



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

25 May 2023*

(Reference for a preliminary ruling – Intellectual property – Copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission – Directive 93/83/EEC – Article 1(2) – Communication to the public by satellite – Concept – Satellite package provider – Broadcasting of programmes in another Member State – Place of the act of exploitation by which that provider participates in such communication)

In Case C-290/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 20 April 2021, received at the Court on 5 May 2021, in the proceedings

Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger Reg. Gen. mbH (AKM)

v

Canal+ Luxembourg Sàrl

intervening parties:

Tele 5 TM-TV GmbH,

Österreichische Rundfunksender GmbH & Co. KG,

Seven.One Entertainment Group GmbH,

ProSiebenSat.1 PULS 4 GmbH,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, K. Lenaerts, President of the Court, acting as judge of the First Chamber, L. Bay Larsen, Vice-President of the Court, acting as judge of the First Chamber, P.G. Xuereb and I. Ziemele (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: S. Beer, Administrator,

* Language of the case: German.

having regard to the written procedure and further to the hearing on 8 June 2022,

after considering the observations submitted on behalf of:

- Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger Reg. Gen. mbH (AKM), by N. Kraft, Rechtsanwalt,
- Canal+ Luxembourg Sàrl, by A. Anderl, Rechtsanwalt,
- Seven.One Entertainment Group GmbH and ProSiebenSat.1 PULS 4 GmbH, by M. Boesch, Rechtsanwalt,
- the European Commission, by J. Samnadda and G. von Rintelen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 September 2022,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1(2)(a) to (c) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15) and of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).
- 2 The request has been made in proceedings between Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger Reg. Gen. mbH ('AKM'), an Austrian society responsible for the collective management of copyright, and Canal+ Luxembourg Sàrl ('Canal+'), a satellite television operator, concerning the broadcasting by that company of television programmes in Austria.

Legal context

European Union law

Directive 93/83

- 3 Recitals 5, 14, 15 and 17 of Directive 93/83 state:
 - '(5) Whereas, however, the achievement of [the objectives of the European Union] in respect of cross-border satellite broadcasting and the cable retransmission of programmes from other Member States is currently still obstructed by a series of differences between national rules of copyright and some degree of legal uncertainty; whereas this means that holders of rights are exposed to the threat of seeing their works exploited without payment of remuneration

or that the individual holders of exclusive rights in various Member States block the exploitation of their rights; whereas the legal uncertainty in particular constitutes a direct obstacle in the free circulation of programmes within the [European Union];

...

- (14) Whereas the legal uncertainty regarding the rights to be acquired which impedes cross-border satellite broadcasting should be overcome by defining the notion of communication to the public by satellite at [EU] level; whereas this definition should at the same time specify where the act of communication takes place; whereas such a definition is necessary to avoid the cumulative application of several national laws to one single act of broadcasting; whereas communication to the public by satellite occurs only when, and in the Member State where, the programme-carrying signals are introduced under the control and responsibility of the broadcasting organisation into an uninterrupted chain of communication leading to the satellite and down towards the earth; whereas normal technical procedures relating to the programme-carrying signals should not be considered as interruptions to the chain of broadcasting;
- (15) Whereas the acquisition on a contractual basis of exclusive broadcasting rights should comply with any legislation on copyright and rights related to copyright in the Member State in which communication to the public by satellite occurs;

...

- (17) Whereas, in arriving at the amount of the payment to be made for the rights acquired, the parties should take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version’.

4 Article 1 of that directive, entitled ‘Definitions’, provides in paragraph 2 (a) to (c):

- ‘(a) For the purpose of this Directive, “communication to the public by satellite” means the act of introducing, under the control and responsibility of the broadcasting organisation, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.
- (b) The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.
- (c) If the programme-carrying signals are encrypted, then there is communication to the public by satellite on condition that the means for decrypting the broadcast are provided to the public by the broadcasting organisation or with its consent.’

5 Article 2 of that directive provides:

‘Member States shall provide an exclusive right for the author to authorize the communication to the public by satellite of copyright works, subject to the provisions set out in this chapter.’

Directive 2001/29

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

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

Austrian law

- 7 Paragraph 17b(1) of the Urheberrechtsgesetz (Law on Copyright) of 9 April 1936 (BGBl. 111/1936), in the version of 27 December 2018 (BGBl. I 105/2018) states:

‘In satellite broadcasting, the act of exploitation reserved for the author consists in the introduction, under the control and responsibility of a broadcasting body, of the programme-carrying signals into an uninterrupted chain of communication leading to the satellite and down towards the earth. Subject to subparagraph 2, satellite broadcasting therefore occurs only in the State in which the signal is introduced.’

- 8 Paragraph 59a of that law provides:

‘1. Only collecting societies may exercise the right to use broadcasts, including satellite broadcasts, of works for simultaneous, complete and unmodified retransmission by cable; however, this does not concern the right to bring legal proceedings for copyright infringements.

2. Broadcasts may be used for retransmission within the meaning of paragraph 1 if the broadcasting organisation making the retransmission has obtained authorisation from the responsible collecting society for that purpose.

3. However, paragraphs 1 and 2 shall not apply where the broadcasting organisation whose broadcast is retransmitted has the right to broadcast within the meaning of paragraph 1.’

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

- 9 AKM holds a licence to exploit musical works, entitling it to exercise broadcasting rights in Austria on a fiduciary basis.
- 10 Canal+, established in Luxembourg, offers in Austria, by satellite, in return for payment, packages of encrypted programmes (‘the satellite packages at issue in the main proceedings’) of various broadcasting organisations located in other Member States, both in high-definition and in standard definition.
- 11 The introduction of each of the programme-carrying satellite signals into the chain of communication (uplinking) is carried out for the most part by those broadcasting organisations themselves, sometimes by Canal+, in those other Member States. A stream is broadcast containing the entire programme in high-definition quality together with all additional

information, such as audio data and subtitle data. After being ‘re-sent’ by the satellite, that stream is received by satellite-receiving equipment within the coverage area. That stream is then split up and the user may access each of the programmes on a terminal by means of a decoder.

- 12 The satellite packages at issue in the main proceedings contain free-to-air television programmes. Those programmes are not encrypted and may always be received in standard quality by everyone in Austrian territory.
- 13 AKM has brought an action seeking, in essence, an injunction against the broadcasting by Canal+ of satellite signals in Austria and payment of damages, claiming that, in the Member States in which the act of broadcasting or of communication to the public by satellite takes place, no authorisation had been obtained for such exploitation and that it had not authorised that broadcasting in Austria. AKM submits that that broadcasting serves an additional category of Canal+ customers, which is not covered by the authorisations obtained, as the case may be, in the broadcasting Member States, by the broadcasting organisations concerned, for the purposes of communication to the public of the works in question by satellite, and that Canal+ should also have obtained an authorisation from AKM for broadcasting satellite signals in Austria. Accordingly, AKM claims that Canal+ is infringing the rights which AKM manages.
- 14 Canal+ replies that it merely provides, with the consent of the broadcasting organisations, equipment enabling a signal introduced by those organisations outside Austria into a chain of communication leading to a satellite to be encoded. Under the broadcasting Member State principle laid down in Article 1(2)(b) of Directive 93/83, it is not AKM who is entitled to assert claims arising from the act of exploitation at issue in the main proceedings, but only the collecting societies of the copyright in the broadcasting Member State. Furthermore, that act of exploitation carried out by Canal+ is covered by the authorisations obtained in the broadcasting Member States by the broadcasting organisations concerned.
- 15 Four companies, including Seven.One Entertainment Group GmbH, a broadcasting organisation established in Germany, and ProSiebenSat.1 PULS 4 GmbH, a broadcasting organisation established in Austria, were granted leave to intervene in the main proceedings in support of Canal+.
- 16 By judgment of 31 October 2019, the Handelsgericht Wien (Commercial Court, Vienna, Austria) dismissed the action for an injunction prohibiting the broadcasting of satellite signals in Austria, but largely upheld both the action (in part in the alternative) seeking an injunction against the satellite broadcasting, directed towards Austria, of the programme signals at issue and the request for the production of documents related thereto. Hearing an appeal against that judgment, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), by judgment of 30 June 2020, ruled broadly to the same effect. That court considered, in particular, that the satellite packages at issue in the main proceedings reached a new public, that is to say, a different public from that for the broadcasters’ free-to-air transmissions. AKM, Canal+, Seven.One Entertainment Group GmbH and ProSiebenSat.1 PULS 4 GmbH brought appeals on a point of law (*‘Revision’*) against that latter judgment before the referring court.
- 17 Referring to paragraphs 61 and 69 of the judgment of 13 October 2011, *Airfield and Canal Digitaal* (C-431/09 and C-432/09, EU:C:2011:648), which also concerned a satellite package provider, the referring court considers that it could be considered that both the act of exploitation of the broadcasting organisation and the intervention of the satellite package provider must be located exclusively in the Member State in which the programme-carrying

signals are introduced into the chain of communication concerned, since such a provider, in carrying out its activity alongside the broadcasting organisation, merely participates in the original, single and indivisible act of satellite broadcasting.

- 18 If that were not the case, the question would arise as to the extent to which the actual acts of exploitation of that provider infringe copyright on the ground that a new public would potentially be affected in the Member State in which those signals are received. It would be necessary, in that context, to determine whether the fact that, in the satellite packages at issue in the main proceedings, that provider also offers free television programmes is relevant, since those programmes are already freely accessible to any user within the coverage area.
- 19 In those circumstances, the Oberster Gerichtshof (Supreme Court, Austria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 1(2)(b) of [Directive 93/83] to be interpreted as meaning that not only the broadcasting organisation, but also a satellite package provider intervening in the indivisible and single act of broadcasting, carries out an act of exploitation – which in any case requires consent – simply in the State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth, with the result that the intervention of the satellite package provider in the act of broadcasting is not liable to infringe copyright in the receiving State?

(2) If Question 1 is answered in the negative:

is the concept of “communication to the public” set out in Article 1(2)(a) and (c) of [Directive 93/83] and in Article 3(1) of [Directive 2001/29] to be interpreted as meaning that the satellite package provider, which intervenes as another operator during a communication to the public by satellite, bundles several encrypted high-definition signals of free-to-air and pay-TV programmes and offers the independent audiovisual product created in this way to its customers in return for payment, requires separate authorisation from the right holder concerned even in respect of the protected content in the free-to-air TV programmes contained in the package of programmes, although in this respect it is merely providing its customers with access to works which are already freely accessible – albeit in poorer standard-definition quality – to everyone in the broadcasting area?’

Consideration of the questions referred

The first question

- 20 By its first question, the referring court asks, in essence, whether Article 1(2)(b) of Directive 93/83 must be interpreted as meaning that, where a satellite package provider is required to obtain, for the act of communication to the public by satellite in which it participates, the authorisation of the holders of the copyright and rights related to copyright concerned, that authorisation must be obtained, such as that granted to the broadcasting organisation concerned, only in the Member State in which the programme-carrying signals are introduced into the chain of communication leading to the satellite.

- 21 Under Article 1(2)(b) of Directive 93/83, the act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.
- 22 In order for the rule laid down in Article 1(2)(b) of Directive 93/83 to apply, there must be a ‘communication to the public by satellite’, within the meaning of Article 1(2)(a) and (c), those provisions laying down cumulative conditions to that effect. Thus, a transmission constitutes a single ‘communication to the public by satellite’ if, first, it is triggered by an ‘act of introducing’ of programme-carrying signals carried out ‘under the control and responsibility of the broadcasting organisation’; secondly, those signals are introduced ‘into an uninterrupted chain of communication leading to the satellite and down towards the earth’; thirdly, those signals are ‘intended for reception by the public’, and fourthly, if those signals are encrypted, their decoding device is ‘provided to the public by the broadcasting organisation or with its consent’ (see, to that effect, judgment of 13 October 2011, *Airfield and Canal Digitaal*, C-431/09 and C-432/09, EU:C:2011:648, paragraph 52).
- 23 As regards a transmission such as that at issue in the main proceedings, the Court has already held that both the indirect and direct transmission of television programmes that fulfil all of those cumulative conditions, must each be regarded as constituting a single communication to the public by satellite and thus as indivisible. Yet, the indivisibility of such a communication, within the meaning of Article 1(2)(a) and (c), does not however signify that the intervention of the satellite package provider in that communication can occur without the authorisation of the right holders concerned (see, to that effect, judgment of 13 October 2011, *Airfield and Canal Digitaal*, C-431/09 and C-432/09, EU:C:2011:648, paragraphs 69 and 70).
- 24 It should be borne in mind that it is apparent from Article 2 of Directive 93/83, read in conjunction with recital 17 thereof, that copyright holders must authorise any communication of the protected works to the public by satellite and that, in order to determine the appropriate remuneration of those right holders for such communication of their works, all aspects of the broadcast must be taken into account, such as its actual audience and its potential audience (see, to that effect, judgment of 13 October 2011, *Airfield and Canal Digitaal*, C-431/09 and C-432/09, EU:C:2011:648, paragraphs 71 and 73).
- 25 Such authorisation must be obtained, in particular, by a person who triggers such a communication or who intervenes when it is carried out, so that, by means of that communication, he or she makes the protected works accessible to a new public, that is to say, a public which was not taken into account by the authors of the protected works within the framework of an authorisation given to another person (see, to that effect, judgment of 13 October 2011, *Airfield and Canal Digitaal*, C-431/09 and C-432/09, EU:C:2011:648, paragraph 72).
- 26 In that regard, the Court has already noted that, in accordance with Article 1(2)(a) of Directive 93/83, a communication to the public by satellite, such as that at issue in the main proceedings, is triggered by the broadcasting organisation under whose control and responsibility the programme-carrying signals are introduced into the chain of communication leading to the satellite. Furthermore, it is common ground that, as a general rule, that organisation thereby renders the protected works accessible to a new public. Consequently, that organisation is

required to obtain the authorisation provided for in Article 2 of Directive 93/83 (judgment of 13 October 2011, *Airfield and Canal Digitaal*, C-431/09 and C-432/09, EU:C:2011:648, paragraph 75).

- 27 In so far as, pursuant to the rule laid down in Article 1(2)(b) of Directive 93/83, such a communication to the public by satellite is deemed to take place only in the Member State in which the programme-carrying signals are introduced into the chain of communication leading to the satellite, the broadcasting organisation is required to obtain that authorisation only in that Member State.
- 28 However, as has been pointed out in paragraph 24 of this judgment, in order to determine the appropriate remuneration of the copyright holders for such communication of their works, all aspects of the broadcast concerned must be taken into account, such as its actual audience and its potential audience. Accordingly, where part of that actual or potential audience is located in Member States other than that in which the programme-carrying signals are introduced into the chain of communication leading to the satellite, it is, where appropriate, for the various collecting societies concerned to find adequate solutions in order to ensure equitable remuneration of those right holders.
- 29 That said, it cannot be ruled out that other operators may intervene in the course of a communication to the public by satellite, with the result that they render the protected works or subject matter accessible to a public wider than that targeted by the broadcasting organisation concerned, that is to say, a public which was not taken into account by the authors of those works or subject matter when they authorised the use of the latter by the broadcasting organisation. In such a situation, the intervention of those operators is thus not covered by the authorisation granted to that organisation. That may in particular be the case where an operator expands the circle of persons having access to that communication and thereby renders the protected works or subject matter accessible to a new public (judgment of 13 October 2011, *Airfield and Canal Digitaal*, C-431/09 and C-432/09, EU:C:2011:648, paragraphs 76 and 77).
- 30 It follows from the wording of Article 1(2)(b) of Directive 93/83 and from the scheme of Article 1(2)(a) to (c) that, where a satellite package provider is required to obtain, for the communication to the public by satellite in which it participates, the authorisation of the holders of the copyright and related rights concerned, that authorisation must be obtained, such as that granted to the broadcasting organisation concerned, only in the Member State in which the programme-carrying signals are introduced into the chain of communication leading to the satellite.
- 31 Furthermore, that conclusion is supported by the objective pursued by Article 1(2)(b) of Directive 93/83. In that regard, it should be noted, first, that it is apparent from recitals 5 and 14 of that directive that the legal uncertainty resulting from differences between national rules of copyright constitutes a direct obstacle in the free movement of programmes within the European Union and that the legal uncertainty regarding the rights to be acquired, which impedes cross-border satellite broadcasting, should be overcome by defining the concept of communication to the public by satellite at EU level, in order, in particular, to avoid the cumulative application of several national laws to a single act of broadcasting. Secondly, recital 15 of that directive further states that the acquisition on a contractual basis of exclusive broadcasting rights should comply with any legislation on copyright and rights related to copyright in the Member State in which communication to the public by satellite occurs.

- 32 It thus follows from recitals 5, 14 and 15 of Directive 93/83 that Article 1(2)(b) thereof seeks to ensure that any ‘communication to the public by satellite’, within the meaning of Article 1(2)(a) and (c), is subject exclusively to the legislation on copyright and related rights in force in the Member State in which the programme-carrying signals are introduced into the chain of communication leading to the satellite. Accordingly, it would be contrary to that objective if a satellite package provider were also required to obtain authorisation from the holders of the copyright and related rights concerned in other Member States.
- 33 In the light of all the foregoing considerations, the answer to the first question is that Article 1(2)(b) of Directive 93/83 must be interpreted as meaning that, where a satellite package provider is required to obtain, for the communication to the public by satellite in which it participates, the authorisation of the holders of the copyright and related rights concerned, that authorisation must be obtained, such as that granted to the broadcasting organisation concerned, only in the Member State in which the programme-carrying signals are introduced into the chain of communication leading to the satellite.

The second question

- 34 Having regard to the answer given to the first question, there is no need to answer the second question.

Costs

- 35 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 (First Chamber) hereby rules:

Article 1(2)(b) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission

must be interpreted as meaning that, where a satellite package provider is required to obtain, for the communication to the public by satellite in which it participates, the authorisation of the holders of the copyright and related rights concerned, that authorisation must be obtained, such as that granted to the broadcasting organisation concerned, only in the Member State in which the programme-carrying signals are introduced into the chain of communication leading to the satellite.

[Signatures]