OPINION OF ADVOCATE GENERAL
Trstenjak
delivered on 17 January 2012

Case C-510/10

DR
TV2 Danmark A/S
v
NCB

(Reference for a preliminary ruling from the Østre Landsret (Denmark))

(Copyright and related rights – Directive 2001/29/EC – Article 5(2)(d) – Conditions governing an exception to the reproduction right – Ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts – A broadcasting organisation which has commissioned recordings from external, independent television producers for the purpose of distributing them as part of its own broadcasts)

I – Introduction

1. This reference for a preliminary ruling from the Danish Østre Landsret (Eastern Regional Court) concerns the interpretation of Article 5(2)(d) 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) (the 'InfoSoc Directive').

2. That provision makes it possible for Member States to limit the right, provided for in Article 2 of that directive, to reproduce works protected by intellectual property law in respect of 'ephemeral recordings' of works (3) made by broadcasting organisations by means of their own facilities and for their own broadcasts.

3. However, even after transposition of the InfoSoc Directive, the Danish Law on Copyright does not specify the criteria by reference to which it is to be determined whether a recording has been made 'by means of [the broadcasting

organisation's] own facilities and for [its] own broadcasts'. (4) That is the issue at the heart of the main proceedings, in which the referring court is called upon to apply Article 5(2)(d) of the InfoSoc Directive to television programmes which have been commissioned by broadcasting organisations from external production companies.

4. Against that background, the referring court essentially wishes to ascertain whether and, if so, under what conditions the recording of a television programme by a production company, where a broadcasting organisation has specifically commissioned the production of that programme for its own broadcasts from that company, is to be regarded as having been made by the broadcasting organisation 'by means of [its] own facilities and for [its] own broadcasts' in accordance with Article 5(2)(d) of the InfoSoc Directive in conjunction with recital 41 of the preamble to that directive.

II – Legal context

A – *European Union law*

5. Article 2 of the InfoSoc Directive ('Reproduction right') provides:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

…'.

6. Article 3 of the InfoSoc Directive ('Right of communication to the public of works and right of making available to the public other subject-matter') provides:

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

…'.

7. Article 5(2) of the Infosoc Directive provides:

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

…

(d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; …'.

8. With regard to the term 'own facilities', recital 41 of the preamble to the InfoSoc Directive states:

'When applying the exception or limitation in respect of ephemeral recordings made by broadcasting organisations it is understood that a broadcaster's own facilities include those of a person acting on behalf of and (5) under the responsibility of the broadcasting organisation'.

9. Point 27 of Council Common Position (EC) No 48/2000 (6) comments on this as follows:

'The provision of Article 5(2)(d) had been added to the list of exceptions in the Commission's amended proposal following a suggestion from the European Parliament (amendment 39). The Council has … added a second clause to this subparagraph in order to align the wording with Article 11*bis* of the Berne Convention. The Council also clarified the notion "by means of their own facilities" in the new recital 41 in order to provide Member States with sufficient flexibility to adapt their law to market changes'.

B – *International Law*

10. Article 11*bis* of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979 ('Berne Convention'), reads as follows:

'(1) Authors of literary and artistic works shall enjoy the exclusive right of authorising:

1. the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

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

3. the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

…

(3) In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means

of instruments recording sounds or images, the work broadcast. It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation'.

C – *National law*

11. Paragraph 31 of the Danish Law on Copyright (7) provides that:

'(1) Broadcasting organisations may, for the purpose of their broadcasts, record works on tape, film or any other device that can reproduce them, on condition that they have the right to broadcast the works in question. The right to make such recorded works available to the public shall be subject to the provisions otherwise in force.

(2) The Minister for Culture may lay down rules governing the conditions under which such recordings may be made and on their use and storage'.

12. The order for reference states (8) that, when it came to transposing the InfoSoc Directive in Denmark, the national legislature assumed that Paragraph 31 of the current law contained an exception equivalent to Article 5(2)(d) of the Directive. The transposition of Article 5(2)(d) did not therefore give rise to any change to Paragraph 31 of the Danish Law on Copyright, with the result that no thought was given to the question of the relevance of recital 41 of the preamble to the InfoSoc Directive.

III – The main proceedings and the questions referred for a preliminary ruling

13. The main proceedings concern a dispute as to how the exception in respect of recordings made for broadcasting purposes provided for in Paragraph 31 of the Danish Law on Copyright is to be interpreted where the recording is made in connection with television programmes which a television broadcasting organisation commissions from a third party for use in its own broadcasts.

14. More specifically, the issue is whether and to what extent the InfoSoc Directive affects the application of Paragraph 31 of the Danish Law on Copyright if that law is interpreted in conformity with the Directive and how exactly the provisions of the Directive relating to broadcasting organisations are to be understood.

15. These proceedings involve Nordisk Copyright Bureau, on the one hand, and two broadcasting organisations, DR and TV2 Danmark, on the other.

16. Nordisk Copyright Bureau ('NCB'), is a Nordic-Baltic company which works in conjunction with similar copyright companies around the world to administer rights to record and reproduce music on CD, DVD, film, video, the Internet, etc. – known as 'mechanical rights' – for composers, songwriters and music publishers.

17. DR is a radio and television organisation which broadcasts throughout Denmark and is financed from licence fees. TV2 Danmark ('TV2') is a nationwide television broadcaster funded commercially from television advertising.

18. The radio and television programmes broadcast by DR and TV2 include programmes produced by third parties under specific agreements with DR or TV2 with a view to being broadcast for the first time on DR or TV2. Although DR has traditionally produced its own broadcasts, it has an obligation under a public service contract with the Minister for Culture to commission an increasing number of television programmes from third parties in order to support private production. TV2, on the other hand, is conceptually based on a so-called 'enterprise model' under which virtually all television programmes, apart from news, current affairs and films (which are covered by licensing contracts), are commissioned from third parties.

19. The more extensive use of independent external television production companies by DR and TV2 has aggravated a long-running dispute between the parties as to whether the statutory exception also covers recordings which are commissioned from independent external television production companies by DR or TV2 for initial broadcast on DR or TV2 Danmark.

20. More specifically, that dispute relates to music, which may be used as the main subject of a television production or as a subordinate element in a programme, such as the background music accompanying the broadcast, and the related financial claims of certain performing rights societies. (9)

21. That is the context in which the national court referred the following questions to the Court of Justice for a preliminary ruling:

1. Should the terms 'by means of their own facilities' in Article 5(2)(d) of Directive 2001/29/EC and 'on behalf of and (10) under the responsibility of the broadcasting organisation' in recital 41 in the preamble to that directive be interpreted with reference to national law or to Community law?

2. Should it be assumed that the wording of Article 5(2)(d) of Directive 2001/29/EC, as, for example, in the Danish, English and French versions of that provision, is to mean 'on behalf of and under the responsibility of the broadcasting organisation' or, as, for example, in the German version,

is to mean 'on behalf of or under the responsibility of the broadcasting organisation'?

3. On the assumption that the terms cited in Question 1 are to be interpreted with reference to Community law, the following question is asked: What criteria should national courts apply to a specific assessment as to whether a recording made by a third party (the 'Producer') for use in a broadcasting organisation's transmissions was made 'by means of their own facilities', and 'on behalf of [and/or] under the responsibility of the broadcasting organisation', such that the recording is covered by the exception laid down in Article 5(2)(d)?

   In connection with the answer to Question 3, answers are sought in particular to the following questions:

   (a) Should the concept of 'own facilities' in Article 5(2)(d) of Directive 2001/29/EC be understood to mean that a recording made by the Producer for use in a broadcasting organisation's transmissions is covered by the exception laid down in Article 5(2)(d) only if the broadcasting organisation is liable towards third parties for the Producer's acts and omissions in relation to the recording, as if the broadcasting organisation had itself carried out those acts and omissions?

   (b) Is the condition that the recording must be made 'on behalf of [and/or] under the responsibility of the broadcasting organisation' satisfied where a broadcasting organisation has commissioned the Producer to make the recording in order that that broadcasting organisation can transmit the recording in question, and on the assumption that the broadcasting organisation concerned has the right to transmit the recording in question?

   Clarification is sought as to whether the following situations may or must be taken into consideration for the purpose of answering Question 3(b), and if so, what weight should be given to them:

   (i) Whether it is the broadcasting organisation or the Producer which has the final and conclusive artistic/editorial decision on the content of the commissioned programme under agreements between those parties.

   (ii) Whether the broadcasting organisation is liable towards third parties in respect of the Producer's obligations in relation to the recording, as if the broadcasting organisation itself had carried out those acts and omissions.

(iii) Whether the Producer is contractually obliged by the agreement with the broadcasting organisation to deliver the programme in question to the broadcasting organisation for a specified price and has to meet, out of this price, all expenses that may be associated with the recording.

(iv) Whether it is the broadcasting organisation or the Producer which assumes liability for the recording in question vis-à-vis third parties.

(c) Is the condition that the recording must be made 'on behalf of [and/or] under the responsibility of the broadcasting organisation' satisfied in the case where a broadcasting organisation has commissioned the Producer to make the recording in order for the broadcasting organisation to be able to transmit the recording in question, and on the assumption that the broadcasting organisation in question has the right to transmit the recording, where the Producer, in the agreement with the broadcasting organisation relating to the recording, has assumed the financial and legal responsibility for (i) meeting all the expenses associated with the recording in return for payment of an amount fixed in advance; (ii) the purchase of rights; and (iii) unforeseen circumstances, including any delay in the recording and breach of contract, but without the broadcasting organisation being liable towards third parties in respect of the Producer's obligations in relation to the recording as if the broadcasting organisation had itself carried out those acts and omissions?

IV – Admissibility of the questions referred

22. 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 of European Union law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (11)

23. The parties to the main proceedings have taken different views on the question whether the InfoSoc Directive, the interpretation of which the questions referred seek, is relevant at all to the judgment to be given in the dispute pending before the referring court.

24. The broadcasting organisations have pointed out that the expression 'by means of their own facilities and for their own broadcasts' contained in the InfoSoc Directive does not appear in Paragraph 31 of the Danish Law on Copyright and cannot therefore be relied on in the main proceedings. They

submit, moreover, that Article 5(2)(d) of the InfoSoc Directive is not directly applicable and the condition of production 'by means of their own facilities' cannot be read into Paragraph 31 of the Law on Copyright if the Danish legislature did not so intend.

25. NCB, on the other hand, submits that the condition relating to production 'by means of their own facilities' is laid down in Article 5(2)(d) of the InfoSoc Directive and is also applicable under Danish law since Paragraph 31 of the Law on Copyright must be interpreted in accordance with that directive.

26. If, for legal reasons, the Danish court were definitively precluded from taking account of the aforementioned provision of the directive in the main proceedings, in other words if the machinery of the national legal system did not allow an interpretation in accordance with the directive, the admissibility of the reference for a preliminary ruling would be open to question, since the questions referred would be of no relevance to the judgment to be given in the main proceedings. (12)

27. However, it is settled case law that, within the framework of the cooperation between the Court and national courts and tribunals established by 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 the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling. (13)

28. In this case, the questions referred concern the interpretation of European Union law, and there are no compelling reasons why an interpretation of the national law in accordance with the directive should not at least lie within the bounds of possibility. Indeed, the submissions contained in point 12 of this Opinion, above, militate against the view put forward by the broadcasting organisations that the contested provision of the directive cannot be taken into account in the main proceedings. After all, if, when it came to transposing the directive, the national legislature refrained from amending Paragraph 31 of the Law on Copyright in the belief that, as it stood, that law was already compatible with European Union law, it is only reasonably to take account of the legislature's thinking, however inadequately it may have been manifested, when interpreting the national legislation. In any event, the referring court does not expressly take the view that this is not possible. We must therefore defer to its prerogative to determine the relevance of the questions referred to the main proceedings and proceed on the assumption that those questions have a bearing on the facts or purpose of the main proceedings and that the issue raised is not purely hypothetical. (14)

V – Substantive assessment of the questions referred

29. The questions of law submitted by the referring court are essentially concerned with the meaning of 'own facilities' and the interpretation of that term in the context of the InfoSoc Directive.

A – *The first question*

30. By its first question, the referring court wishes to ascertain whether the expressions 'by means of their own facilities' and 'on behalf of [and/or] under the responsibility of the broadcasting organisation' are to be interpreted with reference to national law or to European Union law.

1. Submissions of the parties to the proceedings

31. The parties to the proceedings have differing opinions on the first question. While the broadcasting organisations advocate an interpretation based purely on national law, since the directive in question does not contain a definition of the expressions concerned and is not intended to harmonise the relevant legislation, (15) the Spanish Government, the Commission and NCB consider that an autonomous interpretation in accordance with European Union law is required.

2. Assessment of the question referred

32. An interpretation of the expressions 'by means of their own facilities' in Article 5(2)(d) of the InfoSoc Directive and 'on behalf of [and/or] under the responsibility of the broadcasting organisation' in recital 41 of the preamble to that directive in accordance with national law does not seem to me to serve the desired purpose and, in particular, is not justified by the mere fact that the directive does not contain a specific definition of those expressions such as might be found in a list of terms and their meanings.

33. After all, it is settled case-law that the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union. (16)

34. With regard to the meaning of 'own facilities', it should be pointed out first that there is no reference to national law and, secondly, that the InfoSoc Directive defines that term, albeit only in a rudimentary fashion, in recital 41 of its preamble. This shows that European Union law itself endeavours to provide a specific clarification of that term within the body of the legislative act and, in recital 41, offers guidance for its interpretation.

35. Thirdly, the fact that an independent interpretation of that term within the context of EU law is also required for reasons connected with the matters addressed by the legislation, in particular the EU-wide, cross-border significance of economic interpenetration, is illustrated by the subject-matter and objective of the InfoSoc Directive. In this regard, reference may be made, *mutatis mutandis*, to the findings in the recent judgment in *Brüstle* and to the judgment in *Padawan*. (17)

36. As there is therefore no readily apparent reason to depart from the customary approach of an independent and uniform interpretation, the answer to the first question must be that the expressions 'by means of their own facilities' in Article 5(2)(d) of the InfoSoc Directive and 'on behalf of [and/or] under the responsibility of the broadcasting organisation' in recital 41 of the preamble to that directive are to be interpreted with reference to European Union law.

37. The issue of whether and to what extent the determination of an independent and uniform interpretation of the aforementioned expressions within the context of European Union law will require recourse to parameters, substantive provisions or even an existing interpretation drawn from international law sources, (18) such as the Berne Convention, can be left open for the purposes of answering this first question and will be discussed in the course of answering the second question.

B – *The second question*

38. The second question concerns a discrepancy between different language versions. The referring court wishes to ascertain whether Article 5(2)(d) of the InfoSoc Directive is to be read as 'on behalf of *and* under the responsibility of the broadcasting organisation' or as 'on behalf of *or* under the responsibility of the broadcasting organisation'. The question is imprecisely worded, since it refers to Article 5 of the InfoSoc Directive but clearly means recital 41 in its preamble, in the light of which the aforementioned Article 5 is to be interpreted. After all, the aforementioned linguistic discrepancy is to be found not in Article 5 of that directive but in its preamble.

1. Submissions of the parties to the proceedings

39. While the Commission points out that, in principle, the official languages share equal status and advocates an open-minded teleological approach, NCB takes a decidedly restrictive view, as, in the final analysis, the Spanish Government does too, which proceeds on the premise that the German-language version is unique and submits that logic too dictates that the provision should be read cumulatively. (19) DR and TV2 also rely on logic to support their case but come to precisely the opposite conclusion. (20)

2. Assessment of the question referred

40. In my opinion, the numerical ratio (21) of the language versions containing the conjunctions in question ('and' (22) or 'or' (23)) is as immaterial as differences of linguistic detail, the determining factor being the purpose and general scheme of the rules of which they form a part. (24)

a) Principle: no particular language version has primacy for the purposes of interpretation

41. According to settled case-law, the need for a uniform interpretation of the provisions of European Union law makes it impossible in principle for the text of a provision to be considered in isolation, but requires, on the contrary, that it be interpreted and applied in the light of the versions existing in the other official languages. (25) It should also be pointed out in this regard that the imprecision attendant upon multi-lingualism means than an individual word will have less force in the provisions of European Union law than it would in a monolingual environment. (26)

b) Does the reference to the Berne Convention and the WIPO Treaties have any implications for interpretation?

42. The wording of Article 5(2)(d) of the InfoSoc Directive, to which recital 41 relates, is based on Article 11*bis*(3) of the Berne Convention. (27)

43. According to the information contained on the World Intellectual Property Organisation (WIPO) website, (28) to date, 164 States have acceded to the Berne Convention, including all the Member States of the European Union. Unlike the WIPO Treaties, (29) however, the Berne Convention is open only to States.

44. Article 37(1)(c) of the Berne Convention provides that, in the event of doubts as to interpretation, the French text is to prevail.

45. In the present context of European Union law, however, the French text is not, by analogy so to speak with Article 37(1)(c) of the Berne Convention, to be given precedence over the other official languages.

46. It is true that the InfoSoc Directive must, in so far as is possible, be interpreted in the light of international law, (30) in particular the Berne Convention and the WIPO Copyright Treaty. That directive is after all intended inter alia to implement that Treaty, (31) Article 1(4) of which obliges the Contracting Parties to comply with *Articles 1 to 21* of the Berne Convention. (32) However, the provision to the effect that French is to prevail in the event of doubts as to interpretation is contained in *Article 37(1)(c)* of the Berne Convention and therefore falls outside the rules to which reference is made by the

WIPO Copyright Treaty, the obligations of which the InfoSoc Directive is intended to fulfil.

47. The view that, just because the InfoSoc Directive refers to the WIPO Copyright Treaty, the language regime laid down in Article 24 of that treaty should somehow be transferred to the InfoSoc Directive and the languages which it prescribes should, in the event of doubts as to interpretation, be regarded as authentic in the context of the InfoSoc Directive too, would be stretching the bounds of plausibility, not to say positively absurd. It is sufficient to point out in this regard that Article 24 of the WIPO Copyright Treaty describes six languages as being equally authentic, although these include, not surprisingly in the case of a WIPO treaty, not only French, English and Spanish – three official languages of the European Union – but also Russian, Arabic and Chinese, which, *de lege lata*, cannot in any way be taken into account for the purposes of interpreting the Directive.

48. Consequently, notwithstanding the international law context within which the InfoSoc Directive falls, no official language can be said to take precedence in the event of doubts as to interpretation.

c) Interpretation in the light of the drafting history, purpose and general scheme of Article 5(2) of the InfoSoc Directive in conjunction with recital 41

49. We are therefore left with the general principle that, where there is divergence between the various language versions of a European Union legal act, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part. (33) In this case, it is also helpful to consider the drafting history of the provision.

i) No clear-cut terminology

50. At first sight, a separate analysis of the terms in recital 41 that are linked by 'and' or 'or' takes us no further in preparing the ground for an examination based on the purpose and general scheme of the contested provision. It is not immediately possible to ascribe to the expressions 'on behalf [of]' or 'under the responsibility [of]' any clearly defined content that might be the subject of a cumulative or alternative interpretation and that might be classified under a particular scheme of rules. On the contrary, the terms overlap and are not very clear-cut.

51. The two terms are, however, vaguely suggestive of the distinction in, for example, German law between the 'genuine' and 'non-genuine' commissioning of productions. In this context, non-genuine commissioning means that the commissioned producer '[acts] from the outset on behalf *and* (34) for the account of the broadcasting organisation, which therefore directly acquires all ancillary

copyrights and usufructuary rights. In this case, the commissioned producer is not an independent film maker … but merely an outsourced assistant of the broadcasting organisation [(35)]'. However, if recital 41 of the InfoSoc Directive had intended to adopt that distinction *mutatis mutandis* with respect to ephemeral recordings – a term, incidentally, that cannot readily be interpreted as including the recording of a film, which is at least in principle likely to be permanent – and to exclude from the meaning of 'own facilities' only productions where the producer makes the programme in his own name (and possibly at his own risk) and must later transfer the ancillary copyrights and usufructuary rights acquired by him to the broadcasting organisation, it seems reasonable to assume that such an intention would have been more clearly expressed in the preamble.

52. Since the terms used in the provision do not themselves make it possible to draw any clear conclusions as to the legislature's intention, it is necessary now to look at the drafting history of the provision and to examine whether this is capable of shedding any light on its meaning and purpose.

ii) Drafting history of Article 5(2) of the InfoSoc Directive as a derogating provision

53. The drafting history of Article 5(2) of the InfoSoc Directive stretches back ultimately to the Berne Convention, from which the term 'own facilities' is taken.

54. The drafting history of recital 41 of the preamble to the InfoSoc Directive, which explains Article 5(2)(d) of that directive, is set out in documents detailing the relevant legislative texts (36) and shows that those involved in the legislative process held divergent views about the scope of the term 'own facilities'.

55. After all, a look at the drafting history of the contested provision and of the recital relating to it shows first of all that the European Parliament's primary concern was first and foremost to privilege acts of reproduction whose sole purpose is to facilitate a legitimate broadcasting act. (37) Apart from that, however, there was a desire, on the one hand, to base the wording of the contested provision on that of the Berne Convention, but, on the other hand, to open up and expand the narrow meaning of the term 'own facilities' which was used in a similar way in the Convention (and which was felt to be outdated). The intention was that that term should take account of technical and practical developments. The same concerns are in evidence in the Common Position reproduced in extract above.

56. The purpose of recital 41 was therefore to effect a cautious opening-up of the derogating provision, in principle to be interpreted strictly, while not entirely divesting it of its clarity of definition. Consequently, although the derogating provisions contained in the InfoSoc Directive must in principle be interpreted strictly, (38) a historical and teleological interpretation militates in favour of a

flexible and open construction of what recital 41 says, although it must be borne in mind that that recital is in the form of an example of the rule to which it relates and does not represent a binding and definitive definition.

iii) Interim conclusions based on the purpose and general scheme of the contested provision

57. In the light of the foregoing considerations, the question is whether the foregoing yields any guidance that will help to resolve the – ultimately syntactical – issue raised in the second question referred for a preliminary ruling.

58. In my opinion, because it is broader than the expression 'on behalf [of]', in which there is also an implicit notion of attribution giving rise to responsibility, the predominant concept in the compound term 'on behalf of [and/or] under the responsibility of' is that of responsibility. That concept is open to a broad or a narrow interpretation, and its connotations may vary from one language version to another.

59. Given that this case is specifically concerned with the assessment of productions commissioned from third-party undertakings, the criterion that defines each of the situations at issue is whether or not the broadcasting organisation carries responsibility – whatever form that may take – for a production or the ephemeral recording of that production which it has commissioned from the third-party undertaking.

60. I shall now determine the meaning of responsibility by means of considerations based on the purpose and general scheme of the contested provision.

61. From a schematic point of view, it must be borne in mind that a broad understanding of the criterion of 'responsibility' has a direct bearing on Article 5(2)(d) of the Directive. The more undertakings that are considered to be acting 'under the responsibility of the broadcasting organisation', the more recordings that will be considered to have been made 'by means of [the broadcasting organisation's] own facilities' within the meaning of Article 5(2)(d) of the Directive (in conjunction with recital 41) (39) and that will be eligible for the exception applicable to ephemeral recordings.

62. More so than any linguistic nuances in the recitals, the interpretation of Article 5(2)(d) of the InfoSoc Directive and of the expression 'on behalf of [and/or] under the responsibility of' must take into account the fact that the term 'own facilities', which is to be developed but not distorted by the notion of responsibility, is borrowed from one of the articles of the Berne Convention with which the European Union too has an obligation to comply. (40)

63. In keeping with its nature as an exception, the term 'own facilities' is interpreted strictly in the legal literature concerning the Berne Convention, (41) which fact, the legal literature states, in turn indicates that, if the meaning of that term is not to be diluted, the notion of responsibility must be subject to strict conditions. I am bound in principle to agree with that view, particularly since there would otherwise be a risk that an exception which should in principle be interpreted strictly would be less clearly defined.

64. In the light of my submissions in point 61 above, the interpretation of the InfoSoc Directive in this case involves a legal balancing act. (42) On the one hand, the views in evidence in the drafting history of the InfoSoc Directive indicate that the intention was that the term in question should be understood in a broad sense; on the other hand, the Berne Convention, whose approach is generally to be followed, deals with the matter in a decidedly strict fashion.

65. That said, and despite the terminological link to the Berne Convention, in my opinion, the view that the only persons to be regarded as acting under the responsibility of the broadcasting organisation are those who are part of the undertaking and thus operate effectively as agents – such as employees or contract workers – as well as, at most, wholly controlled affiliated companies, and that any outsourcing of production by the broadcasting organisation falls outside the scope of Article 5(2)(d) of the InfoSoc Directive, (43) is too restrictive, is not prescribed even by the standard of the concepts used in the Berne Convention itself, and is difficult to reconcile with the changing practical realities which the flexible use of terms in the contested directive expressly seeks to take into account.

66. In particular, media groups in which, for example, one of the holding company's subsidiaries is responsible for broadcasting operations, while its sister company makes the recordings, say as a service provider, might then, if such an arrangement were not considered to satisfy the criterion of 'the broadcasting organisation's own facilities', be at an economically unjustifiable disadvantage in relation to large-scale public corporations which assign those two functions to separate divisions that act independently but are legally connected.

67. I therefore suggest that the syntactical issue raised in the second question be broken down according to the purpose served and that recital 41, in the light of which Article 5(2)(d) of the Directive is to be interpreted, must be understood as meaning that the facilities to which it refers include those which are employed by the third party for the sole purpose of enabling a particular broadcasting organisation subsequently to use the ephemeral recording to make a lawful broadcast, provided that the recording is made under the broadcasting organisation's responsibility.

68. The practical relevance of the meaning of responsibility plays an important part in the assessment of the last question referred for a preliminary ruling.

C – *The third question referred*

69. By this question, the referring court is essentially asking the Court to look at certain practical situations and to draw from these the criteria that may be relevant for the purpose of deciding whether 'own facilities' have been used or whether [the producer] has acted 'on behalf of [and/or] under the responsibility of the broadcasting organisation'.

70. The question is ultimately whether any third-party production made on the basis of a contract – which may permit extensive artistic discretion – between a third party and the broadcasting organisation is automatically capable of benefiting from Article 5(2)(d) of the InfoSoc Directive or whether, in particular, the criterion that the producer must act 'under the responsibility of the broadcasting organisation' indicates that a more restrictive interpretation should be adopted to the effect that what matters is whether and to what extent the broadcasting organisation must assume liability for any misconduct on the third company's part.

1. Submissions of the parties

71. The Commission takes the purpose of the recording to be the decisive point of reference and submits that only ephemeral recordings qualify for the exception in question. Major film productions are unlikely to qualify, but it is for the national court to make an assessment of each individual case. DR and TV 2, on the other hand, take a broad approach favourable to the broadcasting organisation, the Spanish Government and NCB a restrictive approach, NCB arguing that contractual relations with the third party should not be considered sufficient unless it is certain that liability towards non-contracting parties rests with the broadcasting organisation. Exactly what form such liability might be for is ultimately left open.

2. Assessment of the question referred

72. On the basis of the conclusion arrived at in relation to Question 2, the response to Question 3 must be that the specific assessment of whether a third-party recording for a broadcast by a broadcasting organisation was made 'by means of [the broadcasting organisation's] own facilities' and also 'on behalf [and/or] under the responsibility of the broadcasting organisation', with the result that the recording is covered by the exception provided for in Article 5(2)(d) of the InfoSoc Directive, must be based on whether the facilities were employed for the sole purpose of enabling the broadcasting organisation subsequently to use the ephemeral recording to make a lawful broadcast, provided that the recording was made under the broadcasting organisation's responsibility.

73. The conditions under which such responsibility must be considered to exist are the subject of the following sub-questions.

a) Sub-question 3(a)

74. By this sub-question, the referring court essentially wishes to ascertain whether the term 'own facilities' is to be understood as meaning that a recording is covered by the exception only if the broadcasting organisation is liable towards third parties for the producer's acts and omissions in relation to the recording in the same way as it would be if it had committed those acts or omissions itself.

75. This sub-question is based on the idea of liability being attributed to the broadcasting organisation. That idea is compatible with the notion of responsibility under the InfoSoc Directive; indeed it is positively indispensable to that notion if the concept of 'own facilities' is not to become nebulous.

76. In keeping with the notion of responsibility under the InfoSoc Directive, the term 'own facilities' in Article 5(2)(d) of that directive must therefore be understood as meaning that a recording which was made by the producer for use in a broadcasting organisation's transmissions is covered by the exception laid down in Article 5(2)(d) only if the broadcasting organisation is liable towards third parties for the producer's acts and omissions in relation to the recording in the same way as it would be if the broadcasting organisation had itself committed those acts and omissions.

77. After all, the notion of responsibility in recital 41 would be meaningless if the broadcasting organisation's obligation to assume liability were not a binding condition of such responsibility. It is true that, by including the notion of responsibility, recital 41 seeks to give some flexibility to the concept of own facilities and to enable that concept to be adapted to changing circumstances. The necessary corollary of this, however, is that acts carried out by means of a broadcasting organisation's own facilities must also ultimately carry with them an obligation to assume liability towards third parties on the part of the very organisation to which those facilities are attributed as its own. The use of the notion of responsibility to extend the concept of 'facilities' thus implies an obligation – not defined in detail but postulated – on the part of the broadcasting organisation to assume liability.

78. This approach leaves open the question of exactly what form such liability should take, in particular whether it extends to shareholders or constitutes a joint and several liability and whether it is non-contractual liability, or contractual liability, such as the assumption of an obligation as a secondary debtor or as the primary debtor substituting the original debtor.

79. When read in that way, the broadcasting organisation's fundamental obligation to assume liability is a corollary of the extension of the meaning of 'own facilities' and, on the assumption that the third party involved acts lawfully, should normally be of no practical consequence.

b) Question 3(b)

80. By this sub-question, the referring court wishes to ascertain whether the condition that the recording must be made 'on behalf of [and/or] under the responsibility of the broadcasting organisation' is satisfied where a broadcasting organisation has commissioned the producer to make the recording so that the broadcasting organisation can transmit the recording in question itself, on the assumption that the broadcasting organisation concerned has the right to transmit the recording in question.

81. This sub-question therefore assumes a diametrically opposite situation, and asks in essence whether the notion of responsibility can be said to exist even in the absence of an obligation to assume liability on the part of the broadcasting organisation.

82. In keeping with my submissions in point 75 above, the condition that the recording must be made 'on behalf of [and/or] under the responsibility of the broadcasting organisation' is not automatically satisfied where the broadcasting organisation has commissioned the producer to make the recording so that the broadcasting organisation can transmit the recording in question itself, on the assumption that the broadcasting organisation concerned has the right to transmit the recording in question.

83. What matters here is the specific nature of the contractual relationship, its effects vis-à-vis third parties and, ultimately, whether the broadcasting organisation can be said to have an obligation to assume liability towards third parties, as discussed in point 75 above.

84. The following sub-questions look at further details of the possible contractual arrangements between the broadcasting organisation and the producer in the light of Article 5(2)(d) of the InfoSoc Directive and must be answered in accordance with the parameters set out above.

i) Question 3(b)(i)

85. By this sub-question, the national court seeks to ascertain whether the power to make artistic/editorial decisions may serve as a criterion for determining whether the producer is acting 'on behalf [and/or] under the responsibility of the broadcasting organisation'.

86. That question must be answered in the negative.

87. The criterion of who is responsible for taking the final and conclusive artistic/editorial decision on the *content* of the commissioned programme is not decisive, since, on the one hand, the only important factor in the exception provided for in the InfoSoc Directive is the *recording*, which is to say that the exception is concerned with the *technical reproduction*, and, on the other hand, artistic direction might be irrelevant to the issue of liability towards third parties. The only conclusive factor is the obligation to assume liability that is a condition of the broadcasting organisation's responsibility.

ii) Question 3(b)(ii)

88. By this sub-question, the referring court seeks to ascertain whether it is material whether the broadcasting organisation is liable towards third parties for the producer's obligations in relation to the recording in the same way as it would be if the broadcasting organisation had itself committed those acts and omissions.

89. In keeping with my submissions concerning the term 'own facilities' in point 75 above, it must be concluded that such an obligation to assume liability is relevant to and determinative of the criterion as to whether a producer is acting 'on behalf of [and/or] under the responsibility of the broadcasting organisation'.

iii) Question 3(b)(iii)

90. By this sub-question, the referring court essentially wishes to ascertain whether, in order to be regarded as acting 'on behalf of [and/or] under the responsibility of the broadcasting organisation', it makes any difference that the producer is contractually obliged by the agreement with the broadcasting organisation to carry the full economic risk for the commissioned programme.

91. This question must be answered in the negative.

92. The fact that the producer is contractually obliged by the agreement with the broadcasting organisation to deliver the programme in question to the broadcasting organisation for a specified price and has to meet, out of this price, all expenses that may be associated with the recording is not decisive. It makes no difference to the issue of liability towards third parties.

iv) Question 3(b)(iv)

93. By this sub-question, the referring court essentially wishes to ascertain whether the condition that the recording must be made 'on behalf of [and/or] under the responsibility of the broadcasting organisation' is affected by the fact

that it is the broadcasting organisation or the commissioned producer which assumes liability for the recording vis-à-vis third parties.

94. This question must be answered in the affirmative.

95. For, in accordance with my foregoing submissions, it does make a difference whether it is the broadcasting organisation or the producer which assumes liability for the recording vis-à-vis third parties, although the two may be jointly and severally liable. In any event, if the broadcasting organisation is under an obligation to assume liability, it must be assumed that the producer is acting 'on behalf [and/or] under the responsibility of the broadcasting organisation', although any – perhaps additional – joint and several liability on the part of the producer would not be detrimental.

c) Question 3(c)

96. Lastly, in accordance with my foregoing submissions, the condition that the recording must be made 'on behalf of [and/or] under the responsibility of the broadcasting organisation' is not automatically satisfied where a broadcasting organisation has commissioned the producer to make the recording so that the broadcasting organisation can transmit the recording in question itself, on the assumption that the broadcasting organisation in question has the right to transmit the recording, where the producer, in the agreement with the broadcasting organisation relating to the recording, has assumed the financial and legal responsibility for (i) meeting all the expenses associated with the recording in return for payment of an amount fixed in advance; (ii) the purchase of rights; and (iii) unforeseen circumstances, including any delay in the recording and breach of contract, but without the broadcasting organisation being liable towards third parties in respect of the producer's obligations in relation to the recording as if the broadcasting organisation had itself committed those acts and omissions.

97. The decisive criterion is the broadcasting organisation's liability towards third parties, mentioned last above. It must not be lacking.

VI – Conclusion

98. In the light of the foregoing, I propose that the questions referred should be answered as follows:

1. The expressions 'by means of their own facilities' in Article 5(2)(d) 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 and 'on behalf of [and/or] under the responsibility of the broadcasting organisation' in recital 41 of the preamble to that directive must be interpreted with reference to European Union law.

2. Recital 41, in the light of which Article 5(2)(d) of the directive is to be interpreted, is to be understood as meaning that the facilities referred to there include those which are employed for the sole purpose of enabling a particular broadcasting organisation subsequently to use the ephemeral recording to make a lawful broadcast, on the assumption that the recording is made under the responsibility of the broadcasting organisation.

3. A specific assessment as to whether a recording made by a third party ('the producer') for use in a broadcasting organisation's transmission was made 'by means of [the broadcasting organisation's] own facilities' and also 'on behalf of [and/or] under the responsibility of the broadcasting organisation', with the result that the recording is covered by the exception laid down in Article 5(2)(d) of Directive 2001/29, is to be based on whether the facilities are employed for the sole purpose of enabling the broadcasting organisation subsequently to use the ephemeral recording to make a lawful broadcast, on the assumption that the recording is made under the responsibility of the broadcasting organisation.

   (a) The term 'own facilities' in Article 5(2)(d) of Directive 2001/29 is to be understood as meaning that a recording which was made by the producer for use in a broadcasting organisation's transmissions is covered by the exception laid down in Article 5(2)(d) only if the broadcasting organisation is liable towards third parties for the producer's acts and omissions in relation to the recording in the same way as it would be if the broadcasting organisation had itself committed those acts and omissions.

   (b) The condition that the recording must be made 'on behalf of [and/or] under the responsibility of the broadcasting organisation' is not, however, always automatically satisfied where the broadcasting organisation has commissioned the producer to make the recording so that the broadcasting organisation can transmit the recording in question itself, on the assumption that the broadcasting organisation concerned has the right to transmit the recording in question.

   For the purpose of answering Question 3(b),

   (i) it is immaterial whether it is the broadcasting organisation or the Producer which has the final and conclusive artistic/editorial decision on the content of the commissioned programme under the agreement concluded between those parties;

   (ii) the question whether the broadcasting organisation is liable towards third parties for the producer's obligations in relation to the recording in the same way as it would be if the

broadcasting organisation itself had committed those acts and omissions is a decisive consideration;

(iii) it is immaterial whether the producer is contractually obliged by the agreement with the broadcasting organisation to deliver the programme in question to the broadcasting organisation for a specified price and has to meet, out of this price, all expenses that may be associated with the recording;

(iv) it is material whether it is the broadcasting organisation or the producer which assumes liability for the recording in question vis-à-vis third parties, although both may be jointly liable.

(c) The condition that the recording must be made 'on behalf of [and/or] under the responsibility of the broadcasting organisation' is not automatically satisfied where a broadcasting organisation has commissioned the producer to make the recording so that the broadcasting organisation can transmit the recording in question itself, on the assumption that the broadcasting organisation in question has the right to transmit the recording, where the producer, in the agreement with the broadcasting organisation relating to the recording, has assumed the financial and legal responsibility for (i) meeting all the expenses associated with the recording in return for payment of an amount fixed in advance; (ii) the purchase of rights; and (iii) unforeseen circumstances, including any delay in the recording and breach of contract, but without the broadcasting organisation being liable towards third parties in respect of the producer's obligations in relation to the recording in the same way as it would be if the broadcasting organisation had itself committed those acts and omissions.

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1 – Original language of the Opinion: German; language of the case: Danish.

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2 – OJ 2001 L 167, p. 10.

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3 – This term has its origin in the term 'ephemeral recordings' contained in the Berne Convention for the Protection of Literary and Artistic Works, into which it was inserted in 1948. It describes a phenomenon specific to broadcasting whereby, in preparation for a broadcast to be transmitted at a later time, the contributions of the copyright holders and artists engaged by the broadcaster must first be fixed on mechanical devices. Recordings made in this way are described as ephemeral recordings, although the Berne Convention leaves open the question of how long they may be preserved.

They are to some extent accessories because they are produced only for the purpose of exercising the existing right to broadcast the recorded work and may not be exploited in any other way (Ruijsenaars, H., 'Zur Vergänglichkeit von "ephemeren Aufnahmen"', ZUM 1999, 9. 707, 708).

4 – See p. 6 of the order for reference.

5 – The different language versions are not uniform in this regard, however, as the referring court points out in its second question. That said, the language versions which, like the German, employ the conjunction 'or', implying an alternative, are in the minority compared with those using a cumulative formulation ('and').

6 – Common Position (EC) No 48/2000 of 28 September 2000 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2000 C 344, p. 1).

7 – In the version of Consolidated Law No 202 of 27 February 2010.

8 – See p. 6 of that order.

9 – See in this regard paragraphs 5 and 6 of the written observations of NCB, paragraphs 2 to 10 of the written observations of DR and TV2 and paragraphs 4 to 7 of the written observations of the Commission.

10 – The Danish version of the Directive is in fact one of those in which recital 41 has a cumulative formulation using the conjunction 'and' (… Når undtagelsen eller indskrænkningen gælder efemere optagelser foretaget af radio- og fjernsynsforetagender, antages radio- og fjernsynsforetagendets egne midler at omfatte midler tilhørende en person, der handler på radio- og fjernsynsforetagendets vegne *og* under dette foretagendes ansvar.' [my emphasis]).

11 – Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 46 and the case-law cited there.

12 – On a similar issue of admissibility – albeit in the context of the interpretation of a framework decision – see most recently Joined Cases C-483/09 and C-1/10 *Gueye* [2011] ECR I-00000, paragraphs 34 to 45, and the Opinion of Advocate General Kokott in those cases, points 21 to 32, in which the question of a possible interpretation of national law *contra legem* is discussed.

13 – *Gueye* (footnote 12), paragraph 39 and the case-law cited there.

14 – We can leave aside the question whether the instruments of interpretation available in Danish national law allow the existing national law to be further developed in accordance with the directive but in isolation from the wording of that law, as the German Bundesgerichtshof (Federal Court) (BGH) held to be so in the wake of the judgment in Case C-404/06 *Quelle* [2008] ECR I-2685 (see BGH, judgment of 26 November 2008, VIII ZR 200/05, printed inter alia in ZGS 2009, 85).

15 – Paragraphs 46 to 51 and 127 of their written observations.

16 – See to this effect, most recently, Case C-34/10 *Brüstle* [2011] ECR I-00000, paragraph 25 and the case-law cited there; on the independent and uniform interpretation of the term 'fair compensation' in Article 5(2) of the InfoSoc Directive, see Case C-467/08 *Padawan* [2010] ECR I-00000, paragraphs 32 to 37 of the grounds and paragraph 1 of the operative part of the judgment; on the independent and uniform interpretation of the expression' communication to the public' within the meaning of Article 3(1) of the Directive, see Case C-306/05 *SGAE* [2006] ECR I-11519.

17 – On the meaning of 'embryo' and the interpretation of Directive 98/44/EC on the legal protection of biotechnological inventions, see *Brüstle* (footnote 16), paragraph 26 et seq.; on the independent and uniform interpretation of the expression 'fair compensation' in Article 5(2) of the InfoSoc Directive, see *Padawan* (footnote 16), paragraphs 32 to 37.

18 – See to this effect, most recently, Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-00000, paragraph 189 and the case-law cited there.

19 – Paragraph 25 of the Spanish Government's written observations.

20 – Paragraph 131 of its written observations.

21 – On the particularly extreme case of a divergence on the part of a single language version, see Case C-63/06 *Profisa* [2007] ECR I-3239, paragraphs 13 and 14 and the case-law cited there.

22 – As in the Bulgarian, Danish, English, Estonian, Finnish, French, Greek, Latvian, Lithuanian, Dutch, Polish, Romanian, Swedish, Slovak, Slovene, Spanish and Hungarian versions.

23 – As in the German, Italian, Portuguese and Czech versions.

24 – See Case C-30/77 *Bouchereau* [1977] ECR 1999, paragraph 14, Case C-449/93 *Rockfon* [1995] ECR I-4291, paragraph 28, and my Opinion in Case C-466/03 *Albert Reiss Beteiligungsgesellschaft*, paragraph 62 and footnote 32; on issues relating to the interpretation of European Union law, see Stotz, R., 'Die Rechtsprechung des EuGH' in Riesenhuber, K., Europäische Methodenlehre, 2nd edition, Walter de Gruyter 2010, § 22, point 13 et seq..

25 – *Profisa* (footnote 21), paragraph 13, and, most recently, Case C-445/09 *IMCSecurities* [2011] ECR I-00000, paragraph 25 and the case-law cited there.

26 – See Colneric, N., 'Auslegung des Gemeinschaftsrechts und gemeinschaftsrechtskonforme Auslegung', ZEuP, 2005, p. 225, 227.

27 – See Common Position No 48/2000 of 28 September 2000, reproduced in point 9 above, and point 10 of this Opinion.

28 – See http://www.wipo.int/treaties/en/ip/berne/.

29 – This refers to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). These were both ratified by the Community on 14 December 2009. See in this regard Council Decision 2000/278/EC of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (OJ 2000 L 89, p. 6).

30 – See also to this effect recital 44 in its preamble.

31 – See expressly to this effect recital 15 of the preamble to the InfoSoc Directive.

32 – *Football Association Premier League and others* (footnote 18), paragraph 189.

33 – *Profisa* (footnote 21), paragraph 14; *Bouchereau* (footnote 24), paragraph 14; Case C-482/98 *Italy* v *Commission* [2000] ECR I-10861, paragraph 49; Case C-1/02 *Borgmann* [2004] ECR I-3219, paragraph 25.

34 – My emphasis.

35 – Schack, H., Urheber- und Urhebervertragsrecht, 5th edition, Mohr Siebeck, Tübingen 2010, point 1225.

36 – Overview in the written observations submitted by DR and TV 2, paragraph 30 et seq.; see also Mayer, H-P, 'Richtlinie 2001/29/EG zur Harmonisierung bestimmter Aspekte des Urheberechts und der verwandten Schutzrechte in der Informationsgesellschaft', EuZW 2002, 325.

37 – See to this effect – in relation to Article 5(2) of the Directive – Amendment 39 of the legislative resolution of the European Parliament on the proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (COM(97)0628 – C4-0079/98 – 97/0359(COD)) (OJ 1999 C 150, p. 171, at p. 179).

38 – Cf. e.g. Case C-5/08 *InfopaqInternational* [2009] ECR I-6569, paragraphs 56 to 59, and Case C-145/10 *Panier* [2011] ECR I-0000, paragraphs 109 and 110.

39 – Provided that they also satisfy the criterion of having been made 'for [the broadcasting organisation's] own broadcasts'.

40 – See recital 44 of the preamble to the InfoSoc Directive.

41 – On the Berne Convention and the English expression 'by means of its own facilities', see von Lewinski, International Copyright Law and Policy, Oxford 2008, p. 165.

42 – On the 'considerable misgivings in treaty law' about a 'widening interpretation of the statutory definition' of the concept of own facilities in the light of recital 41, see Melichar, F., in Schricker, G., Loewenheim, U., *Urheberrecht, Kommentar*, 4th edition, published by C. H. Beck, Munich 2011, paragraph 55, point 5, with further references.

43 – On the other hand, referring to the rules of the Berne Convention, Walter, M.M., and von Lewinski, S., *European Copyright Law*, *A Commentary*, Oxford 2010, p. 1039, argue strongly against any outsourcing of 'recording activity to another company'. On the Berne Convention and the English expression 'by means of its own facilities', see von Lewinski (footnote 41), p. 165, point 5.191: '… this excludes the possibility of the organisation putting someone else in charge of this task'.