Court of Justice EU, 21 March 2024, Liberi editori e autori (LEA) v Jamendo

COPYRIGHT

The freedom to provide services (article 56 TFEU), read in conjunction with the Collective Management Directive (2014) precludes

- **legislation of a Member State which generally and absolutely excludes the possibility of independent management entities established in another Member State providing their copyright management services in that first Member State.**

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

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

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

Request for a preliminary ruling inadmissible in so far as it relates to independent management entities established in Italy

- **Request is hypothetical in so far as it refers to independent management entities established in the Member State concerned**.

As it is, Jamendo is established in Luxembourg and there is nothing in the documents before the Court to suggest that the dispute in the main proceedings concerns any independent management entity established in Italy.

Access by independent management entities to copyright management activities not exhaustively harmonised at Union level

- **Collective Management Directive does not preclude legislation of a Member State which generally and absolutely excludes the possibility of independent management entities established in another Member State providing their copyright management services in that first Member State.**

- **E-commerce Directive does not apply to management of copyright and neighboring rights**

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

- **Management of copyright and neighboring rights does not fall within the scope of Services Directive 2006**

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

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

Source: **ECLI:EU:C:2024:254**

Court of Justice EU, 21 March 2024

(E. Regan, M. Ilešič, I. Jarukaitis, A. Kumin en D. Gratsias)

JUDGMENT OF THE COURT (Fifth Chamber)

21 March 2024 (*)

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

In Case C-10/22,

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

Liberi editori e autori (LEA)

v
Jamendo SA,
THE COURT (Fifth Chamber),
composed of E. Regan, President of the Chamber, M. Ilešič (Rapporteur), I. Jarukaitis, A. Kumin and D. Gratsias, Judges,
Advocate General: M. Szpunar,
Registrar: C. Di Bella, Administrator,
having regard to the written procedure and further to the hearing on 9 February 2023,
after considering the observations submitted on behalf of:
– Liberi editori e autori (LEA), by D. Malandrino, A. Peduto and G.M. Riccio, avvocati,
– Jamendo SA, by M. Dalla Costa, G. Donà and A. Ferraro, avvocati,
– the Italian Government, by G. Palmieri, acting as Agent, and by R. Guizzi, avvocato dello Stato,
– the Austrian Government, by A. Posch, J. Schmoll, G. Kunnert and F. Parapatits, acting as Agents,
– the European Commission, by V. Di Bucci and J. Samnadda, acting as Agents,
after hearing **the Opinion of the Advocate General at the sitting on 25 May 2023**,
gives the following
Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ 2014 L 84, p. 72).
2 The request has been made in proceedings between Liberi editori e autori (LEA) (Free publishers and authors) and Jamendo SA concerning the latter's intermediation activity in Italy in respect of copyright and related rights.
Legal context
European Union law
Directive 2000/31/EC
3. Article 1 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('*Directive on electronic commerce*') (OJ 2000 L 178, p. 1), provides, in paragraph 1:
'*This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.*'
4 Under Article 3(2) of that directive:
'*Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.*'
5 Article 3(3) of that directive provides that, inter alia, Article 3(2) thereof is not to apply to the fields referred to in the annex to that directive.
6 According to the wording of that annex, Article 3(1) and (2) of Directive 2000/31 do not apply '*to: ... copyright, neighbouring rights, rights referred to in [Council] Directive 87/54/EEC [of 16 December 1986 on the legal protection of topographies of semiconductor products (OJ 1987 L 24, p. 36)] and Directive 96/9/EC [of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20)] as well as industrial property rights*'.
Directive 2006/123/EC
7 Article 1 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36) is headed '*Subject matter*' and provides, in paragraph 1:
'*This Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services.*'
8 Article 3 of that directive, headed '*Relationship with other provisions of Community law*', provides, in paragraph 1:
'*If the provisions of this Directive conflict with a provision of another Community act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions. ...*'
9 Article 16 of that directive, headed '*Freedom to provide services*', provides, in paragraph 1:
'*Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.*
...'
10 As provided in Article 17 of that directive, headed '*Additional derogations from the freedom to provide services*':
'*Article 16 shall not apply to:*
...
(11) copyright, neighbouring rights ...'
Directive 2014/26
11 Recitals 2 to 4, 7 to 9, 15, 16, 19 and 55 of Directive 2014/26 state:
'(2) The dissemination of content which is protected by copyright and related rights, including books, audiovisual productions and recorded music, and services linked thereto, requires the licensing of rights by different holders of copyright and related rights, such as authors, performers, producers and publishers. It is normally for the rightholder to choose between the individual or collective management of his rights, unless Member States provide otherwise, in compliance with Union law and the international obligations of the Union and its Member States. Management of copyright and related rights includes granting of licences to users, auditing of users, monitoring of the use of rights, enforcement of copyright and related rights, collection of rights revenue derived from the exploitation of rights and the distribution of the amounts due to rightholders. Collective management organisations enable rightholders to be remunerated for uses which they

would not be in a position to control or enforce themselves, including in non-domestic markets.

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

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

...

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

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

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

...

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

(16) Audiovisual producers, record producers and broadcasters license their own rights, in certain cases alongside rights that have been transferred to them by, for instance, performers, on the basis of individually negotiated agreements, and act in their own interest. Book, music or newspaper publishers license rights that have been transferred to them on the basis of individually negotiated agreements and act in their own interest. Therefore audiovisual producers, record producers, broadcasters and publishers should not be regarded as "independent management entities". Furthermore, authors' and performers' managers and agents acting as intermediaries and representing rightholders in their relations with collective management organisations should not be regarded as "independent management entities" since they do not manage rights in the sense of setting tariffs, granting licences or collecting money from users.

...

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

...

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

...

...

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

Article, this Directive does not go beyond what is necessary in order to achieve those objectives.'

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

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

13 Article 2 of that directive, headed '*Scope*', is worded as follows:

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

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

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

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

14 Article 3 of that directive, headed '*Definitions*', provides:

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

(a) "collective management organisation" means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria:

(i) it is owned or controlled by its members;

(ii) it is organised on a not-for-profit basis;

(b) "independent management entity" means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is:

(i) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and

(ii) organised on a for-profit basis;

…

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

…'

15 Article 4 of Directive 2014/26, headed '*General principles*', provides:

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

16 As provided in Article 5 of that directive, headed '*Rights of rightholders*':

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

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

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

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

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

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

…'

17 Article 6 of that directive, headed '*Membership rules of collective management organisations*', states, in paragraph 2:
'*A collective management organisation shall accept rightholders and entities representing rightholders, including other collective management organisations and associations of rightholders, as members if they fulfil the membership requirements, which shall be based on objective, transparent and non-discriminatory criteria. …*'
18 Article 16 of Directive 2014/26, headed 'Licensing', provides:
'*1. Member States shall ensure that collective management organisations and users conduct negotiations for the licensing of rights in good faith. …*
2. Licensing terms shall be based on objective and non-discriminatory criteria. …
Rightholders shall receive appropriate remuneration for the use of their rights. Tariffs for exclusive rights and rights to remuneration shall be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject matter, as well as in relation to the economic value of the service provided by the collective management organisation. …
3. Collective management organisations shall reply without undue delay to requests from users, indicating, inter alia, the information needed in order for the collective management organisation to offer a licence.
Upon receipt of all relevant information, the collective management organisation shall, without undue delay, either offer a licence or provide the user with a reasoned statement explaining why it does not intend to license a particular service.
…'
19 Article 30 of that directive, headed '*Obligation to represent another collective management organisation for multi-territorial licensing*', provides, in paragraph 1:
'*Member States shall ensure that where a collective management organisation which does not grant or offer to grant multi-territorial licences for the online rights in musical works in its own repertoire requests another collective management organisation to enter into a representation agreement to represent those rights, the requested collective management organisation is required to agree to such a request if it is already granting or offering to grant multi-territorial licences for the same category of online rights in musical works in the repertoire of one or more other collective management organisations.*'
20 As provided in Article 36 of that directive, headed '*Compliance*':
'*1. Member States shall ensure that compliance by collective management organisations established in their territory with the provisions of national law adopted pursuant to the requirements laid down in this Directive is monitored by competent authorities designated for that purpose.*
…
3. Member States shall ensure that the competent authorities designated for that purpose have the power to impose appropriate sanctions or to take appropriate measures where the provisions of national law adopted in implementation of this Directive have not been complied with. Those sanctions and measures shall be effective, proportionate and dissuasive.
…'
21 Article 39 of Directive 2014/26, headed '*Notification of collective management organisations*', provides:
'*By 10 April 2016, Member States shall provide the [European] Commission, on the basis of the information at their disposal, with a list of the collective management organisations established in their territories.*
Member States shall notify any changes to that list to the Commission without undue delay.
The Commission shall publish that information and keep it up to date.'
22 Article 41 of that directive, headed '*Expert group*', provides:
'*An expert group is hereby established. It shall be composed of representatives of the competent authorities of the Member States. The expert group shall be chaired by a representative of the Commission and shall meet either on the initiative of the chairman or at the request of the delegation of a Member State. The tasks of the group shall be as follows:*
(a) to examine the impact of the transposition of this Directive on the functioning of collective management organisations and independent management entities in the internal market, and to highlight any difficulties;
…'

Italian law

23 Article 180 of legge n. 633 – Protezione del diritto d'autore e di altri diritti connessi al suo esercizio (Law No 633 on the protection of copyright and related rights) of 22 April 1941 (GURI No 166 of 16 July 1941), as amended by decreto legge n. 148 – Disposizioni urgenti in materia finanziaria e per esigenze indifferibili (Decree-Law No 148 laying down urgent provisions on financial matters and non-deferrable needs) of 16 October 2017 (GURI No 242 of 16 October 2017) ('*Law on the protection of copyright*'), provides:
'*The activity of intermediary, however implemented, by any direct or indirect form of intervention, mediation, mandate, representation and even assignment for the exercise of rights of representation, execution, performing, broadcasting including communication to the public via satellite and mechanical and cinematic reproduction of protected works, shall be exclusively reserved to the Società italiana degli autori ed editori (SIAE, Italian Society of Authors and Publishers) and to the other collective management organisations referred to in [decreto legislativo n. 35 – Attuazione della direttiva 2014/26/UE sulla gestione collettiva dei diritti d'autore e dei diritti connessi e sulla concessione di licenze multiterritoriali per i diritti su opere musicali per l'uso online nel mercato interno (Legislative Decree No 35 transposing [Directive 2014/26/EU]) of 15 March 2017 (GURI No 72 of 27 March 2017; 'Legislative Decree No 35/2017')].*
That activity shall be carried out for the purpose of:

(1) granting, on behalf of and in the interests of the beneficiaries, licences and authorisations for the exploitation of protected works;
(2) collecting the proceeds deriving from those licences and authorisations;
(3) distributing those revenues among the beneficiaries.
The activity of the [SIAE] shall also be carried out according to the rules established by regulation in the foreign countries in which it has organised representation.
The abovementioned exclusivity of powers shall not affect the power of the author, his or her successors or beneficiaries to exercise directly the rights recognised by this law.
…'

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

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

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

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

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

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

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

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

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

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

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

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

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

Admissibility of the request for a preliminary ruling

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

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

sufficient to establish the artificial nature of the main proceedings.

36 In that regard, it must be borne in mind that, according to the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (**judgment of 12 October 2023, INTER Consulting, C-726/21, EU:C:2023:764**, paragraph 32 and the case-law cited).

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

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

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

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

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

Consideration of the question referred

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

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

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

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

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

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

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

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

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

51 Moreover, recital 19 of that directive cannot lead to an interpretation of Article 2(4) and Article 5(2) that would be inconsistent with the wording of those provisions. According to settled case-law, while the preamble to an EU act may explain the content of the provisions of that act and provides elements of interpretation which are likely to clarify the intention of the author of that act, it has no binding legal value and cannot be relied upon to derogate from the provisions of the act itself or to interpret those provisions in a manner contrary to their wording (see, to that effect, judgment of 25 March 2021, Balgarska Narodna Banka, C-501/18, EU:C:2021:249, paragraph 90 and the case-law cited).

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

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

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

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

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

57 In that regard, it should be borne in mind that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. Consequently, even if, formally, the referring court has limited its question to the interpretation of a specific provision of EU law, that does not prevent this Court from providing the referring court with all the elements of interpretation of EU law that may be of assistance in adjudicating in the case before it, whether or not the referring court has referred to them in the wording of its questions. To that end, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in view of the subject matter of the dispute (see, to that effect, judgment of **18 September 2019, VIPA, C-222/18, EU:C:2019:751**, paragraph 50 and the case-law cited).

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

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

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

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

Applicability of Directive 2000/31

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

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

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

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

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

67 That interpretation cannot be called into question by the fact that, as a derogation from the general rule laid down in Article 3(2) of Directive 2000/31, Article 3(3) of that directive must be interpreted strictly. Indeed, while it follows from settled case-law that provisions derogating from a fundamental freedom must be interpreted strictly, it is necessary to ensure that the effectiveness of the derogation thereby established is safeguarded and its purpose observed (see, to that effect, judgment of **4 October 2011, Football Association Premier League and Others, C-403/08 and C-429/08, EU:C:2011:631**, paragraphs 162 and 163).

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

Applicability of Directive 2006/123

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

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

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

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

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

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

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

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

76 According to settled case-law, Article 56 TFEU precludes any national measure which, even if applicable without distinction, is liable to prohibit, impede or render less attractive the exercise by EU nationals of the freedom to provide services that is guaranteed in that article of the FEU Treaty (see, to that effect, judgment of 11 February 2021, Katoen Natie Bulk Terminals and General Services Antwerp, C-407/19 and C-471/19, EU:C:2021:107, paragraph 58 and the case-law cited).

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

78 However, that restriction may be justified by overriding reasons in the public interest, provided that it is suitable for securing the attainment of the public interest objective concerned and does not go beyond what is necessary to attain that objective (see, to that

effect, judgment of 27 February 2014, OSA, C-351/12, **EU:C:2014:110**, paragraph 70).

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

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

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

Whether the restriction concerned is proportionate

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

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

83 In the present case, however, the national legislation at issue in the main proceedings does not grant a collective management organisation a monopoly over the activity of copyright management in the territory of the Member State concerned. In fact, Article 180 of the Law on the protection of copyright allows that activity to be carried out in Italy not only by the SIAE, but also by the collective management organisations referred to in Legislative Decree No 35/2017, Article 4(2) of which provides that rightholders may entrust to a collective management organisation or to an independent management entity of their choice the management of their rights, and that they may do so '*regardless of the Member State of nationality, residence or establishment of the collective management organisation, of the independent management entity or of the rightholder*' concerned, while making clear that the application of that provision is without prejudice to the provisions of Article 180 of the Law on the protection of copyright.

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

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

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

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

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

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

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

91 Thirdly, independent management entities are not obliged to manage the rights of rightholders who ask them to do so, as collective management organisations are required to do, according to the second sentence of Article 5(2) of Directive 2014/26 – unless there are objectively justified reasons not to do so – if management of such rights falls within the scope of the organisations' activity, which means that independent management entities are free to choose the most

profitable categories of rights and to leave the management of the others to collective management organisations. Nor are those entities subject to the obligation, laid down in Article 5(4) of that directive, to respect the freedom of rightholders to terminate the authorisation to manage their rights, categories of rights or types of works, or to withdraw rights for certain territories.

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

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

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

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

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

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

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

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

Costs

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

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

Article 56 TFEU, read in conjunction with Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market,

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

OPINION OF ADVOCATE GENERAL SZPUNAR delivered on 25 May 2023

On 25 May 2023[1]

Case C-10/22

Liberi editori e autori (LEA)

v

Jamendo SA

(Request for a preliminary ruling from the Tribunale ordinario di Roma (District Court, Rome, Italy))

(Reference for a preliminary ruling – Directive 2014/26/EU – Collective management of copyright and related rights – Collective management organisations – Independent management entities – Access to copyright management activities – Directive 2000/31/EC – Information society services – Article 3 – Freedom to

[1] Original language: French.

provide information society services – Directive 2006/123/EC – Article 16 – Freedom to provide services – Article 17 – Derogations – Article 56 TFEU)

Introduction

1. The origin of the collective management of copyright dates back to the 18th century, with the creation on the initiative of Pierre-Augustin Caron de Beaumarchais, a playwright who was indignant at the alleged unfair practices of the Comédie française, of a group of playwrights which later became the Société des auteurs et compositeurs dramatiques. In Italy, the Società Italiana degli Autori, which became the Società Italiana degli Autori ed Editori ('*the SIAE*'), was founded in 1882 by figures such as Giuseppe Verdi, Giosuè Carducci and Edmondo de Amicis, and is still active today.

2. The rationale for the collective management of copyright is not merely the defence of the interests of rightholders vis-à-vis users of works, which is more effective because it is collective.[2] The multitude of ways in which works are distributed and the large number of players involved, accentuated by the internationalisation of culture and, therefore, of the exploitation of works, often make it ineffective, if not impossible, for authors to manage their rights individually. Only an organisation which represents several authors, and has an appropriate administrative structure, is in a position to issue, in an efficient and economically viable manner, licences for the use of works to different users, to collect and distribute among rightholders the remuneration due and to monitor users' compliance with the conditions for the exploitation of the works, including the prosecution of infringements.

3. However, collective management does not benefit only rightholders. Users also benefit from it, since they may apply to a single organisation for licences for the use of several works, without having to search for different copyright holders and contract individually with them.

4. That need for efficacy, on the part of both rightholders and users, has resulted in a monopoly for collective management organisations in their respective countries. That monopoly may be statutory, as was until recently the case of the SIAE in Italy, or de facto, where several collective management organisations coexist but specialise according to the categories of works or rights which they manage, so that each organisation has a monopoly in its field of activity. At international level, while each collective management organisation issues licences for use for its own territory, in accordance with the principle of territoriality of copyright, as a result of a network of reciprocal representation arrangements, it is able to offer authorisations for works belonging to the repertoires of organisations from other countries, that is to say, in practice, from all over the world.

5. Such a system has, of course, important advantages. First, from the users' point of view, it allows, through the payment of a single, often flat-rate, fee, access to and use of practically all the works in a given category on the market without having to worry about possible copyright infringement. Secondly, that system allows lesser-known artists and works having a smaller audience, in particular for cultural and linguistic reasons, to co-exist on the market on an equal footing with artists who are more popular with the public, without users '*cherry-picking*' from repertoires only those works which are most popular and therefore most profitable. Thirdly, the system of territorial authorisations and representation arrangements allows organisations managing 'smaller' repertoires to receive a share of revenues from the use of internationally renowned works in their territories, without which the management of their own repertoire might not be profitable on account of the high fixed costs involved in such management. Fourthly and finally, the monitoring of the exploitation of works and the prosecution of infringements are also organised according to the principle of territoriality, which greatly facilitates that monitoring and makes it possible to limit its cost.

6. However, that system of collective management based on monopoly and territoriality must overcome two major challenges, the first legal and the second factual.

7. On the one hand, in EU law, such a system raises questions from the point of view of both competition law and the freedoms of the internal market. While the decisions of the EU courts in those two areas have established a certain balance,[3] they have not made it possible to dispel all doubts as to the compatibility of the monopoly position of collective management organisations with EU law.

8. On the other hand, the emergence of digital technology and of the internet has significantly altered the landscape of artistic creation and of the dissemination of works. It is no longer necessary to have the support of a publishing house or a studio to create and distribute literary, musical or audiovisual works. For many authors, distribution via the internet is more than sufficient, which also simplifies the management of their rights and makes the individual exercise of those rights much more realistic. At the same time, a growing number of individual users of works have neither the means nor the need to obtain access to the entire repertoires of collective management organisations. Where that supply and demand intersect, independent management entities have emerged, which are purely commercial in nature and often operate via the internet; their legal status and relationship with collective management organisations are still a source of conflict, despite their express recognition by the EU legislature.

9. It is in those circumstances that the Court will be called upon to answer the question referred for a preliminary ruling in the present case.

Legal framework

European Union law

[2] By '*users*' I am referring here to the persons and entities which use works in order to make them available to the public. Those users must therefore be distinguished from members of the public, who may be regarded as '*end users*'.

[3] See, inter alia, judgments of 12 April 2013, CISAC v Commission (T-442/08, EU:T:2013:188), and of 27 February 2014, OSA (C-351/12, EU:C:2014:110; '*the judgment in OSA*').

Directive 2000/31/EC

10. Article 2(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [4] defines information society services as '*services within the meaning of Article 1(2) of Directive 98/34/EC, [5] as amended by Directive 98/48/EC*'.

11. Directive 98/34 was repealed by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services. [6] Article 1(2) of Directive 98/34 has been replaced by Article 1(b) of Directive 2015/1535, which is worded as follows:

'*1. For the purposes of this Directive, the following definitions apply:*

…

(b) "service" means any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

(i) "at a distance" means that the service is provided without the parties being simultaneously present;

(ii) "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;

(iii) "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.

…'

12. Article 3 of Directive 2000/31, entitled '*Internal market*', provides:

'*1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.*

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

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

– public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

– the protection of public health,

– public security, including the safeguarding of national security and defence,

– the protection of consumers, including investors;

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

…'

13. According to the Annex to Directive 2000/31:

'*As provided for in Article 3(3), Article 3(1) and (2) do not apply to:*

– copyright, neighbouring rights …

…'

Directive 2006/123/EC

14. Article 1(1) to (3) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market[7] provides:

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

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

3. This Directive does not deal with the abolition of monopolies providing services …'

15. According to Article 3(1) of that directive:

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

16. According to Article 4(1), (5) and (7) of that directive:

'*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 50 of the Treaty;

…

(5) "establishment" means the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out;

…

(7) "requirement" means any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States …'

17. Article 16(1) and (2) of Directive 2006/123 provides:

[4] OJ 2000 L 178, p. 1.

[5] Directive of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37).

[6] OJ 2015 L 241, p. 1.

[7] OJ 2006 L 376, p. 36.

'*1. Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.*
The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.
Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:
(a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;
(b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;
(c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.
2. Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:
...
(d) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed;
...'

18. Finally, according to Article 17(11) of that directive: '*Article 16 shall not apply to:*
...
(11) copyright, neighbouring rights ...'

Directive 2014/26/EU

19. Under Article 3(a) and (b) of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market[8]
'*For the purposes of this Directive, the following definitions shall apply:*
(a) "collective management organisation" means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria:
(i) it is owned or controlled by its members;
(ii) it is organised on a not-for-profit basis;
(b) "independent management entity" means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is:
(i) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and
(ii) organised on a for-profit basis;
...'

20. Article 5(2), (4) and (6) of that directive provides:
'*2. Rightholders shall have the right to authorise a collective management organisation of their choice to manage the rights, categories of rights or types of works and other subject matter of their choice, for the territories of their choice, irrespective of the Member State of nationality, residence or establishment of either the collective management organisation or the rightholder. Unless the collective management organisation has objectively justified reasons to refuse management, it shall be obliged to manage such rights, categories of rights or types of works and other subject matter, provided that their management falls within the scope of its activity.*
...
4. Rightholders shall have the right to terminate the authorisation to manage rights, categories of rights or types of works and other subject matter granted by them to a collective management organisation or to withdraw from a collective management organisation any of the rights, categories of rights or types of works and other subject matter of their choice, as determined pursuant to paragraph 2, for the territories of their choice ...
...
6. A collective management organisation shall not restrict the exercise of rights provided for under paragraphs 4 and 5 by requiring, as a condition for the exercise of those rights, that the management of rights or categories of rights or types of works and other subject matter which are subject to the termination or the withdrawal be entrusted to another collective management organisation.'

Italian law

21. Article 180 of Legge n. 633 – Protezione del diritto d'autore e di altri diritti connessi al suo esercizio (Law No 633 on the protection of copyright and related rights) of 22 April 1941,[9] as amended by Decreto legge n. 148 recante 'Disposizioni urgenti in materia finanziaria e per esigenze indifferibili' (Decree Law No 148 laying down '*urgent provisions on financial matters and non-deferrable needs*') of 16 October 2017[10] ('*the Law on the protection of copyright*'), provides:
'*The activity of intermediary, however implemented, by any direct or indirect form of intervention, mediation, mandate, representation and even assignment for the exercise of rights of representation, execution, performing, broadcasting including communication to the public via satellite and mechanical and cinematic reproduction of protected works, shall be exclusively reserved to the [SIAE] and to the other collective management organisations referred to in [decreto legislativo n. 35 – Attuazione della direttiva 2014/26/UE*

[8] OJ 2014 L 84, p. 72.

[9] GURI No 166 of 16 July 1941.
[10] GURI No 242 of 16 October 2017.

sulla gestione collettiva dei diritti d'autore e dei diritti connessi e sulla concessione di licenze multiterritoriali per i diritti su opere musicali per l'uso online nel mercato interno (Legislative Decree No 35 transposing Directive 2014/26) of 15 March 2017[11] *('Legislative Decree No 35/2017')].*

That activity shall be carried out for the purpose of:

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

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

(3) distributing those revenues among the beneficiaries.

…

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

…'

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

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

Facts in the main proceedings, procedure and the question referred for a preliminary ruling

23. Liberi editori e autori ('*LEA*') is a collective management organisation governed by Italian law and authorised to operate in the field of copyright intermediation in Italy. [12]

24. Jamendo SA is a company incorporated under Luxembourg law. Its activity is twofold. First, under the name Jamendo Music, it communicates to the public, on its website, musical works which artists have published on that site under Creative Commons licences.[13] Secondly, under the name Jamendo Licensing, it manages the copyright in musical works entrusted to it for that purpose by artists, issuing authorisations for only two methods of exploitation, namely as background music in shops and other establishments open to the public and as background music for audiovisual works, in particular those subsequently distributed on the internet. With respect to the second part of its activity, Jamendo may therefore be regarded as an independent management entity within the meaning of Article 3(b) of Directive 2014/26. That activity covers, inter alia, Italian territory. It is that second aspect which is the subject matter of the dispute in the main proceedings and of the present case. According to the information provided by Jamendo, its management activity, both as regards the transfer of rights by artists and the issuing of licences for use, is carried out entirely online, via its website. Moreover, the contracts which Jamendo concludes with artists require them to be independent, that is to say, inter alia, that they not be affiliated to any collective management organisation or linked to such an organisation in a way which would prevent them from using Jamendo's management services throughout the world.

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

26. Before the referring court, Jamendo submits that directive 2014/26 was incorrectly transposed into Italian law, arguing that the Italian legislature failed to confer on independent management entities the rights provided for by that directive. In that regard, Jamendo states that, under Article 180 of the Law on the protection of copyright, only the SIAE and the other collective management organisations referred to therein may carry out intermediation activities in Italy, the effect of which is to prevent independent management entities from operating in the field of copyright intermediation and to compel them to enter into representation arrangements with the SIAE or other authorised collective management organisations.

27. The Tribunale ordinario di Roma (District Court, Rome) essentially agrees with the interpretation of Italian law put forward by the parties to the main proceedings. In those circumstances, it decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

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

28. The request for a preliminary ruling was received at the Court on 5 January 2022. Written observations were submitted by the parties to the main proceedings, the European Commission and the Austrian Government.

[11] GURI No 72 of 27 March 2017.

[12] On the specific role of that organisation, see point 31 of this Opinion.

[13] This case therefore concerns the individual management of rights by authors and Jamendo's role is that of a user which distributes the works.

The same parties, together with the Italian Government, were represented at the hearing, which was held on 9 February 2023.

Analysis

29. The analysis of the substance of the present request for a preliminary ruling must be preceded by some clarifications concerning its admissibility. Moreover, it seems to me necessary to specify the provisions of EU law applicable and the scope of the question referred.

Admissibility

30. Before the Court, the parties to the main proceedings maintain convergent positions seeking, in essence, a declaration that the reservation of copyright intermediation, enshrined in Italian law, solely to collective management organisations, to the exclusion of independent management entities, is incompatible with EU law. It is therefore possible to question the reality of the dispute in the main proceedings and the need for the interpretation of EU law requested by the referring court. Moreover, that question was expressly raised at the hearing by the Italian Government, which argued that that dispute was fictitious and artificial, in order to call into question the admissibility of the request for a preliminary ruling. However, I believe that clarification of the specific situation of LEA and its role in the Italian market will allow those doubts to be dispelled.

31. A similar dispute had previously arisen between the SIAE and Soundreef Ltd, an independent management entity established in the United Kingdom which sought to operate in Italy. In that case, the same national court as in the present case had referred a similar question to the Court for a preliminary ruling. However, the national court withdrew its request for a preliminary ruling following the conclusion of an agreement between the parties.[14] Under that agreement, a collective management organisation governed by Italian law, namely LEA, was authorised to represent Soundreef on Italian territory.

32. In its written observations, LEA explains that, as a collective management organisation which is organised on a not-for-profit basis, it is not in a position adequately to ensure its economic development and to deal with competition from entities such as Jamendo, competition which, as Italian law now stands, is unfair. It therefore has a legitimate interest in obtaining a prohibition on Jamendo's activity. At the same time, as a representative of Soundreef, LEA also has an interest in the Court's interpretation of EU law resulting in liberalisation of the Italian legal framework. In that respect, therefore, its interests align with those of Jamendo.

33. Accordingly, the fact that the parties to the main proceedings are at one in their interpretation of EU law cannot, in my view, affect the reality of the dispute in the main proceedings or, consequently, the admissibility of the present request for a preliminary ruling.[15]

The applicable provisions of EU law and the scope of the question referred

34. The referring court submits the question referred from the perspective of Directive 2014/26. However, as I shall demonstrate below, that directive does not appear to be sufficient, in itself, to resolve the issue facing that court. It is therefore essential, in my view, to analyse other provisions of EU law in order to provide that court with an answer which will be useful in resolving the dispute in the main proceedings.[16]

Directive 2014/26

35. A reading of the recitals of Directive 2014/26 may give the impression that that measure introduces a general liberalisation of the collective management of copyright in the European Union, including for the benefit of independent management entities. This is particularly true of recitals 4,[17] 8,[18] and 15.[19] However, it appears, in the light of the normative part of that directive, that that ambition has been achieved only partially, or even not at all in so far as independent management entities are concerned.

36. It is true that Article 5 of Directive 2014/26 gives rightholders a wide choice as regards the collective management organisation to which they wish to entrust the management of their rights, without imposing any limit as regards the place of domicile or establishment of either the rightholder or the organisation in question. Collective management organisations may not, without good reason, refuse to manage rights, including the rights of rightholders domiciled or established in the territory of other Member States.

37. However, Directive 2014/26 does not contain any rules either on the access of collective management organisations to their activity or on the territories for which those organisations may issue licences for use. Accordingly, that directive does not preclude national rules of Member States which limit both the access of those organisations to the activity of management or the territorial scope of the licences for use which those organisations are entitled to issue.[20] The choice available to rightholders under Article 5 of that directive must therefore be limited to those collective management organisations authorised to operate in various Member States under their national law.

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[14] Order of the President of the Court of 16 July 2019, S.I.A.E. (C-781/18, not published, EU:C:2019:656).

[15] See, to that effect, judgment of 22 November 2005, Mangold (C-144/04, EU:C:2005:709, paragraph 38). The solution adopted by the Court in its judgment of 11 March 1980 in Foglia (104/79, EU:C:1980:73, paragraphs 10 to 13), which was relied on by the Italian Government at the hearing, is therefore not applicable here.

[16] According to established case-law (see, most recently, judgment of 9 March 2023, Registrų centras, C-354/21, EU:C:2023:184, paragraph 35).

[17] This recital states that '*when established in the Union, collective management organisations should be able to enjoy the freedoms provided by the Treaties when representing rightholders who are resident or established in other Member States or granting licences to users who are resident or established in other Member States*'.

[18] This recital states, inter alia, that '*the aim of this Directive is to provide for coordination of national rules concerning access to the activity of managing copyright and related rights by collective management organisations'*.

[19] This recital states, in the first sentence, that '*rightholders should be free to entrust the management of their rights to independent management entities*.'

[20] The provisions of Title III of Directive 2014/26 organise a system of multi-territorial licensing for the distribution of music online. However, this remains outside the scope of the present case.

38. Moreover, Directive 2014/26 recognises the existence of independent management entities, by defining them, and makes them subject to certain obligations towards rightholders and users and to supervisory measures by Member States.[21] However, no provision in that directive refers to the freedom of those entities as regards access to the copyright management market. Article 5 of that directive establishes only the freedom of choice of rightholders between collective management organisations, omitting any reference to independent management entities, thereby rendering the first sentence of recital 15 of that directive meaningless. Only Article 5(6) of that directive, which prohibits collective management organisations from limiting the right of withdrawal of rightholders by requiring them to entrust their rights to another collective management organisation, suggests that those rightholders have the option of using other methods of management of their rights, such as individual management or management through independent management entities. However, there is no guarantee of free access to the activity for those entities.

39. The answer to the question referred for a preliminary ruling as formulated by the referring court could therefore only be in the negative, as Directive 2014/26 itself does not preclude rules of Member States which restrict access to copyright management activities[22] An answer which will be useful in resolving the dispute in the main proceedings must therefore be sought in other provisions of EU law.

Other applicable provisions of EU law

40. According to the information contained in its observations, Jamendo carries out its activity mainly, if not exclusively, online, through its website. It is through that channel not only that rightholders entrust Jamendo with the management of their rights, but also that Jamendo issues licences for use. The service therefore appears to be a service provided at a distance, by electronic means and at the individual request of a recipient, that is to say, an information society service within the meaning of Directive 2000/31. It is therefore in the light of that directive that the question raised in this request for a preliminary ruling must be examined. However, since the referring court did not contemplate the application of that directive in the dispute in the main proceedings, it does not state whether, in its view, Jamendo's services can be classified as an '*information society service*' within the meaning of that directive. It is therefore for the referring court to make that assessment.

41. If, following the factual assessment I have just set out, the referring court were to consider that Jamendo's activity does not fall within the scope of Directive 2000/31, the question would then arise as to the applicability of Directive 2006/123 to that activity.[23] It is true that the Court has excluded the possibility of applying the provisions of Directive 2006/123 concerning the freedom to provide services to the activity of collective management organisations.[24] I shall analyse below the question whether that exclusion is valid for independent management entities. However, I would like to point out at the outset that although Directive 2014/26 is silent on free access for collective management organisations and independent management entities to the market, this is probably because the authors of that directive took it as a given that Directive 2006/123 would apply to that activity, as is reflected in the initial proposal for Directive 2014/26.[25]

42. Finally, if neither Directive 2000/31 nor Directive 2006/123 were to be considered applicable to the activity of independent management entities, the issue raised by the present request for a preliminary ruling would have to be analysed in the light of the relevant provisions of the Treaty.

The wording of the question referred

43. In the light of the foregoing, I consider that the question referred for a preliminary ruling in the present case must be understood as relating to the interpretation of not only Directive 2014/26 but, more generally, of all the provisions of EU law relevant to the factual situation in the main proceedings. That factual situation must, moreover, be reflected in the Court's answer, in so far as it may determine both the applicable provisions of EU law and the discretion available to the Member States in the light of those provisions.

44. Furthermore, in its question, the referring court refers to the exclusion of independent management entities 'incorporated in that Member State [[26]] or in other Member States' from copyright management activities. However, nothing in the documents before the Court confirms that the dispute in the main proceedings concerns any independent management entity established in Italy, since the only entity concerned is

[21] The provisions of Title III of Directive 2014/26 organise a system of multi-territorial licensing for the distribution of music online. However, this remains outside the scope of the present case.

[22] For an interpretation of Directive 2014/26 to that effect, see, Spina Ali, G., '*Collective monopolies: SIAE v Soundreef and the implementation of Directive 2014/26 in Italy*', European Intellectual Property Review, 2018, No 40, pp. 113 to 128.

[23] I would recall that, according to Article 3(1) of Directive 2006/123, acts of EU law governing service activities in specific sectors take precedence over the provisions of that directive. This necessarily applies to the information society services sector, which is governed by Directive 2000/31.

[24] Judgment in OSA, paragraphs 64 to 66.

[25] COM(2012) 372 final. Recital 3 of that proposal for a directive stated that '*when established in the Union, collecting societies – as service providers – must comply with the national requirements pursuant to [Directive 2006/123], which seeks to create a legal framework for ensuring the freedom of establishment and the free movement of services between the Member States. This implies that collecting societies should be free to provide their services across borders, to represent rightholders resident or established in other Member States or grant licences to users resident or established in other Member States*'. That recital referred only to collective management organisations, since the proposal for a directive did not include within its scope independent management entities, which were added in the course of the legislative procedure. A reference to Directive 2006/123 was also included in recital 8 of the proposal for a directive. Although the references to that directive were removed during the legislative work, its applicability to the various service activities derives from its own provisions and not from the recitals of another act of EU law.

[26] The same Member State as that which introduced the rules at issue.

Jamendo, whose place of establishment is in Luxembourg. In so far as the rules applicable in those two situations, relating, respectively, to the freedom of establishment and to the freedom to provide services, could be different, the answer concerning access to the activity by an independent management entity established in the Member State in question is hypothetical. I therefore propose to limit the analysis of the question referred to the situation of an independent management entity established in another Member State.

45. Accordingly, by its question, the referring court is asking, in essence, whether the relevant provisions of EU law must be interpreted as precluding legislation of a Member State which reserves access to copyright management activities solely to collective management organisations,[27] to the exclusion of independent management entities established in other Member States.

The question referred for a preliminary ruling

46. As I have already noted,[28] although Directive 2014/26 does not, in itself, allow the issue facing the referring court to be resolved, other provisions of EU law may nevertheless be applicable to the dispute main proceedings. I shall therefore analyse the consequences of their application to this dispute and the answer which, in my view, must be given to the question referred as formulated above.

Directive 2000/31

47. On the basis of the information available, the services provided by Jamendo should in all probability, subject to verification by the national court, be classified as information society services falling within the scope of Directive 2000/31.[29] Accordingly, in my view, the answer to the question referred should first be sought in that directive.

48. First of all, Directive 2000/31 introduces, in Article 2(h) thereof, the concept of a '*coordinated field*', which covers the requirements laid down in the national law of Member States applicable to information society service providers and to those services, irrespective of whether those requirements have been designed specifically for that category of services or whether they are of a general nature. The coordinated field covers, inter alia, requirements relating to the taking up of the activity of an information society service, in particular concerning authorisation and notification.

49. Next, Article 3 of Directive 2000/31 draws a distinction between the rules applicable to service providers established in the Member State in question and the rules applicable to service providers established in other Member States. In the first case, under Article 3(1) thereof, Member States are obliged to ensure that service providers established in their territories comply with the provisions applicable to those providers under national law. By contrast, as regards providers established in other Member States, Article 3(2) of that directive prohibits Member States from restricting the freedom to provide services from those other Member States. Those two provisions therefore introduce the principle of the Member State of origin and the mutual recognition between Member States of the conditions for access to the activity of information society services (and for the exercise of that activity).

50. Since Jamendo is established in Luxembourg, it is in Italy in the situation of a service provider established in another Member State. The restriction on its activity which arises from the reservation under Italian law of the provision of copyright intermediation services solely to collective management organisations clearly falls, in my view, within the coordinated field as a requirement relating to access to the service activity. That restriction therefore falls under the prohibition in Article 3(2) of Directive 2000/31 and is contrary to that provision.

51. It is true that, under Article 3(4) of Directive 2000/31, Member States may take measures to derogate from that prohibition in respect of given services, provided that they fulfil the conditions set out in Article 3(4)(a). However, the restriction at issue is not a measure taken in respect of a given service, but is general in nature.[30] Moreover, it is not justified by any of the reasons listed in Article 3(4)(a)(i) of that directive, namely public policy, the protection of public health, public security or the protection of consumers.

52. The justification for the restriction at issue is to ensure the proper functioning of the system of management of copyright, in the interests of both rightholders and users, including the promotion of lesser-known authors and works. However, neither rightholders who entrust the management of their copyright to a collective management organisation or an independent management entity nor users who seek authorisation for the public use of works can be categorised as consumers, since they perform those acts in the context of a professional and remunerated activity. Moreover, the proper functioning of the system of management of copyright, which includes the promotion of certain authors or works, seeks to secure private interests and is certainly not a matter of public policy.

53. It is also true that Article 3(3) of Directive 2000/31, read together with the annex thereto, excludes the combined application of Article 3(1) and (2) of that directive, in particular, '*in the case of copyright and related rights*'. That exclusion must, in my view, be interpreted as meaning that copyright and related rights are not covered by the principle of mutual recognition, that is to say that national rules continue to apply, including with respect to service providers established in other Member States.[31]

54. However, the point at issue is the substantive law governing copyright and related rights, in accordance

[27] According to the answer given at the hearing by the Italian Government to a question from the Court, collective management organisations established in other Member States may directly carry out copyright management activities on Italian territory.

[28] See point 39 of this Opinion.

[29] See point 40 of this Opinion.

[30] Since that aspect is not decisive here, I do not analyse it in detail. It is, however, at the heart of Case C-376/22, Google Ireland and Others, in which I shall be delivering my Opinion on 8 June 2023.

[31] See, to that effect, De Miguel Asensio, P., Conflict of Laws and the Internet, Edward Elgar Publishing, Cheltenham, 2020, p. 73.

with the principle of territoriality of those rights. Thus, where an information society service consists in the use of works protected by copyright or related rights (for example the dissemination of works online) or requires such use, the provisions of Directive 2000/31 do not release the service provider from the obligation to obtain an authorisation for use for the territories of all Member States in which its service is provided, not only for the Member State of establishment of that service provider.

55. However, I see no reason relating to the wording or purpose of that provision of the annex to Directive 2000/31 for interpreting it as excluding services for the management of copyright or related rights from the scope of Article 3 of Directive 2000/31. The reservation of access to such services to the collective management organisations set out in Italian law is therefore not covered by that derogation from the principle of mutual recognition.

56. When asked at the hearing about the applicability of Directive 2000/31 to services such as those provided by Jamendo, the Commission expressed reservations, stating that a provider of such services which issues, inter alia, licences for the use of works in '*physical*' shops should also monitor the use of those works in those shops, which cannot be done online. However, in the first place, there is no indication that Jamendo actually provides such a monitoring service. In the second place, if such a '*physical*' ancillary service were excluded from the application of the principle of mutual recognition provided for by that directive under the third indent of Article 2(h)(ii) thereof, that would not prevent the application of the provisions of that directive to the services which lie at the heart of its activity and which are provided by electronic means.

57. In the light of the foregoing, I consider that, if the referring court were to find that Jamendo's activity falls within the scope of Directive 2000/31, Article 3(2) of that directive must be interpreted as precluding legislation of a Member State which reserves access to copyright management activities solely to collective management organisations, by excluding independent management entities established in other Member States.

Directive 2006/123

58. If the referring court were to consider that Jamendo's activity does not fall within the scope of Directive 2000/31, that activity would have to be treated as a '*physical*' provision of services. Such services are in principle governed by the provisions of Directive 2006/123. It is therefore necessary to analyse, in the first place, the applicability of that directive to activities such as those of Jamendo and, in the second place, the consequences of its application in the present case.

– The applicability of Directive 2006/123

59. Directive 2006/123 lays down detailed rules concerning the exercise of two fundamental freedoms of the internal market, the freedom of establishment and the freedom to provide services. Determining which of those freedoms applies to an activity such as that of Jamendo is not as obvious as it might seem.

60. For example, in its written observations, the Commission considers this to be impossible, in the absence of sufficient information from the referring court. However, it proposes to rely on the distinguishing criteria established by the Court in its landmark judgment Gebhard.[32] According to those criteria, the freedom of establishment allows any national of a Member State to pursue an economic activity through a fixed establishment for an indefinite period. By contrast, the freedom to provide services covers all services that are not offered on a stable and continuing basis from an established professional base in the Member State of destination.[33] It should be noted that those distinguishing criteria simply reflect the terms of the Treaty itself. Under Article 49 TFEU, the freedom of establishment concerns the creation of all forms of undertakings and the pursuit of their activities, whereas under the third paragraph of Article 57 TFEU, the freedom to provide services consists in the temporary pursuit of the service provider's activities in the Member State of destination.

61. However, as in many other areas, the internet has significantly altered those categories, which were established in the '*real*' world.[34] While the Treaty and, subsequently, the criteria established in the judgment in Gebhard[35] associate, first, the lasting exercise of an activity in a Member State with a permanent establishment in that Member State and, secondly, the temporary exercise of an activity with the absence of such an establishment, the internet allows the lasting exercise of an activity without a permanent establishment in the Member State in which that activity is carried out. Since an online service is provided, in any event, at a distance, it is irrelevant whether the provider and the customer are physically located in the same Member State or in two different Member States.

62. It therefore appears that, with regard to online services, the criteria laid down in the judgment in Gebhard[36] are outdated and that it is necessary to draw a distinction on other grounds.

63. In my view, notwithstanding the potentially lasting nature of an activity exercised via the internet in one Member State from another Member State, such an activity must be analysed in the light of the freedom to provide services. The contrary approach would lead to the absurd result that a provider who is not established in the Member State of destination of his or her service would nevertheless be considered to be established there and would have to comply with the legislation of that Member State not only as regards his or her activity in the strict sense, but also as regards the establishment and operation of his or her undertaking. This becomes even more absurd if regard is had to the fact that activities

[32] Judgment of 30 November 1995 (C-55/94, EU:C:1995:411, paragraphs 25 to 27).

[33] See, most recently, judgment of 23 February 2016, Commission v Hungary (C-179/14, EU:C:2016:108, paragraphs 148 and 150).

[34] As opposed to the so-called '*virtual*' world of the internet.

[35] Judgment of 30 November 1995 (C-55/94, EU:C:1995:411).

[36] Judgment of 30 November 1995 (C-55/94, EU:C:1995:411).

carried out online are often aimed at several or even all Member States.

64. That conclusion is indirectly confirmed by Directive 2000/31. While that directive does not openly take a position on the distinction between the freedom of establishment and the freedom to provide services, in bringing together the relevant provisions under the heading of '*internal market*',[37] it nevertheless draws a clear distinction between Member States in which a service provider is established,[38] whose obligations are defined in Article 3(1) thereof, and Member States in which a service is provided from another Member State, which must comply with the rules defined in Article 3(2) et seq. That distinction thus reflects the distinction made between the exercise of the freedom of establishment and the exercise of the freedom to provide services.[39]

65. Consequently, and in the light of the information on Jamendo's activity contained in the order for reference and supplemented in that company's observations, I am of the view that, in the present case, the provisions on the freedom to provide services should be applied.

66. In Directive 2006/123, the provisions on the freedom to provide services are contained in Article 16 of that directive. However, according to Article 17(11) of that directive, Article 16 is not to apply, inter alia, to '*copyright [and] neighbouring rights*'.

67. In the judgment in OSA, the Court ruled that, as a result of that exclusion, Article 16 of Directive 2006/123 does not apply to the activities of collective management organisations handling copyright.[40] Adopting the view of Advocate General Sharpston in that regard,[41] the Court held that, since only services can be excluded from the application of Article 16, the exclusion contained in Article 17(11) of that directive must necessarily concern services in the field of copyright and related rights, such as the services provided by collective management organisations.[42]

68. However, that finding does not seem convincing to me in the light of the considerations set out below. Since this is a question of fundamental importance for the interpretation of Directive 2006/123, I suggest that the Court reconsider the meaning and scope of the exclusions from the scope of that directive.

69. Directive 2006/123 provides for a number of both general and specific exclusions from its scope in Article 16 thereof. Where an exclusion concerns a category of services, this is expressly stated in that directive. This is the case, inter alia, with the exclusions listed in Article 2(2) of that directive, which uses the term '*services*' to refer to each activity concerned. This is also the case with some of the exclusions listed in Article 17 of that directive, inter alia in Article 17(1), which concerns '*services of general economic interest*', and in Article 17(5), which concerns '*the activity of judicial recovery of debts*'.

70. By contrast, some other exclusions clearly do not concern categories of services. That is the case, for example, with Article 2(3) of Directive 2006/123, according to which that directive is not to apply in the field of taxation. However, the Court has already ruled that that exclusion concerns not services, but the fiscal rules of the Member States.[43] The same necessarily applies to the exclusions provided for in Article 17 thereof, in point (6) (which expressly refers to 'requirements in the Member State where the service is provided'), in point (8) ('administrative formalities concerning the free movement of persons and their residence'), in point (9) ('the possibility for Member States to require visa or residence permits'), in point (12) ('*acts requiring by law the involvement of a notary*'), in point (14) ('*the registration of vehicles*') and in point (15) ('*provisions regarding contractual and non-contractual obligations*'), which clearly do not concern categories of services but measures in force in the Member States. Lastly, the exclusions provided for in Article 17(2), (3), (4), (10) and (13) of that directive, which concern 'matters' covered by various acts of EU law, seem to relate not to categories of services, but to legislation in areas already harmonised at the level of EU law.

71. The premiss that the exclusions from the scope of Article 16 of Directive 2006/123 provided for in Article 17 thereof can concern only services is therefore not established and cannot serve as a basis for interpreting the exclusion provided for in Article 17(11), which concerns, I would repeat, '*copyright [and] neighbouring rights*'.

72. As stated above, most of the exclusions provided for in Article 17 of Directive 2006/123 relate to measures in force in the Member States. Those exclusions must be understood as meaning that the freedom to provide services on a cross-border border basis, as set out in Article 16 thereof, does not prevent the application of those measures and that service providers cannot rely on that freedom to avoid the obligations which those measures impose on them.

73. The exclusion provided for in Article 17(11) of Directive 2006/123 must, in my view, be interpreted in the same way. It follows from that provision only that Article 16 thereof does not preclude application of the substantive copyright law of the Member State of destination of the service or application of the service provider's obligations, in particular as regards the authorisation required for the use of works. This interpretation is therefore similar to that of the analogous exclusion provided for by Directive 2000/31.[44] By

[37] See title of Article 3 of that directive.

[38] The concept of '*established service provider*' is defined in Article 2(c) of Directive 2000/31.

[39] Moreover, the definition of '*establishment*' in Article 4(5) of Directive 2006/123 requires the existence of a stable infrastructure from where the business of providing services is actually carried out. By contrary inference, therefore, in the absence of such a stable infrastructure, the provision of a service is considered to be cross-border, even if it is of a lasting nature.

[40] Judgment in OSA, paragraph 65.

[41] See her Opinion in OSA (C-351/12, EU:C:2013:749, point 64).

[42] Judgment in OSA, paragraph 65.

[43] See judgment of 22 December 2022, Airbnb Ireland and Airbnb Payments UK (C-83/21, EU:C:2022:1018, paragraph 38).

[44] See points 53 to 55 of this Opinion.

contrast, if the EU legislature had intended to exclude management services for copyright and related rights from the scope of Article 16 of Directive 2006/123, it would have expressly provided for this.

74. I am therefore of the view that Article 16 of Directive 2006/123 is fully applicable to independent management entities as defined in Directive 2014/26.

– **The effects of Directive 2006/123**

75. Like Article 3 of Directive 2000/31, Article 16(1) of Directive 2006/123 allows Member States to restrict the freedom to provide services by providers established in other Member States only by measures justified for one of the four reasons listed in the third subparagraph thereof, namely public policy, public security, public health and the protection of the environment. The restriction at issue cannot be justified for any of those reasons.[45]

76. Moreover, Article 16(2) of Directive 2006/123 lists the requirements limiting the freedom to provide services which are absolutely prohibited. Article 16(2)(d) of that directive refers to '*the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed*'. Under Article 3(a) of Directive 2014/26, a collective management organisation must meet at least one of the following conditions, namely that it is owned or controlled by its members or is organised on a not-for-profit basis. By reserving the activity of copyright intermediation to collective management organisations, Italian law thus requires providers either to adopt specific contractual arrangements with the rightholders who are recipients of their services or to carry out their activity on a not-for-profit basis. In both cases, this restricts service provision by the self-employed, either by making the provider dependent on recipients or by preventing him or her from pursuing his or her activity in an economically profitable manner. I consider such a requirement to be clearly contrary to Article 16(2)(d) of Directive 2006/123.

77. According to Article 1(2) of Directive 2006/123, that directive does not deal with the liberalisation of services of general economic interest. The issue of whether services provided by collective management organisations are in the nature of services of general economic interest was raised by the Italian Government at the hearing. However, that provision does not exclude services of general economic interest from the scope of that directive.[46] Moreover, the restriction at issue consists not in the assignment of a general interest task to a specific organisation[47] but in the reservation of a certain economic activity, namely copyright intermediation, to a category of economic operators, that is to say collective management organisations.

78. While such organisations, on the basis of the provisions of Italian law and of Directive 2014/26, have certain obligations towards rightholders, those obligations are imposed not in the general interest, but in the interest of those rightholders, who constitute a specific professional group and should not be confused with the general population. Those obligations can be compared, for example, to those of a company towards its shareholders. However, they do not constitute a general interest task.[48] Unlike the Italian Government, I therefore see a clear difference between the role of collective management organisations handling copyright and the services of general economic interest excluded from the application of Article 16 of Directive 2006/123 by virtue of Article 17(1) thereof, such as postal services, the distribution of electricity, gas and water or the treatment of waste.[49]

79. Finally, with regard to Article 1(3) of Directive 2006/123, according to which that directive does not deal with the abolition of monopolies providing services, I have doubts, in the light of its enigmatic and abstract nature, as to whether that provision has any independent legislative force. In any event, however, it does not seem to me that there can be said to be a monopoly here.

80. On the one hand, Directive 2014/26, in granting rightholders a wide choice as to how they wish to manage their rights, which includes both the choice of a collective management organisation from another Member State and reliance on individual management, has significantly undermined the monopoly position of collective management organisations concerning that aspect of their activity.

81. On the other hand, Italian law, in accepting the creation of collective management organisations which compete with the SIAE, such as LEA, and in allowing the direct exercise of the activity of intermediation on the Italian market by collective management organisations from other Member States, has itself removed the exclusivity of powers of the SIAE, which is no longer in a monopoly position either de jure or de facto.

82. Article 1(2) and (3) of Directive 2006/123 therefore does not, in my view, prevent the application of the provisions of that directive, including those of Article 16 thereof, to copyright management activities by independent management entities.

83. I am therefore of the view that, if the referring court were to find that Directive 2000/31 does not apply to the activity of Jamendo, Article 16(1) and (2)(d) of Directive 2006/123 must be interpreted as meaning that it precludes legislation of a Member State which

[45] As regards the reasons behind the restriction at issue, see point 52 of this Opinion.

[46] Judgment of 23 December 2015, Hiebler (C-293/14, EU:C:2015:843, paragraphs 43 and 44).

[47] As recital 70 of Directive 2006/123 seems to require for the purposes of interpreting the concept of '*service of general economic interest*'.

[48] I do not exclude the possibility that collective management organisations may be entrusted with general interest tasks, such as contributing, financially or otherwise, to the development of culture. However, this activity is distinct from copyright management in the strict sense.

[49] Moreover, the Court had previously ruled that a collective management organisation handling copyright could not be classified a service of general economic interest in its judgment of 2 March 1983, GVL v Commission (7/82, EU:C:1983:52, paragraphs 29 to 32).

reserves copyright management activities to collective management organisations, to the exclusion of independent management entities established in other Member States.

Article 56 TFEU

84. The interpretation of Directives 2000/31 and 2006/123 should be sufficient, in the light of EU law, to resolve the dispute pending before the referring court. According to settled case-law, a national measure in an area which has been the subject of exhaustive harmonisation in EU law must be assessed in the light of that harmonising measure and not the Treaty.[50] However, in case the Court does not agree with my analysis of the applicability of Directive 2006/123, I shall, in the alternative, briefly analyse the situation in the present case in the light of Article 56 TFEU.[51]

85. The Court has already considered a situation similar to that at issue in the main proceedings in the case which gave rise to the judgment in OSA. In that judgment, the Court concluded that the prohibition on the cross-border provision of copyright management services on account of a national collective management organisation's monopoly in that field constitutes a restriction on the freedom to provide services that must be justified by one of the overriding reasons in the general interest, which include the protection of intellectual property rights.[52]

86. The Court next ruled that the monopoly on the management of rights relating to a category of protected subject matter entrusted to a collective management organisation, coupled with a system of reciprocal representation arrangements with analogous foreign organisations, arose in the context of the territorial protection of copyright and is appropriate and proportionate to the objective pursued.[53]

87. In particular, it found that there is no other method for protecting copyright as effectively and that allowing users to obtain authorisation for the use of works from any collective management organisation for any territory would create significant problems in monitoring the use of rights and the payment of fees.[54] Aware of the impending change in the legal environment for copyright management,[55] the Court was careful to state that its analysis related to '*European Union Law [as it] stands at present'*.[56]

88. However, the lessons to be learned from the judgment in OSA in that regard seem to me to be of little use for the resolution of the present case. This case is concerned not with the right of a user to have recourse to a collective management organisation in another Member State in order to obtain authorisation for the use of works the rights on which are managed by a national organisation, as was the situation in the case which gave rise to the judgment in OSA, but with the right of an independent management entity to manage rights whose management is not entrusted to any other collective management organisation, whether established on national territory or elsewhere.

89. As I have already observed in the part of this Opinion concerned with Directive 2006/123, as a result of both Directive 2014/26 and the liberalisation of Italian law, there no longer exists in Italy the monopoly in this field analogous to that analysed by the Court in the case which gave rise to the judgment in OSA, since copyright intermediation can be carried out by various collective management organisations, whether national ones or those established in other Member States. Only independent management entities are excluded from access to that activity. In those circumstances, such a difference in treatment cannot be justified by the arguments used by the Court in the judgment in OSA.

90. The Italian Government relies, by way of justification, on the specific nature of collective management organisations, which are controlled by their members and are operated on a not-for-profit basis, on the obligations imposed on them towards rightholders and on the benefits of centralised copyright management for repertoires which are less popular with the public and, thus, for the development of culture.

91. However, it should be observed, first, that, under Article 2(4) of Directive 2014/26, many of the obligations imposed on collective management organisations also apply to independent management entities. For example, as regards guarantees for rightholders, those entities are in a situation comparable to that of collective management organisations.

92. Next, it is certainly true that membership of a major collective management organisation, with its network of reciprocal representation arrangements, can benefit many artists and promote wide dissemination of their works. However, this is not always true for all[57] and, in the present market conditions, some may be satisfied, at least temporarily, with limited management services such as those offered by Jamendo. Copyright holders are, it seems to me, sufficiently informed independently to choose the most effective way to protect their interests. The protection of those rights, as an overriding reason in the general interest, cannot justify restrictions on achieving that protection in the manner which is most appropriate according to the persons concerned themselves.

93. I am therefore of the view that the exclusion of independent management entities from the activity of copyright intermediation, as provided for in Italian law, is not justified in the light of Article 56 TFEU.

Conclusion

[50] See, most recently, judgment of 11 June 2020, KOB (C-206/19, EU:C:2020:463, paragraph 30 and the case-law cited). With particular reference to Directive 2006/123, see, to that effect, judgment of 16 June 2015, Rina Services and Others (C-593/13, EU:C:2015:399, paragraph 23 et seq.).

[51] On the applicable freedom of the internal market, see points 59 to 65 of this Opinion.

[52] OSA judgment, paragraphs 69 to 71.

[53] OSA judgment, paragraphs 72 to 78.

[54] OSA judgment, paragraphs 76 and 77.

[55] The judgment in OSA was delivered the day after the adoption of Directive 2014/26.

[56] Ibid.

[57] According to a 2009 study, more than half of the SIAE's members were receiving fees which did not even cover the costs of membership of that organisation (Spina Ali, G., op. cit.).

94. In the light of all the foregoing considerations, I propose that the Court answer the question referred for a preliminary ruling by the Tribunale ordinario di Roma (District Court, Rome, Italy) as follows:

Article 3(2) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, and Article 16(1) and (2)(d) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market,

must be interpreted as meaning that they preclude legislation of a Member State which reserves copyright management activities to collective management organisations, to the exclusion of independent management entities established in other Member States.
