JUDGMENT OF THE COURT (Fourth Chamber)

27 February 2014 (*)

(Directive 2001/29/EC – Copyright and related rights in the information society – Definition of 'communication to the public' – Transmission of works in a spa establishment – Direct effect of the provisions of the directive – Articles 56 TFEU and 102 TFEU – Directive 2006/123/EC – Freedom to provide services – Competition – Exclusive right of collective management of copyright)

In Case C-351/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Krajský soud v Plzni (Czech Republic), made by decision of 10 April 2012, received at the Court on 24 July 2012, in the proceedings

OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s.

v

Léčebné lázně Mariánské Lázně a.s.,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as a Judge of the Fourth Chamber, M. Safjan, J. Malenovský and A. Prechal (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 26 June 2013,

after considering the observations submitted on behalf of:

– OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s., by A. Klech and P. Vojíř, advokáti, and by T. Matějičný, acting as Agent,

– Léčebné lázně Mariánské Lázně a.s., by R. Šup, advokát,

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the German Government, by T. Henze and J. Kemper, acting as Agents,

– the Hungarian Government, by M.Z. Fehér and K. Szíjjártó, acting as Agents,

– the Austrian Government, by A. Posch, acting as Agent,

– the Polish Government, by B. Majczyna, M. Drwięcki, D. Lutostańska and M. Szpunar, acting as Agents,

– the European Commission, by P. Ondrůšek, I.V. Rogalski and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 November 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 3 and 5 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), of Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36), and Articles 56 TFEU and 102 TFEU.

2 The request has been made in proceedings between OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. (‘OSA’), a musical works copyright collecting society, and Léčebné lázně Mariánské Lázně a.s. (‘Léčebné lázně’), a company managing a non-State health establishment providing spa treatment services, concerning the payment of copyright licence fees for the making available of works transmitted by radio or television in its bedrooms.

Legal context

European Union law

3 Recital 23 in the preamble to Directive 2001/29 states:

‘This Directive should harmonise further the author’s right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.’

4 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.’

5 Article 5 of Directive 2001/29, entitled ‘Exceptions and limitations’, provides:

‘...

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 [entitled “Reproduction right”] in the following cases:

...

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

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

...

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

...

5. The exceptions and limitations provided for in [paragraphs 2 and 3] shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.’

6 Article 4 of Directive 2006/123, entitled ‘Definitions’, provides:

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

1) “service” means any self-employed economic activity, normally provided for remuneration, as referred to in Article [57 TFEU];

...’

7 Article 16 of Directive 2006/123, entitled ‘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.

...'

8 Under Article 17 of Directive 2006/123, entitled 'Additional derogations from the freedom to provide services':

'Article 16 shall not apply to:

...

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

Czech law

9 Under Paragraph 23 of Law No 121/2000 on Copyright ('the Copyright Law'), as in force during the period in question, the radio or television broadcasting of a work means making a work transmitted by radio or television available by means of devices technically suitable for receiving a radio or television transmission. However, it does not include making a work available to patients when providing health care to them in establishments which provide such services.

10 Article 98 of the Copyright Law makes the collective management of copyright subject to the grant of an authorisation. Under paragraph 6(c) of that article, the relevant ministry may grant such an authorisation only if no other person already has such an authorisation for the exercise of the same right in relation to the same subject-matter and, in so far as a work is concerned, for the exercise of the same right in relation to the same kind of work.

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

11 OSA claims from Léčebné lázně the payment of 546 995 Czech crowns (CZK), together with late-payment interest, for having installed radio and television sets in the bedrooms of its spa establishments during the period in question (1 May 2008 to 31 December 2009), through which it made works managed by OSA available to its patients, without entering into a licence agreement with OSA. According to OSA, Article 23 of the Copyright law, in so far as it provides for an exemption from the payment of copyright fees for health care establishments when providing health care, is contrary to Directive 2001/29.

12 Léčebné lázně maintains that it is covered by the exception referred to in Article 23 of the Copyright law and contests the assertion that the provision in question is contrary to Directive 2001/29. It adds that if, however, it were found that the provision in question is indeed contrary to Directive 2001/29, that directive cannot be invoked in a dispute between individuals.

13 Furthermore, Léčebné lázně claims that OSA is abusing its monopoly position in the market, since the amount of the fees set out in its fee scales is disproportionately high in comparison with the fees demanded by the copyright collecting societies ('the collecting societies') in neighbouring countries for the same kind of use of copyright-protected works, which undermines its position in the market and its ability to compete with spa establishments in neighbouring countries. The clientele of its spa establishment is international, and foreign radio and television signals are received there. It claims that its freedom to provide services is restricted and that it would be in its interest to conclude a licence agreement with a collecting society which demands lower copyright fees established in another Member State.

14 In those circumstances, the Krajský soud v Plzni (Plzeň Regional Court) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Must Directive 2001/29 … be interpreted as meaning that an exception disallowing remuneration to authors for the communication of their work by television or radio transmission by means of television or radio receivers to patients in rooms in a spa establishment which is a business is contrary to Articles 3 and 5 [and, in particular] Article 5(2)(e), (3)(b) and (5)?

2. Is the content of those provisions of the directive concerning the above use of a work unconditional enough and sufficiently precise for … collecting societies to be able to rely on them before the national courts in a dispute between individuals, if the [Member] State has not transposed the directive correctly in national law?

3. Must Article 56 [TFEU] et seq. and Article 102 [TFEU] (or as the case may be Article 16 of Directive 2006/123 …) be interpreted as precluding the application of rules of national law which reserve the exercise of collective management of copyright in the territory of the [Member] State to only a single (monopoly) … collecting society and thereby do not allow recipients of services a free choice of a collecting society from another [Member] State of the European Union?'

The reopening of the oral procedure

15 By document lodged at the Court Registry on 16 December 2013, Léčebné lázně asked the Court to take 'measures of organisation of procedure and inquiry', including the production of a judgment of 14 May 2013 of the Městský soud v Praze (Prague Municipal Court), which was annexed to that document. By that document, Léčebné lázně also requested the reopening of the oral procedure. The reasons given for that request were the fact that the judgment in question is linked to the third question raised by the referring court and the fact that, according to Léčebné lázně, points 28 and 29 of the Opinion of the Advocate General contain erroneous statements.

16 Having regard to its content, that request must be regarded, at the current stage of the proceedings, as a request for the reopening of the oral procedure within the meaning of Article 83 of the Rules of Procedure of the Court.

17 Under that provision, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

18 In that respect, first of all, it must be pointed out that the referring court's first question, to which points 28 and 29 of the Advocate General's Opinion relate, has been debated at length before the Court by the interested parties. In those circumstances, the Court is of the view that it has all the information necessary to enable it to answer that question.

19 Furthermore, the judgment delivered by the Městský soud v Praze cannot be considered as a new fact which is of such a nature as to be a decisive factor for the answer to be given by the Court to the referring court's third question.

20 Lastly, it is not claimed that the present case must be decided on the basis of an argument which has not been debated before the Court.

21 Accordingly, the Court, after hearing the Advocate General, considers it appropriate to reject the request to reopen the oral procedure.

Consideration of the questions referred

The first question

22 By its first question, the referring court asks, in essence, whether Article 3(1) of Directive 2001/29 must be interpreted as precluding national legislation which excludes the right of authors to authorise or prohibit the communication of their works, by a spa establishment which is a business, through the intentional distribution of a signal by means of television or radio sets in the bedrooms of the establishment's patients. In addition, it raises the issue whether Article 5(2)(e), (3)(b) and (5) of that directive is such as to affect the interpretation of Article 3(1) in such a context.

23 In that respect, it must be noted that the principal objective of Directive 2001/29 is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication to the public. It follows that the concept of 'communication to the public' in Article 3(1) of that directive must be interpreted broadly, as recital 23 in the

preamble to the directive indeed expressly states (Case C-607/11 *ITV Broadcasting and Others* [2013] ECR, paragraph 20 and the case-law cited).

24 As OSA, the Czech government and the European Commission rightly point out, there is an act of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, when the operator of a spa establishment, such as that at issue in the main proceedings, gives its patients access to the broadcast works via television or radio sets by distributing in the patients' rooms the signal carrying the protected works.

25 First of all, the concept of 'communication' must be construed as referring to any transmission of the protected works, irrespective of the technical means or process used (Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-9083, paragraph 193).

26 Therefore, the operator of a spa establishment carries out a communication when it deliberately transmits protected works, by intentionally distributing a signal through television or radio sets, in the rooms of the patients of that establishment (see, to that effect, *Football Association Premier League and Others*, paragraph 196, and Case C-162/10 *Phonographic Performance (Ireland)* [2012] ECR, paragraph 40).

27 Furthermore, it must be noted that the term 'public' in Article 3(1) of Directive 2001/29 refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons (*ITV Broadcasting and Others*, paragraph 32).

28 As regards that last criterion specifically, the cumulative effect of making the works available to potential recipients should be taken into account. It is in particular relevant in that respect to ascertain the number of persons who have access to the same work at the same time and successively (Case C-306/05 *SGAE* [2006] ECR I-11519, paragraph 39, and *ITV Broadcasting and Others*, paragraph 33).

29 As the Advocate General noted in point 28 of her Opinion, a spa establishment is likely to accommodate, both at the same time and successively, an indeterminate but fairly large number of people who can receive broadcasts in their rooms.

30 Contrary to what is claimed by Léčebné lázně, the mere fact that the patients of a spa establishment generally stay for a longer period than the guests of a hotel does not invalidate that finding, since the making available of the works to such patients is likely, as a result of its cumulative effects, to concern a fairly large number of people.

31 It must also be pointed out that, in order for there to be a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29, it is also necessary for the work broadcast to be transmitted to a new public, that is to say, to a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public (*Football Association Premier League and Others*, paragraph 197 and the case-law cited).

32 Like the guests of a hotel, the patients of a spa establishment constitute such a new public. The spa establishment is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its patients. In the absence of that intervention, its patients would not, in principle, be able to enjoy the broadcast work (see, to that effect, *SGAE*, paragraphs 41 and 42).

33 It follows that communication by a spa establishment, such as that at issue in the main proceedings, of protected works through the intentional distribution of a signal by means of television or radio sets in the bedrooms of its patients constitutes a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29.

34 That interpretation is not invalidated by Léčebné lázně's argument that an act of communication such as that at issue in the main proceedings has the same characteristics as a communication of protected works by a dentist at his dental practice, in respect of which the Court held, in Case C-135/10 *SCF* [2012] ECR, that it did not constitute a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29.

35 In that respect, it suffices to note that the principles developed in *SCF* are not relevant in the present case, since *SCF* does not concern the copyright referred to in Article 3(1) of Directive 2001/29, but rather the right to remuneration of performers and producers of phonograms provided for in Article 8(2) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61).

36 Since a communication of protected rights such as that at issue in the main proceedings constitutes a 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, it is clear from the wording of that provision that the national legislation must provide authors with the exclusive right to authorise or prohibit such communication, unless that communication is covered by an exception or a limitation provided for in Directive 2001/29.

37 In that respect, it is necessary, in particular, to examine whether Article 5(2)(e), (3)(b), and (5) of that directive, to which the referring court expressly refers, may form the basis of such an exception or limitation.

38 First, Article 5(2)(e) of Directive 2001/29, as can be seen from its wording, only forms the basis for an exception or limitation to the reproduction right, provided for in Article 2 of that directive. It cannot therefore form the basis for an exception or limitation to the exclusive right to authorise or prohibit any communication to the public of their works, provided for in Article 3(1) of that directive.

39 Secondly, Article 5(3)(b) of Directive 2001/29 provides that Member States may provide for exceptions or limitations to the rights provided for in Article 3 in respect of uses, for the benefit of people with a disability, which are directly related to the disability and are of a non-commercial nature, to the extent required by the specific

disability. There is nothing in the documents before the Court to indicate that all the conditions laid down in Article 5(3)(b) are met in a case such as that in the main proceedings.

40 Lastly, Article 5(5) of Directive 2001/29 does not provide for exceptions or limitations that the Member States may establish in respect of the rights referred to, in particular, in Article 3(1) of that directive but merely states the scope of the exceptions and limitations provided for in the paragraphs preceding Article 5(5).

41 In view of the foregoing, the answer to the first question is that Article 3(1) of Directive 2001/29 must be interpreted as precluding national legislation which excludes the right of authors to authorise or prohibit the communication of their works, by a spa establishment which is a business, through the intentional distribution of a signal by means of television or radio sets in the bedrooms of the establishment's patients. Article 5(2)(e), (3)(b) and (5) of that directive is not such as to affect that interpretation.

The second question

42 By its second question, the referring court asks, in essence, whether Article 3(1) of Directive 2001/29 must be interpreted as meaning that it can be relied on by a collecting society in a dispute between individuals for the purpose of setting aside national legislation which is contrary to that provision.

43 In that respect, it must be recalled that, according to settled case-law, even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties (Case C-176/12 *Association de médiation sociale* [2014] ECR, paragraph 36 and the case-law cited).

44 However, the Court has held that a national court, when hearing a case between individuals, is required, when applying the provisions of domestic law, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive (see, to that effect, *Association de médiation sociale*, paragraph 38 and the case-law cited).

45 Nevertheless, the Court has stated that this principle of interpreting national law in conformity with European Union law has certain limits. Thus the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law *contra legem* (*Association de médiation sociale*, paragraph 39 and the case-law cited).

46 In addition, since, in the context of the reasons stated for the second question, the referring court raises an issue concerning the real nature of a collecting society such as OSA, referring to Case C-188/89 *Foster and Others* [1990] ECR I-3313, it must be

added that such a collecting society would still not be able to rely on Article 3(1) of Directive 2001/29 in order to set aside national legislation contrary to that provision if it were to be regarded as an emanation of the State.

47 If that were the case, the situation, in circumstance such as those in the main proceedings, would not be that of an individual invoking the direct effect of a provision of a directive against a Member State, but rather the reverse. It is settled case-law that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (Case C-282/10 *Dominguez* [2012] ECR, paragraph 37 and the case-law cited).

48 In view of the foregoing, the answer to the second question is that Article 3(1) of Directive 2001/29 must be interpreted as meaning that it cannot be relied on by a collecting society in a dispute between individuals for the purpose of setting aside national legislation contrary to that provision. However, the national court hearing such a case is required to interpret that legislation, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive.

The third question

Admissibility

49 OSA and the Czech and Austrian governments query the admissibility of the third question. There is no indication in the order for reference that Léčebné lázně sought to contract with a collecting society established in another Member State. Likewise, in their view, the answer to the third question is irrelevant to the resolution of the dispute in the main proceedings. Whatever the answer, it cannot exempt Léčebné lázně from its obligation to pay OSA the fees in question.

50 In that respect, it must be noted that a reference for a preliminary ruling made by a national court may be declared inadmissible only where it is quite obvious that the interpretation of European Union law that is sought is unrelated to the actual 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 (see, inter alia, Case C-500/10 *Belvedere Costruzioni* [2012] ECR, paragraph 16 and the case-law cited).

51 It is clear from the order for reference that Léčebné lázně relies on the provisions referred to in the referring court's third question in support of its claim that the fees demanded by OSA are disproportionately high in comparison with the fees demanded by collecting societies in neighbouring Member States.

52 In those circumstances, it is not obvious that the interpretation sought is unrelated to the actual facts of the main action or its purpose, or that the problem is hypothetical.

53 Accordingly, the third question is admissible.

Substance

54 By its third question, the referring court asks, in essence, whether Article 16 of Directive 2006/123 and Articles 56 TFEU and/or 102 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which reserves the exercise of collective management of copyright in respect of certain protected works in the territory of the Member State concerned to a single collecting society and thereby prevents users of such works, such as the spa establishment in the main proceedings, from benefiting from the services provided by another collecting society established in another Member State.

55 OSA disputes that the legislation in question prevents a user of the protected works, such as the spa establishment at issue in the main proceedings, from benefiting from the services provided by a collecting society established in another Member State.

56 However, it is not for the Court to make a ruling in that respect. Questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance (see, in particular, Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 27 and the case-law cited).

– Preliminary observations

57 Since both Article 16 of Directive 2006/123 and Article 56 TFEU et seq. concern the freedom to provide services, it must be examined whether a collecting society, such as OSA, may be regarded as providing a service to a user of protected works, such as the spa establishment at issue in the main proceedings. OSA and the governments which submitted observations to the Court are of the view that it cannot.

58 In that respect, it must be noted that, as can be seen from Article 4(1) of Directive 2006/123, the concept of ‘service’ referred to in that directive is the same as that referred to in Article 57 TFEU.

59 The activities of collecting societies are subject to the provisions of Article 56 TFEU et seq. relating to the freedom to provide services (see, to that effect, Case 22/79 *Greenwich Film Production* [1979] ECR 3275, paragraph 12, Case 7/82 *GVL* v*Commission* [1983] ECR 483, paragraph 38; and Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, paragraph 24).

60 That is the case not only as regards the relationship between a collecting society and a copyright holder, as can be seen from the case-law cited in the above paragraph, but also as regards the relationship between a collecting society, such as OSA, and a user of protected works, such as the spa establishment at issue in the main proceedings.

61 Such a collecting society facilitates the acquisition, by that user, of an authorisation for the use of protected works and the payment of fees owed to the copyright holders, with the result that it must be regarded as also providing a service to that user.

62 Furthermore, as the Commission rightly points out, it is of little importance, in that regard, whether it is the copyright holder or the user of the protected works which pays for that service. Article 57 TFEU does not require that the service provided be paid for by those who benefit from it (Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraph 16).

63 It follows that a collecting society, such as OSA, must be regarded as providing a 'service' within the meaning of both Article 4(1) of Directive 2006/123 and Article 57 TFEU to the users of protected works, such as the spa establishment at issue in the main proceedings.

– The interpretation of Article 16 of Directive 2006/123

64 As regards the question whether Article 16 of Directive 2006/123 applies to such a service, it must be observed, first of all, that under Article 17(11) of that directive, Article 16 does not apply to copyright and to neighbouring rights.

65 As the Advocate General pointed out in point 64 of her Opinion, since only services can be excluded from the application of Article 16 of Directive 2006/123, Article 17(11) of that directive must be interpreted as excluding the service relating to copyright referred to in paragraph 63 of the present judgment from the scope of Article 16.

66 It follows that, since Article 16 of Directive 2006/123 is inapplicable, it does not preclude legislation such as that at issue in the main proceedings.

– The interpretation of Article 56 TFEU

67 As can be seen from the order for reference, legislation such as that at issue in the main proceedings is liable to prevent a spa establishment, such as that at issue in the main proceedings, from benefiting, as a user of protected works, from the services of a collecting society established in another Member State.

68 Since such a service is of a cross-border nature, Article 56 TFEU is applicable to it (see, to that effect, *Bond van Adverteerders and Others*, paragraph 15).

69 Moreover, legislation such as that at issue in the main proceedings, prohibiting, in practice, the provision of such a service, constitutes a restriction on the freedom to provide services (see, to that effect, *Football Association Premier League and Others*, paragraph 85).

70 That restriction cannot be justified unless it serves overriding reasons in the public interest, is suitable for securing the attainment of the public interest objective which it pursues and does not go beyond what is necessary in order to attain it (see, inter alia, *Football Association Premier League and Others*, paragraph 93).

71 As OSA, the governments which submitted observations to the Court, and the Commission rightly point out, the protection of intellectual property rights constitutes such an overriding reason in the public interest (see, to that effect, *Football Association Premier League and Others*, paragraph 94 and the case-law cited).

72 Furthermore, legislation such as that at issue in the main proceedings – which grants a collecting society, such as OSA, 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 as suitable for protecting intellectual property rights, since it is liable to allow the effective management of those rights and an effective supervision of their respect in that territory.

73 As regards the question whether such legislation goes beyond what is necessary in order to attain the objective of protecting intellectual property rights, it must be pointed out that, as can be seen from the observations submitted to the Court, legislation such as that at issue in the main proceedings forms part of a context of territory-based copyright protection, which also encompasses reciprocal representation agreements.

74 By those agreements, concluded between collecting societies, the societies confer on each other the right to grant, within the territory for which they are responsible, the requisite authorisations for any public performance of protected works of members of the other societies and to subject those authorisations to certain conditions, in conformity with the laws applicable in the territory in question (see, to that effect, Case 395/87 *Tournier* [1989] ECR 2521, paragraph 17, and Joined Cases 110/88, 241/88 and 242/88 *Lucazeau and Others* [1989] ECR 2811, paragraph 11).

75 In that respect, the Court has held that reciprocal representation agreements between the collecting societies are intended, inter alia, to enable those societies to rely, for the protection of their repertoires in another State, on the organisation established by the collecting society operating there, without being obliged to add to that organisation their own network of contracts with users and their own local monitoring arrangements (see, to that effect, *Tournier*, paragraph 19, and *Lucazeau and Others*, paragraph 13).

76 The observations submitted to the Court have not shown, as regards a communication such as that at issue in the main proceedings, that – as European Union Law stands at present – there is another method allowing the same level of copyright protection as the territory-based protection and thus territory-based supervision of those rights, a method of which legislation such as that at issue in the main proceedings forms a part.

77 Moreover, the debate before the Court has shown that – in circumstances such as those at issue in the main proceedings – to allow a user of protected works to obtain authorisation for the use of those works and pay fees due through any collecting society established in the European Union would, as European Union law stands at present, give rise to significant monitoring problems relating to the use of those works and the payment of the fees due.

78 In those circumstances, it cannot be found that legislation such as that at issue in the main proceedings, because it prevents a user of the protected works – such as the spa establishment at issue in the main proceedings – from benefiting from the services provided by a collecting society established in another Member State, goes beyond what is necessary in order to attain the objective of protecting intellectual property rights.

79 In the light of the foregoing, Article 56 TFEU must be interpreted as not precluding such legislation.

– The interpretation of Article 102 TFEU

80 As a preliminary, it must be pointed out, in the first place, that a collecting society, such as OSA, is an undertaking to which Article 102 TFEU applies (see, to that effect, Case 127/73 *BRT and Société belge des auteurs, compositeurs et éditeurs* [1974] ECR 313, paragraphs 6 and 7, 'BRT II').

81 In the second place, Article 106(2) TFEU, which contains specific rules which apply to, inter alia, undertakings entrusted with the operation of services of general economic interest, does not preclude the application of Article 102 TFEU to a collecting society such as OSA. Such a collecting society, to which the State has not assigned any task and which manages private interests, even though it is a case of intellectual property rights protected by law, does not fall within the scope of Article 106(2) TFEU (see, to that effect, *BRT II*, paragraph 23, and *GVL* v *Commission*, paragraph 32).

82 However, legislation such as that at issue in the main proceedings is liable to fall within the scope of Article 106(1) TFEU. That legislation grants exclusive rights to a collecting society such as OSA as regards the management of copyright relating to a certain category of works in the territory of the Member State concerned, thereby preventing other undertakings from exercising the economic activity in question in the same territory (see, to that effect, Case C-475/99 *Ambulanz Glöckner*[2001] ECR I-8089, paragraph 24).

83 As regards the interpretation of Article 102 TFEU in such a context, it is settled case-law that the mere creation of a dominant position through the grant of exclusive rights within the meaning of Article 106(1) TFEU is not in itself incompatible with Article 102 TFEU. A Member State will be in breach of the prohibitions laid down by those two provisions only if the undertaking in question, merely by exercising the exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such

abuses (Case C-437/09*AG2R Prévoyance* [2011] ECR I-973, paragraph 68 and the case-law cited).

84 Therefore, the mere fact that a Member State grants a collecting society, such as OSA, a monopoly over the management of copyright relating to a category of protected works in the territory of that Member State is not, as such, contrary to Article 102 TFEU.

85 However, as can be seen from the order for reference, the third question is intended to allow the referring court to rule on the argument, raised by Léčebné lázně in the main proceedings, that the fees demanded by OSA are disproportionately high in comparison to the fees demanded by collecting societies in neighbouring States.

86 In that respect, it must be pointed out that a collecting society, such as OSA, which has a monopoly over the management in the territory of a Member State of copyright relating to a category of protected works, has a dominant position in a substantial part of the internal market within the meaning of Article 102 TFEU (see, to that effect, Case C-52/07 *Kanal 5 and TV 4* [2008] ECR I-9275, paragraph 22).

87 Where such a collecting society imposes fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position within the meaning of Article 102 TFEU. In such a case it is for the collecting society in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States (see, to that effect, *Tournier*, paragraph 38, and *Lucazeau and Others*, point 25).

88 Likewise, such an abuse might lie in the imposition of a price which is excessive in relation to the economic value of the service provided (*Kanal 5 and TV 4*, paragraph 28).

89 Moreover, if such an abuse were found and if it were attributable to the legislation applicable to that collecting society, that legislation would be contrary to Article 102 TFEU and Article 106(1) TFEU, as is clear from the case-law cited in paragraph 83 above.

90 It is for the referring court to examine, if necessary, whether such a situation exists in the case in the main proceedings.

91 In the light of all the foregoing, the answer to the third question is that Article 16 of Directive 2006/123, and Articles 56 TFEU and 102 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which reserves the exercise of collective management of copyright in respect of certain protected works in the territory of the Member State concerned to a single collecting society and thereby prevents users of such works, such as the spa establishment in the

main proceedings, from benefiting from the services provided by another collecting society established in another Member State.

92 However, Article 102 TFEU must be interpreted as meaning that the imposition by the collecting society of fees for its services which are appreciably higher than those charged in other Member States (a comparison of the fee levels having been made on a consistent basis) or the imposition of a price which is excessive in relation to the economic value of the service provided are indicative of an abuse of a dominant position.

Costs

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

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

1. Article 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 must be interpreted as precluding national legislation which excludes the right of authors to authorise or prohibit the communication of their works, by a spa establishment which is a business, through the intentional distribution of a signal by means of television or radio sets in the bedrooms of the establishment's patients. Article 5(2)(e), (3)(b) and (5) of that directive is not such as to affect that interpretation.

2. Article 3(1) of Directive 2001/29 must be interpreted as meaning that it cannot be relied on by a copyright collecting society in a dispute between individuals for the purpose of setting aside national legislation contrary to that provision. However, the national court hearing such a case is required to interpret that legislation, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive.

3. Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, and Articles 56 TFEU and 102 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which reserves the exercise of collective management of copyright in respect of certain protected works in the territory of the Member State concerned to a single copyright collecting society and thereby prevents users of such works, such as the spa establishment in the main proceedings, from benefiting from the services provided by another collecting society established in another Member State.

However, Article 102 TFEU must be interpreted as meaning that the imposition by that copyright collecting society of fees for its services which are appreciably higher than those charged in other Member States (a comparison of the fee levels having been made on a consistent basis) or the imposition of a price which is excessive in relation to the economic value of the service provided are indicative of an abuse of a dominant position.

[Signatures]