).¹⁵ Finally, if the communication involves a profit-making element (for example, if it attracts customers), that is a relevant indication that it falls within the scope not only of the right to equitable remuneration under Article 8 of Directive 1992/100 or 2006/115 but also of the right of communication to the public under Article 3 of Directive 2001/29.¹⁶

28. Applying those criteria, it seems to me that the provision of television and radio sets in bedrooms in a spa establishment, together with the relevant signal enabling broadcasts to be heard or viewed, must fall within the concept of ‘communication to the public’ in Article 3(1) of Directive 2001/29 unless, in exceptional circumstances, one or more of the criteria are not met. In particular, a spa establishment is likely to accommodate, both at the same time and successively, an indeterminate but fairly large number of people who can receive broadcasts in their rooms; and who constitute a new public in the sense that the original authorisation was for broadcasts to individuals hearing or viewing them personally or within their own private or family circles. Furthermore, it seems difficult to deny that the provision of radio and television sets in bedrooms is of a profit-making nature for the establishment, in that their presence seems more likely than their absence to attract clients. The Spa has itself argued that it is placed at a competitive disadvantage if it is required to pay higher fees than establishments in neighbouring countries; any such disadvantage would be exacerbated if it did not provide access to broadcasts at all while competing establishments did.

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

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

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

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

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

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

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

17 — See paragraphs 95 to 98 of the judgment.

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

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

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

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

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

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

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

Question 2

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

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

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

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

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

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

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

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

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

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

45. Only if such an approach is not possible – for example, if it would lead to an interpretation *contra legem* – is it necessary to consider whether a relevant provision of a directive has direct effect and, if so, whether that direct effect may be relied on against a party to the national dispute.

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

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

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

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

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

22 — At points 44 to 46.

Question 3

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

Admissibility

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

51. I do not agree that the Court should decline to answer this question. According to settled case-law, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the circumstances of the case both the need for a preliminary ruling and the relevance of the questions which it submits. Consequently, where those questions concern the interpretation of EU law, the Court is, in principle, bound to give a ruling. Only exceptionally may it refuse to rule on a question referred, where the interpretation sought obviously bears no relation to the facts or purpose of the main action, where the problem is hypothetical, or where the Court does not have the factual or legal material necessary to give a useful answer.²³

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

Substance

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

– Abuse of a dominant position

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

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

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

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

– Services

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

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

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

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

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

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

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

– Article 16 of Directive 2006/123

61. The submissions to the Court are almost unanimous²⁷ in the view that Article 16 of Directive 2006/123 is not applicable to the situation in the main proceedings, although they differ as to the reasons for its non-applicability. Various: the activities of a collecting society do not constitute ‘services’ within the meaning of Article 4(1) of the directive; they are non-economic services of general interest, excluded under Article 2(2)(a); they are services of general economic interest, excluded from the application of Article 16 by virtue of Article 17(1); and/or they are excluded from the application of Article 16 by virtue of Article 17(11), which excludes copyright and neighbouring rights.

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

63. It does seem to me, however, that the activities in question could be regarded as services of general *economic* interest (Article 17(1) of Directive 2006/123), which it is for the Member States to define (Article 1(3) of the same directive) and which are thereby specifically excluded from the application of Article 16, as well as being excluded from the scope of the directive by Article 1(2).

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

– Article 56 et seq. TFEU

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

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

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

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

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

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

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

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

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

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

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

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

75. Counter-arguments that have been put to the Court are, again very briefly: there is no need for a national ‘one-stop-shop’ since an EU-wide ‘platform’ could be established, making all the necessary information available to all potential users; in Member States (such as Sweden and the United Kingdom) in which there is no territorial monopoly, no fragmentation of repertoires is apparent, nor do users experience any difficulty in identifying and obtaining the licences they want; a free choice of service provider for both rightholders and users will lead to effective competition and thus to fairer rates and more efficient collection, to the benefit of all concerned; there is no need for a statutory monopoly in order to enable Member States to regulate collecting societies effectively; collection costs (which have been found to amount to 15% to 20% of royalties) are in fact increased in the context of reciprocal representation, whereas a collecting society established in one Member State would have no difficulty in monitoring use in other Member States, whether by deployment of its own resources or by recourse to those of a cooperating collecting society established in that other Member State; and the possibility of granting multi-territorial licences would benefit not only users (such as the Spa, which states that it is part of a group operating in several Member States) but rightholders.

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

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

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

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

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

81. In short, it seems to me that, while a good case has been made for the abolition of statutory territorial monopolies in order to respect the Treaty prohibition of restriction on freedom to provide services, it has not been shown that *both* such freedom *and* the fair and efficient collection and management of royalty fees in respect of communication to the public of musical works via fixed radio and television sets can be achieved without an EU-wide regulatory framework. My view is strengthened by the Commission's proposal for a Directive of the European Parliament and of the

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

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

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

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

Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market. That proposal states that ‘EU action is necessary under the principle of subsidiarity (Article 5(3) [TUE]) as the legal framework at both national and EU levels has proved to be insufficient to address the problems’.³³

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

Conclusion

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

- (1) An exception disallowing remuneration to authors for the communication of their works by means of television or radio receivers to patients in bedrooms in a spa establishment which is a business is contrary to the provisions of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
- (2) If a Member State has not transposed Directive 2001/29 correctly, national courts are bound to interpret their domestic law, so far as possible, in the light of the wording and purpose of that directive, in order to achieve the result sought by it. In circumstances such as those of the main proceedings, it is not relevant whether the provisions of the directive are sufficiently unconditional and precise for an individual to be able to rely on them against the State or an entity assimilated to the State.
- (3) The application of rules of national law which reserve the exercise of collective management of copyright in the territory of the Member State to a single (monopoly) copyright collecting society and thereby do not allow recipients of services a free choice of a collecting society from another Member State is not precluded by Article 102 TFEU or by Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. Such rules are precluded under Article 56 et seq. TFEU only if it is established that they do not pursue a legitimate objective compatible with the Treaties, are not justified by overriding reasons of public interest, are not suitable for securing the attainment of that objective, or go beyond what is necessary in order to attain it.

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