Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

21 March 2024*

(Reference for a preliminary ruling – Directive 2014/26/EU – Collective management of copyright and related rights – Collective management organisations – Independent management entities – Access to the activity of managing copyright and related rights – Directive 2000/31/EC – Material scope – Article 3(3) – Directive 2006/123/EC – Material scope – Article 17(11) – Article 56 TFEU)

In Case C-10/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale ordinario di Roma (District Court, Rome, Italy), made by decision of 5 January 2022, received at the Court on 5 January 2022, in the proceedings

Liberi editori e autori (LEA)

v

Jamendo SA,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič (Rapporteur), I. Jarukaitis, A. Kumin and D. Gratsias, Judges,

Advocate General: M. Szpunar,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 9 February 2023,

after considering the observations submitted on behalf of:

– Liberi editori e autori (LEA), by D. Malandrino, A. Peduto and G.M. Riccio, avvocati,

– Jamendo SA, by M. Dalla Costa, G. Donà and A. Ferraro, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by R. Guizzi, avvocato dello Stato,

* Language of the case: Italian.

– the Austrian Government, by A. Posch, J. Schmoll, G. Kunnert and F. Parapatits, acting as Agents,

– the European Commission, by V. Di Bucci and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 May 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ 2014 L 84, p. 72).

2 The request has been made in proceedings between Liberi editori e autori (LEA) (Free publishers and authors) and Jamendo SA concerning the latter's intermediation activity in Italy in respect of copyright and related rights.

Legal context

European Union law

Directive 2000/31/EC

3 Article 1 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1), provides, in paragraph 1:

'This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.'

4 Under Article 3(2) of that directive:

'Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.'

5 Article 3(3) of that directive provides that, inter alia, Article 3(2) thereof is not to apply to the fields referred to in the annex to that directive.

6 According to the wording of that annex, Article 3(1) and (2) of Directive 2000/31 do not apply 'to: … copyright, neighbouring rights, rights referred to in [Council] Directive 87/54/EEC [of 16 December 1986 on the legal protection of topographies of semiconductor products (OJ 1987 L 24, p. 36)] and Directive 96/9/EC [of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20)] as well as industrial property rights'.

Directive 2006/123/EC

7 Article 1 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36) is headed 'Subject matter' and provides, in paragraph 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.'

8 Article 3 of that directive, headed 'Relationship with other provisions of Community law', provides, in paragraph 1:

'If the provisions of this Directive conflict with a provision of another Community act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions. …'

9 Article 16 of that directive, headed 'Freedom to provide services', provides, in paragraph 1:

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

…'

10 As provided in Article 17 of that directive, headed 'Additional derogations from the freedom to provide services':

'Article 16 shall not apply to:

…

(11) copyright, neighbouring rights …'

Directive 2014/26

11 Recitals 2 to 4, 7 to 9, 15, 16, 19 and 55 of Directive 2014/26 state:

'(2) The dissemination of content which is protected by copyright and related rights, including books, audiovisual productions and recorded music, and services linked thereto, requires the licensing of rights by different holders of copyright and related rights, such as authors, performers, producers and publishers. It is normally for the rightholder to choose between the individual or collective management of his rights, unless Member States provide otherwise, in compliance with Union law and the international obligations of the Union and its Member States. Management of copyright and related rights includes granting of licences to users, auditing of users, monitoring of the use of rights, enforcement of copyright and related rights, collection of rights revenue derived from the exploitation of rights and the distribution of the amounts due to rightholders. Collective management organisations enable rightholders to be remunerated for uses which they would not be in a position to control or enforce themselves, including in non-domestic markets.

(3) Article 167 [TFEU] requires the Union to take cultural diversity into account in its action and to contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. Collective management organisations play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightholders and the public.

(4) When established in the Union, collective management organisations should be able to enjoy the freedoms provided by the Treaties when representing rightholders who are resident or established in other Member States or granting licences to users who are resident or established in other Member States.

…

(7) The protection of the interests of the members of collective management organisations, rightholders and third parties requires that the laws of the Member States relating to copyright management and multi-territorial licensing of online rights in musical works should be coordinated with a view to having equivalent safeguards throughout the Union. Therefore, this Directive should have as a legal base Article 50(1) TFEU.

(8) The aim of this Directive is to provide for coordination of national rules concerning access to the activity of managing copyright and related rights by collective management organisations, the modalities for their governance, and their supervisory framework, and it should therefore also have as a legal base Article 53(1) TFEU. In addition, since it is concerned with a sector offering services across the Union, this Directive should have as a legal base Article 62 TFEU.

(9) The aim of this Directive is to lay down requirements applicable to collective management organisations, in order to ensure a high standard of governance, financial management, transparency and reporting. This should not, however, prevent Member States from maintaining or imposing, in relation to collective management organisations established in their territories, more stringent standards than those laid down in Title II of this Directive, provided that such more stringent standards are compatible with Union law.

…

(15) Rightholders should be free to entrust the management of their rights to independent management entities. Such independent management entities are commercial entities which differ from collective management organisations, inter alia, because they are not owned or controlled by rightholders. However, to the extent that such independent management entities carry out the same activities as collective management organisations, they should be obliged to provide certain information to the rightholders they represent, collective management organisations, users and the public.

(16) Audiovisual producers, record producers and broadcasters license their own rights, in certain cases alongside rights that have been transferred to them by, for instance, performers, on the basis of individually negotiated agreements, and act in their own interest. Book, music or newspaper publishers license rights that have been transferred to them on the basis of individually negotiated agreements and act in their own interest.

Therefore audiovisual producers, record producers, broadcasters and publishers should not be regarded as "independent management entities". Furthermore, authors' and performers' managers and agents acting as intermediaries and representing rightholders in their relations with collective management organisations should not be regarded as "independent management entities" since they do not manage rights in the sense of setting tariffs, granting licences or collecting money from users.

…

(19) Having regard to the freedoms established in the TFEU, collective management of copyright and related rights should entail a rightholder being able freely to choose a collective management organisation for the management of his rights, whether those rights be rights of communication to the public or reproduction rights, or categories of rights related to forms of exploitation such as broadcasting, theatrical exhibition or reproduction for online distribution, provided that the collective management organisation that the rightholder wishes to choose already manages such rights or categories of rights.

…

… rightholders should be able easily to withdraw such rights or categories of rights from a collective management organisation and to manage those rights individually or to entrust or transfer the management of all or part of them to another collective management organisation or another entity, irrespective of the Member State of nationality, residence or establishment of the collective management organisation, the other entity or the rightholder. Where a Member State, in compliance with Union law and the international obligations of the Union and its Member States, provides for mandatory collective management of rights, rightholders' choice would be limited to other collective management organisations.

…

…

(55) Since the objectives of this Directive, namely to improve the ability of their members to exercise control over the activities of collective management organisations, to guarantee sufficient transparency by collective management organisations and to improve the multi-territorial licensing of authors' rights in musical works for online use, cannot be sufficiently achieved by Member States but can rather, by reason of their scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 [TEU]. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.'

12 Article 1 of that directive, headed 'Subject matter', provides:

'This Directive lays down requirements necessary to ensure the proper functioning of the management of copyright and related rights by collective management organisations. It also lays down requirements for multi-territorial licensing by collective management organisations of authors' rights in musical works for online use.'

13 Article 2 of that directive, headed ‘Scope’, is worded as follows:

‘1. Titles I, II, IV and V with the exception of Article 34(2) and Article 38 apply to all collective management organisations established in the Union.

2. Title III and Article 34(2) and Article 38 apply to collective management organisations established in the Union managing authors’ rights in musical works for online use on a multi-territorial basis.

3. The relevant provisions of this Directive apply to entities directly or indirectly owned or controlled, wholly or in part, by a collective management organisation, provided that such entities carry out an activity which, if carried out by the collective management organisation, would be subject to the provisions of this Directive.

4. Article 16(1), Articles 18 and 20, points (a), (b), (c), (e), (f) and (g) of Article 21(1) and Articles 36 and 42 apply to all independent management entities established in the Union.’

14 Article 3 of that directive, headed ‘Definitions’, provides:

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

(a) “collective management organisation” means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria:
   (i) it is owned or controlled by its members;
   (ii) it is organised on a not-for-profit basis;

(b) “independent management entity” means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is:
   (i) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and
   (ii) organised on a for-profit basis;

…

(j) “representation agreement” means any agreement between collective management organisations whereby one collective management organisation mandates another collective management organisation to manage the rights it represents, including an agreement concluded under Articles 29 and 30;

…’

15 Article 4 of Directive 2014/26, headed ‘General principles’, provides:

‘Member States shall ensure that collective management organisations act in the best interests of the rightholders whose rights they represent and that they do not impose on them any obligations which are not objectively necessary for the protection of their rights and interests or for the effective management of their rights.’

16 As provided in Article 5 of that directive, headed ‘Rights of rightholders’:

‘1. Member States shall ensure that rightholders have the rights laid down in paragraphs 2 to 8 and that those rights are set out in the statute or membership terms of the collective management organisation.

2. Rightholders shall have the right to authorise a collective management organisation of their choice to manage the rights, categories of rights or types of works and other subject matter of their choice, for the territories of their choice, irrespective of the Member State of nationality, residence or establishment of either the collective management organisation or the rightholder. Unless the collective management organisation has objectively justified reasons to refuse management, it shall be obliged to manage such rights, categories of rights or types of works and other subject matter, provided that their management falls within the scope of its activity.

3. Rightholders shall have the right to grant licences for non-commercial uses of any rights, categories of rights or types of works and other subject matter that they may choose.

4. Rightholders shall have the right to terminate the authorisation to manage rights, categories of rights or types of works and other subject matter granted by them to a collective management organisation or to withdraw from a collective management organisation any of the rights, categories of rights or types of works and other subject matter of their choice, as determined pursuant to paragraph 2, for the territories of their choice, upon serving reasonable notice not exceeding six months. The collective management organisation may decide that such termination or withdrawal is to take effect only at the end of the financial year.

5. If there are amounts due to a rightholder for acts of exploitation which occurred before the termination of the authorisation or the withdrawal of rights took effect, or under a licence granted before such termination or withdrawal took effect, the rightholder shall retain his rights under Articles 12, 13, 18, 20, 28 and 33.

6. A collective management organisation shall not restrict the exercise of rights provided for under paragraphs 4 and 5 by requiring, as a condition for the exercise of those rights, that the management of rights or categories of rights or types of works and other subject matter which are subject to the termination or the withdrawal be entrusted to another collective management organisation.

…’

17 Article 6 of that directive, headed ‘Membership rules of collective management organisations’, states, in paragraph 2:

‘A collective management organisation shall accept rightholders and entities representing rightholders, including other collective management organisations and associations of rightholders,

as members if they fulfil the membership requirements, which shall be based on objective, transparent and non-discriminatory criteria. …'

18 Article 16 of Directive 2014/26, headed 'Licensing', provides:

'1. Member States shall ensure that collective management organisations and users conduct negotiations for the licensing of rights in good faith. …

2. Licensing terms shall be based on objective and non-discriminatory criteria. …

Rightholders shall receive appropriate remuneration for the use of their rights. Tariffs for exclusive rights and rights to remuneration shall be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject matter, as well as in relation to the economic value of the service provided by the collective management organisation. …

3. Collective management organisations shall reply without undue delay to requests from users, indicating, inter alia, the information needed in order for the collective management organisation to offer a licence.

Upon receipt of all relevant information, the collective management organisation shall, without undue delay, either offer a licence or provide the user with a reasoned statement explaining why it does not intend to license a particular service.

…'

19 Article 30 of that directive, headed 'Obligation to represent another collective management organisation for multi-territorial licensing', provides, in paragraph 1:

'Member States shall ensure that where a collective management organisation which does not grant or offer to grant multi-territorial licences for the online rights in musical works in its own repertoire requests another collective management organisation to enter into a representation agreement to represent those rights, the requested collective management organisation is required to agree to such a request if it is already granting or offering to grant multi-territorial licences for the same category of online rights in musical works in the repertoire of one or more other collective management organisations.'

20 As provided in Article 36 of that directive, headed 'Compliance':

'1. Member States shall ensure that compliance by collective management organisations established in their territory with the provisions of national law adopted pursuant to the requirements laid down in this Directive is monitored by competent authorities designated for that purpose.

…

3. Member States shall ensure that the competent authorities designated for that purpose have the power to impose appropriate sanctions or to take appropriate measures where the provisions of national law adopted in implementation of this Directive have not been complied with. Those sanctions and measures shall be effective, proportionate and dissuasive.

…’

21 Article 39 of Directive 2014/26, headed ‘Notification of collective management organisations’, provides:

‘By 10 April 2016, Member States shall provide the [European] Commission, on the basis of the information at their disposal, with a list of the collective management organisations established in their territories.

Member States shall notify any changes to that list to the Commission without undue delay.

The Commission shall publish that information and keep it up to date.’

22 Article 41 of that directive, headed ‘Expert group’, provides:

‘An expert group is hereby established. It shall be composed of representatives of the competent authorities of the Member States. The expert group shall be chaired by a representative of the Commission and shall meet either on the initiative of the chairman or at the request of the delegation of a Member State. The tasks of the group shall be as follows:

(a) to examine the impact of the transposition of this Directive on the functioning of collective management organisations and independent management entities in the internal market, and to highlight any difficulties;

…’

Italian law

23 Article 180 of legge n. 633 – Protezione del diritto d’autore e di altri diritti connessi al suo esercizio (Law No 633 on the protection of copyright and related rights) of 22 April 1941 (GURI No 166 of 16 July 1941), as amended by decreto legge n. 148 – Disposizioni urgenti in materia finanziaria e per esigenze indifferibili (Decree-Law No 148 laying down urgent provisions on financial matters and non-deferrable needs) of 16 October 2017 (GURI No 242 of 16 October 2017) (‘Law on the protection of copyright’), provides:

‘The activity of intermediary, however implemented, by any direct or indirect form of intervention, mediation, mandate, representation and even assignment for the exercise of rights of representation, execution, performing, broadcasting including communication to the public via satellite and mechanical and cinematic reproduction of protected works, shall be exclusively reserved to the Società italiana degli autori ed editori (SIAE, Italian Society of Authors and Publishers) and to the other collective management organisations referred to in [decreto legislativo n. 35 – Attuazione della direttiva 2014/26/UE sulla gestione collettiva dei diritti d’autore e dei diritti connessi e sulla concessione di licenze multiterritoriali per i diritti su opere musicali per l’uso online nel mercato interno (Legislative Decree No 35 transposing [Directive 2014/26/EU]) of 15 March 2017 (GURI No 72 of 27 March 2017; ‘Legislative Decree No 35/2017’)].

That activity shall be carried out for the purpose of:

(1) granting, on behalf of and in the interests of the beneficiaries, licences and authorisations for the exploitation of protected works;

(2) collecting the proceeds deriving from those licences and authorisations;

(3) distributing those revenues among the beneficiaries.

The activity of the [SIAE] shall also be carried out according to the rules established by regulation in the foreign countries in which it has organised representation.

The abovementioned exclusivity of powers shall not affect the power of the author, his or her successors or beneficiaries to exercise directly the rights recognised by this law.

…'

24 According to Article 4(2) of Legislative Decree No 35/2017:

'Rightholders may entrust to a collective management organisation or to an independent management entity of their choice the management of their rights, the related categories or types of works and other materials protected for the territories indicated by them, regardless of the Member State of nationality, residence or establishment of the collective management organisation, of the independent management entity or of the rightholder, without prejudice to the provisions of Article 180 of the [Law on the protection of copyright] in respect of the activity of copyright intermediation.'

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

25 LEA is a collective management organisation governed by Italian law and authorised to operate in the field of copyright intermediation in Italy.

26 Jamendo, a company incorporated under Luxembourg law, is an independent management entity which has been operating in Italy since 2004.

27 LEA brought an action for an injunction against Jamendo before the Tribunale ordinario di Roma (District Court, Rome, Italy), which is the referring court, seeking an order that Jamendo cease its activity of copyright intermediation in Italy. In support of that application, LEA claims that Jamendo is carrying out that activity in Italy unlawfully, on the grounds, first, that it is not registered on the list of organisations authorised to operate in the field of copyright intermediation in Italy; secondly, that it has not satisfied the specific requirements laid down by Legislative Decree No 35/2017; and, thirdly, that it did not inform the Ministry of Telecommunications before starting to exercise that activity, in breach of Article 8 of that legislative decree.

28 Before the referring court, Jamendo submits that Directive 2014/26 was incorrectly transposed into Italian law, arguing that the Italian legislature failed to confer on independent management entities the rights provided for by that directive.

29 In that regard, Jamendo states that, under Article 180 of the Law on the protection of copyright, the activity of intermediation in Italy is exclusively reserved to the SIAE and to the other collective management organisations referred to therein, the effect of which is to prevent independent management entities from operating in the field of copyright intermediation and to compel them to enter into representation arrangements with the SIAE or other authorised collective management organisations.

30 In the alternative, Jamendo submits that its activity does not come under the collective management of copyright but under the direct management of copyright, relying in that regard on recital 16 of Directive 2014/26, according to which entities which license rights that have been transferred to them on the basis of 'individually' negotiated agreements do not fall within the definition of 'independent management entity' provided for in Article 3(b) of that directive.

31 The referring court considers, first, that Jamendo's activity does not appear to be classifiable as 'direct management', given that Jamendo grants licences and sublicences, collects royalties based on the number of uses of a work and keeps a fee calculated as a percentage of the revenues. Moreover, the agreements which Jamendo offers its members do not appear to be negotiated individually and the choice of various options does not call into question the description of those agreements as 'membership agreements', which precludes each of those agreements from being regarded as having been specifically negotiated.

32 Secondly, the referring court notes that Article 180 of the Law on the protection of copyright does not allow independent management entities to carry out the activity of intermediary for the exercise of rights of representation, execution, performing, broadcasting, including communication to the public via satellite and mechanical and cinematic reproduction of protected works.

33 In those circumstances, the Tribunale ordinario di Roma (District Court, Rome) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Directive [2014/26] be interpreted as precluding national legislation that reserves access to the copyright intermediation market, or in any event the granting of licences to users, solely to entities which can be classified, according to the definition in that directive, as collective management organisations, to the exclusion of those which can be classified as independent management entities incorporated in that Member State or in other Member States?'

Admissibility of the request for a preliminary ruling

34 During the hearing before the Court, the Italian Government argued that the request for a preliminary ruling was inadmissible on the ground that the dispute in the main proceedings was fictitious.

35 In its view, the fact that the parties to the main proceedings maintained convergent positions before the Court – seeking, in essence, a declaration that the Italian legislation reserving access to the activity of copyright intermediation solely to collective management organisations, to the exclusion of independent management entities, is incompatible with EU law – was sufficient to establish the artificial nature of the main proceedings.

36 In that regard, it must be borne in mind that, according to the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.

Consequently, where questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (judgment of 12 October 2023, *INTER Consulting*, C-726/21, EU:C:2023:764, paragraph 32 and the case-law cited).

37 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation, or the determination of the validity, of a rule of EU law that is sought bears no relation to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual and legal material necessary to give a useful answer to the questions submitted to it (judgment of 12 October 2023, *INTER Consulting*, C-726/21, EU:C:2023:764, paragraph 33 and the case-law cited).

38 In the present case, it should certainly be noted that, before the referring court, LEA seeks an order requiring Jamendo to cease carrying out its copyright intermediation activity in Italy on the ground that it is contrary to the Italian legislation at issue in the main proceedings, whereas, in the written observations which it lodged with this Court, LEA maintains, in essence, that that Italian legislation is not consistent with EU law.

39 However, in view of the case-law recalled in paragraphs 36 and 37 of the present judgment, that fact, and the fact that the parties to the main proceedings are in agreement as to how EU law is to be interpreted, cannot be sufficient to affect the reality of the dispute in the main proceedings or, consequently, the admissibility of the request for a preliminary ruling in the absence of anything to indicate that it is quite obvious that that dispute is artificial or fictitious (see, to that effect, judgments of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709, paragraphs 37 to 39, and of 19 June 2012, *Chartered Institute of Patent Attorneys*, C-307/10, EU:C:2012:361, paragraphs 31 to 34).

40 However, it should be noted that the referring court refers, in the wording of the question on which a preliminary ruling is sought, to independent management entities incorporated ‘in that Member State or in other Member States’. As it is, Jamendo is established in Luxembourg and there is nothing in the documents before the Court to suggest that the dispute in the main proceedings concerns any independent management entity established in Italy. In those circumstances, it must be held that, in so far as it refers to independent management entities established in the Member State concerned, the question referred for a preliminary ruling is hypothetical.

41 Therefore, in accordance with the case-law recalled in paragraph 37 of the present judgment, the request for a preliminary ruling must be declared inadmissible in so far as it relates to independent management entities established in Italy.

Consideration of the question referred

42 By its question, the referring court asks, in essence, whether Directive 2014/26 must be interpreted as precluding legislation of a Member State which generally and absolutely excludes the possibility of independent management entities established in another Member State providing their copyright management services in that first Member State.

43 As is apparent from recitals 7, 8 and 55, Directive 2014/26 is intended to provide for coordination of national rules concerning access to the activity of managing copyright and related rights by collective management organisations, the modalities for their governance, their supervisory framework and the requirements for multi-territorial licensing of rights in musical works for online use, with the aim of protecting the interests of members of collective management organisations, rightholders and third parties by ensuring that they enjoy equivalent safeguards throughout the European Union.

44 To that end, Article 1 of that directive, read in the light of recital 9 thereof, provides that the directive is to lay down, in particular, requirements applicable to collective management organisations in order to ensure a high standard of governance, financial management, transparency and reporting.

45 Taking the view, as stated in recital 15 of Directive 2014/26, that independent management entities are commercial entities which differ from collective management organisations because, in particular, they are not owned or controlled by rightholders, but that they carry out the same activities as collective management organisations, the EU legislature considered it appropriate to require independent management entities to communicate certain information.

46 Accordingly, certain specific provisions of Directive 2014/26, relating to the communication of information to rightholders represented by independent management entities, to collective management organisations, to users and to the public, are applicable to independent management entities under Article 2(4) of that directive.

47 However, Article 5 of Directive 2014/26, which, in paragraph 2, confers on rightholders the right to choose a collective management organisation to represent them, irrespective of the Member State of nationality, residence or establishment of either the collective management organisation or the rightholder, is not among the provisions listed in Article 2(4) of that directive.

48 In addition, as the Advocate General, in essence, noted in point 38 of his Opinion, no other provision of Directive 2014/26 governs access by those entities to the activity of copyright management.

49 It is true that recital 19 of Directive 2014/26 states, in particular, that rightholders should be able easily to withdraw their rights from a collective management organisation and to manage those rights individually or to entrust their management to another collective management organisation or another entity, irrespective of the Member State of nationality, residence or establishment of the collective management organisation concerned, the other entity or the rightholder.

50 However, the possibility, for rightholders, of withdrawing the management of rights from a collection management organisation, provided for in Article 5(4) of that directive, does not mean that Member States are obliged to ensure that those rightholders have the right to authorise an independent management entity of their choice to manage their rights, irrespective of the Member State of nationality, residence or establishment of that entity.

51 Moreover, recital 19 of that directive cannot lead to an interpretation of Article 2(4) and Article 5(2) that would be inconsistent with the wording of those provisions. According to settled case-law, while the preamble to an EU act may explain the content of the provisions of that act and provides elements of interpretation which are likely to clarify the intention of the author of that

act, it has no binding legal value and cannot be relied upon to derogate from the provisions of the act itself or to interpret those provisions in a manner contrary to their wording (see, to that effect, judgment of 25 March 2021, *Balgarska Narodna Banka*, C-501/18, EU:C:2021:249, paragraph 90 and the case-law cited).

52 Consequently, in view of the fact that Article 2(4) of Directive 2014/26 sets out, exhaustively, the provisions applicable to independent management entities, Article 5(1), (2) and (4) of that directive, read in conjunction with recital 19 thereof, cannot be interpreted as requiring Member States to ensure that rightholders have the right to authorise an independent management entity of their choice to manage their rights irrespective of the Member State of nationality, residence or establishment of the independent management entity or rightholder concerned.

53 In the absence, in Directive 2014/26, of any such obligation and, more generally, of any provision governing access by those entities to the activity of copyright management, it must be concluded that that directive does not harmonise the conditions for such access and, therefore, that it does not preclude legislation of a Member State which generally and absolutely excludes the possibility of independent management entities established in another Member State providing their copyright management services in that first Member State.

54 Nonetheless, it cannot be inferred from this that such national legislation is not covered by EU law as a whole or, a fortiori, that it is consistent with EU law.

55 In the present case, it is apparent from the order for reference that the dispute in the main proceedings is characterised by a situation linked to trade between Member States, since Jamendo, a company incorporated under Luxembourg law, is precluded under Italian legislation from providing services for the management of copyright and related rights in Italy as an independent management entity. That information would thus indicate that, in view of the subject matter of the dispute in the main proceedings, the Court must, in order to give a useful answer to the referring court, interpret other provisions of EU law.

56 In so far as such legislation governs situations that are linked to trade between Member States, it may fall within the scope of the provisions of the FEU Treaty relating to the fundamental freedoms (see, to that effect, judgment of 18 September 2019, *VIPA*, C-222/18, EU:C:2019:751, paragraph 49 and the case-law cited).

57 In that regard, it should be borne in mind that, 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 determine the case before it. Consequently, even if, formally, the referring court has limited its question to the interpretation of a specific provision of EU law, that does not prevent this Court from providing the referring court with all the elements of interpretation of EU law that may be of assistance in adjudicating in the case before it, whether or not the referring court has referred to them in the wording of its questions. To that end, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in view of the subject matter of the dispute (see, to that effect, judgment of 18 September 2019, *VIPA*, C-222/18, EU:C:2019:751, paragraph 50 and the case-law cited).

58 Moreover, a national measure concerning an area which has been the subject of exhaustive harmonisation at EU level must be assessed in the light of the provisions of that harmonising measure and not in the light of primary law (see, to that effect, judgment of 18 September 2019, *VIPA*, C-222/18, EU:C:2019:751, paragraph 52).

59 In this instance, as is apparent from paragraph 53 of this judgment, it is true that Directive 2014/26 did not harmonise conditions for access by independent management entities to the activity of copyright management. However, it is nevertheless appropriate to examine, as the Advocate General did in points 40 and 41 of his Opinion, whether the services for the management of copyright and related rights provided by an independent management entity such as Jamendo are capable of falling within the material scope of Directive 2000/31 or of Directive 2006/123.

60 In that regard, it should be stated at the outset that, in accordance with Article 1(1) of Directive 2000/31, that directive specifically governs information society services. Under Article 3(1) of Directive 2006/123, that directive does not apply if its provisions conflict with a provision of another EU act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions.

61 Accordingly, it is necessary to examine, first of all, whether the activity of copyright management that is carried out by independent management entities is governed by Directive 2000/31 and, if not, whether that activity comes within the scope of Directive 2006/123.

Applicability of Directive 2000/31

62 Article 3(2) of Directive 2000/31 prohibits Member States from restricting the freedom to provide information society services from another Member State.

63 However, under Article 3(3) of that directive, paragraphs 1 and 2 of that article are not to apply to the ‘fields’ referred to in the Annex to that directive, which covers, inter alia, ‘copyright’ and ‘neighbouring rights’.

64 It must be noted that the derogation provided for in Article 3(3) of Directive 2000/31 is broadly worded, covering in general terms restrictions on the freedom to provide services falling within the ‘field’ of copyright and neighbouring rights.

65 There is, moreover, nothing in that directive to indicate that, in adopting that derogation, the EU legislature wished to exclude from its scope services for the management of copyright and related rights.

66 Consequently, it must be held that the management of copyright and related rights, which, as is apparent from recital 2 of Directive 2014/26, includes, in particular, granting of licences to users, monitoring of the use of rights, enforcement of copyright and related rights, collection of rights revenue derived from the exploitation of rights and the distribution of the amounts due to rightholders, is covered by the derogation provided for in Article 3(3) of Directive 2000/31, read in conjunction with the Annex thereto.

67 That interpretation cannot be called into question by the fact that, as a derogation from the general rule laid down in Article 3(2) of Directive 2000/31, Article 3(3) of that directive must be interpreted strictly. Indeed, while it follows from settled case-law that provisions derogating from

a fundamental freedom must be interpreted strictly, it is necessary to ensure that the effectiveness of the derogation thereby established is safeguarded and its purpose observed (see, to that effect, judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraphs 162 and 163).

68 In those circumstances, it must be held that the provisions of Directive 2000/31 are not applicable to services for the management of copyright and related rights.

Applicability of Directive 2006/123

69 In accordance with Article 1(1) of Directive 2006/123, the aim of that directive is, inter alia, to facilitate the exercise of the free movement of services, while maintaining a high quality of services.

70 To that end, the first subparagraph of Article 16(1) of that directive provides that Member States are to respect the right of providers to provide services in a Member State other than that in which they are established.

71 However, according to Article 17(11) of that directive, Article 16 is not to apply to copyright or to neighbouring rights.

72 The Court has interpreted that provision as meaning that the activity of collective management of copyright was excluded from the scope of Article 16 of Directive 2006/123 (judgment of 27 February 2014, *OSA*, C-351/12, EU:C:2014:110, paragraph 65).

73 That derogation, like that provided for in Article 3(3) of Directive 2000/31, is broadly worded, covering in general terms copyright and related rights, so that it cannot be inferred from Article 17(11) of Directive 2006/123 that there was any intention on the part of the EU legislature to exclude services for the management of copyright and related rights from the scope of that derogation.

74 It follows that services for the management of copyright and related rights do not fall within the scope of Article 16 of Directive 2006/123.

75 Since the access of independent management entities to the activity of copyright management has not, as is apparent from paragraphs 53, 68 and 74 of the present judgment, been the subject of exhaustive harmonisation at EU level, the determination of the relevant rules remains within the competence of the Member States, subject to the limits laid down by the provisions of the FEU Treaty, and in particular those relating to the fundamental freedoms (see, to that effect, judgment of 18 September 2019, *VIPA*, C-222/18, EU:C:2019:751, paragraph 56 and the case-law cited). Therefore, national legislation such as that at issue in the main proceedings must be assessed in the light of the relevant provisions of primary law, in this instance, Article 56 TFEU.

Conformity of the measure at issue in the main proceedings with the freedom to provide services guaranteed in Article 56 TFEU

76 According to settled case-law, Article 56 TFEU precludes any national measure which, even if applicable without distinction, is liable to prohibit, impede or render less attractive the exercise by EU nationals of the freedom to provide services that is guaranteed in that article of the FEU

Treaty (see, to that effect, judgment of 11 February 2021, *Katoen Natie Bulk Terminals and General Services Antwerp*, C-407/19 and C-471/19, EU:C:2021:107, paragraph 58 and the case-law cited).

77 In the present case, it must be held that a national measure such as that at issue in the main proceedings, which does not allow independent management entities established in another Member State to provide their services for the management of copyright and related rights in Italy, thus compelling such entities to enter into representation arrangements with a collective management organisation that is authorised in that Member State, plainly constitutes a restriction on the freedom to provide services guaranteed in Article 56 TFEU.

78 However, that restriction may be justified by overriding reasons in the public interest, provided that it is suitable for securing the attainment of the public interest objective concerned and does not go beyond what is necessary to attain that objective (see, to that effect, judgment of 27 February 2014, *OSA*, C-351/12, EU:C:2014:110, paragraph 70).

Whether there is an overriding reason in the public interest that may justify the restriction concerned

79 According to settled case-law, the protection of intellectual property rights constitutes an overriding reason in the public interest (judgment of 27 February 2014, *OSA*, C-351/12, EU:C:2014:110, paragraph 71 and the case-law cited).

80 Accordingly, legislation such as that at issue in the main proceedings is capable of being justified in the light of the objective of copyright protection.

Whether the restriction concerned is proportionate

81 As regards the proportionality of the restriction concerned, it is necessary to ascertain, in the first place, whether the restriction consisting in the exclusion of independent management entities that are established in another Member State from the activity of copyright intermediation is suitable for securing the attainment of the public interest objective relating to copyright protection that is pursued by such a measure.

82 In that regard, the Court has held that national legislation which grants a collecting society a monopoly over the management of copyright in relation to a category of protected works in the territory of the Member State concerned must be considered to be capable of protecting intellectual property rights, in that it is liable to allow the effective management of copyright and related rights and an effective supervision of their respect in the territory of the Member State concerned (judgment of 27 February 2014, *OSA*, C-351/12, EU:C:2014:110, paragraph 72).

83 In the present case, however, the national legislation at issue in the main proceedings does not grant a collective management organisation a monopoly over the activity of copyright management in the territory of the Member State concerned. In fact, Article 180 of the Law on the protection of copyright allows that activity to be carried out in Italy not only by the SIAE, but also by the collective management organisations referred to in Legislative Decree No 35/2017, Article 4(2) of which provides that rightholders may entrust to a collective management organisation or to an independent management entity of their choice the management of their rights, and that they may do so ‘regardless of the Member State of nationality, residence or

establishment of the collective management organisation, of the independent management entity or of the rightholder' concerned, while making clear that the application of that provision is without prejudice to the provisions of Article 180 of the Law on the protection of copyright.

84 As is apparent from the request for a preliminary ruling, the effect of that provision is to prevent independent management entities established in another Member State from carrying out the activity of copyright management in Italy, while allowing collective management organisations established in other Member States to carry out such an activity.

85 In that context, it should be recalled that, according to settled case-law, national legislation is appropriate for ensuring the attainment of the objective sought only if it genuinely meets the concern to attain that objective in a consistent and systematic manner (judgment of 3 February 2021, *Fussl Modestraße Mayr*, C-555/19, EU:C:2021:89, paragraph 59 and the case-law cited).

86 Consequently, it is necessary to examine whether the different treatment, under the Italian legislation at issue in the main proceedings, of collective management organisations and independent management entities meets that requirement.

87 In that regard, it must be noted that, unlike collective management organisations, which have been the subject of extensive harmonisation as regards access to the activity of managing copyright and related rights, the modalities for their governance and their supervisory framework, independent management entities are, as is apparent from Article 2(4) of Directive 2014/26, subject to only a limited number of provisions of that directive and, accordingly, several of the requirements laid down by that directive do not apply to those entities.

88 First, only collective management organisations are subject to the obligation to grant licences on the basis of objective and non-discriminatory criteria under Article 16(2) of Directive 2014/26, while independent management entities are required only to conduct licensing negotiations in good faith in accordance with paragraph 1 of that article and to exchange all necessary information for that purpose. Under Article 16(2), only collective management organisations are subject to the obligation to provide the rightholders whom they represent with appropriate remuneration for the use of their rights. Collective management organisations are also required to set tariffs that are reasonable in relation, inter alia, to the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject matter, as well as in relation to the economic value of the service provided by the collective management organisation, whereas independent management entities are free to set any tariffs they choose.

89 Unlike independent management entities, collective management organisations are also required, under Article 16(3) of that directive, to reply without undue delay to requests from users and to offer them a licence or, if not, to give a reasoned explanation as to why they do not intend to license a particular service.

90 Secondly, unlike collective management organisations, independent management entities are not obliged to accept rightholders as members if they fulfil the membership requirements, which must be based on objective, transparent and non-discriminatory criteria, in accordance with Article 6(2) of that directive.

91 Thirdly, independent management entities are not obliged to manage the rights of rightholders who ask them to do so, as collective management organisations are required to do, according to the second sentence of Article 5(2) of Directive 2014/26 – unless there are objectively justified reasons not to do so – if management of such rights falls within the scope of the organisations' activity, which means that independent management entities are free to choose the most profitable categories of rights and to leave the management of the others to collective management organisations. Nor are those entities subject to the obligation, laid down in Article 5(4) of that directive, to respect the freedom of rightholders to terminate the authorisation to manage their rights, categories of rights or types of works, or to withdraw rights for certain territories.

92 Fourthly, unlike collective management organisations, independent management entities are not bound by the provisions governing membership terms, the modalities for governance and supervision, and conflicts of interest, set out in Articles 6 to 10 of Directive 2014/26, nor are they bound by the provisions on complaints procedures and dispute resolution in Articles 33 to 35 thereof.

93 Fifthly, those entities are not subject to the requirements in relation to the management of rights revenue laid down in Articles 11 to 15 of Directive 2014/26, which enables them to maximise their profits.

94 Sixthly, as regards the specific requirements in relation to transparency that are laid down by that directive, only Article 20 and certain provisions of Article 21 of the directive are applicable to independent management entities. In particular, unlike collective management organisations, independent management entities are not subject to the obligations imposed in Chapter 5 of Directive 2014/26, notably the obligation to prepare an annual transparency report, laid down by Article 22.

95 Finally, seventhly, Title III of Directive 2014/26, concerning the multi-territorial licensing of online rights in musical works, is also inapplicable to independent management entities.

96 In the light of the foregoing considerations, it must be held that the different treatment, under the national legislation at issue, of independent management entities, as compared to collective management organisations, does meet the concern to attain the objective of copyright protection in a consistent and systematic manner, since independent management entities are subject, under Directive 2014/26, to less exacting requirements than collective management organisations as regards, in particular, access to the activity of managing copyright and related rights, licensing, the modalities for their governance and their supervisory framework. In those circumstances, such different treatment may be considered to be suitable for securing the attainment of that objective.

97 However, as regards, in the second place, the question whether the restriction consisting in the exclusion of independent management entities from the activity of copyright intermediation does not go beyond what is necessary to secure the attainment of the public interest objective relating to copyright protection, it should be pointed out that a measure that is less restrictive of the freedom to provide services might consist, in particular, in making the provision of copyright intermediation services in the Member State concerned subject to particular regulatory requirements that would be justified in the light of the objective of copyright protection.

98 In those circumstances, it must be held that, in so far as the national legislation at issue in the main proceedings wholly precludes any independent management entity, regardless of the regulatory requirements to which it is subject under the national law of the Member State in which it is established, from exercising a fundamental freedom that is guaranteed by the FEU Treaty, the legislation appears to go beyond what is necessary for the protection of copyright.

99 In the light of all the foregoing considerations, the answer to the question raised is that Article 56 TFEU, read in conjunction with Directive 2014/26, must be interpreted as precluding legislation of a Member State which generally and absolutely excludes the possibility of independent management entities established in another Member State providing their copyright management services in that first Member State.

Costs

100 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 56 TFEU, read in conjunction with Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market,

must be interpreted as precluding legislation of a Member State which generally and absolutely excludes the possibility of independent management entities established in another Member State providing their copyright management services in that first Member State.

[Signatures]