

**Case C-372/19****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

10 May 2019

**Referring court:**

Ondernemingsrechtbank Antwerpen (Belgium)

**Date of the decision to refer:**

28 February 2019

**Applicant:**Belgische Vereniging van Auteurs, Componisten en Uitgevers  
CVBA (SABAM)**Defendants:**

BVBA Weareone.World

NV Wecandance

**Subject of the action in the main proceedings**

The procedure in the main proceedings concerns a dispute between, on the one hand, the Belgian Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) (Association of Authors, Composers and Publishers CVBA (SABAM); 'SABAM') and, on the other hand, BVBA Weareone.World and NV Wecandance, two festival organisers. The parties are in dispute about the legality and the amount of the remuneration that the festival organisers should pay to SABAM in order to be able to use its repertoire.

**Subject and legal basis of the request for a preliminary ruling**

The request for a preliminary ruling concerns the question whether the tariff structure used by SABAM is sufficiently refined in the light of Article 102 TFEU, whether or not read in conjunction with Article 16 of Directive 2014/26/EU.

The request has been made pursuant to Article 267 TFEU.

### **Questions referred**

Must Article 102 TFEU, whether or not read in conjunction with Article 16 of Directive 2014/26/EU on collective management of copyright and related rights and the multi-territorial licensing of rights in musical works for online use in the internal market, be interpreted as meaning that there is abuse of a dominant position if a copyright management company which has a de facto monopoly in a Member State, applies a remuneration model to organisers of musical events for the right to communicate musical works to the public, based among other things on turnover,

1. which uses a flat-rate tariff in tranches, instead of a tariff that takes into account the precise share (making use of advanced technical tools) of the music repertoire protected by the management company played during the event?
2. which makes licence fees dependent on external elements such as, inter alia, the admission price, the price of refreshments, the artistic budget for the performers and the budget for other elements, such as decor?

### **Provisions of European Union law cited**

Treaty on the Functioning of the European Union: Article 102

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): Articles 16(2) and 43

### **Provisions of national law relied on**

Wetboek van economisch recht (Code of Economic Law): Articles IV.2, VI.104, XI.165(5), XI.247, XI.248

### **Brief summary of the facts and the procedure in the main proceedings**

- 1 The applicant, SABAM, is a copyright management company. It is entitled to charge a fee for the use of its repertoire.
- 2 Since 2005, BVBA Weareone.World has been organising the annual dance festival Tomorrowland in Boom (Belgium). Since 2013, NV Wecandance has in turn been organising an annual dance festival called 'Wecandance'.

- 3 Both BVBA Weareone.World and NV Wecandance disagree with the fees that SABAM has claimed. In particular, there has been debate with regard to the amounts charged by SABAM for the Tomorrowland events in 2014, 2015 and 2016, and the amounts charged by SABAM for the Wecandance events in 2013, 2014, 2015 and 2016.
- 4 With the exception of the Wecandance event of 2013, the amount of the fees collected by SABAM was determined on the basis of the so-called 'tariff 211', which consists of two different tariffs, with SABAM being able to choose which tariff it applies.
- 5 First, there is a *minimum tariff*, which is calculated on the basis of the area which has access to sound or the number of available seats.
- 6 Second, there is a *degressive tariff*, which is calculated on the basis of the artistic budget or the gross receipts from ticket sales. Only certain specified costs (reservation costs, VAT and city taxes) may be deducted from the gross receipts before the copyright charges are calculated.
- 7 In addition, a festival organiser may receive a discount on that degressive tariff on the basis of the '1/3–2/3 rule'. Under that rule, organisers receive a discount of 2/3 or 1/3 of the tariff charged, respectively, if they prove that less than 1/3 or 2/3 of the songs played come from the SABAM repertoire. If more than 2/3 of the songs come from its repertoire, it will charge the full tariff.
- 8 SABAM initiated the main proceedings by summons issued on 13 April 2017 and 5 May 2017.

### **Main submissions of the parties to the main proceedings**

- 9 BVBA Weareone.World and NV Wecandance contest the validity of tariff 211, which they consider to be unfair due to abuse of a dominant position within the meaning of Article 102 TFEU. Their main point of criticism is that the degressive tariff does not correspond to the economic value of the services provided by SABAM.
- 10 First, they believe that the '1/3–2/3 rule' is insufficiently precise. According to them, it is perfectly possible, with the help of modern technology, to determine with greater precision which works from the SABAM repertoire are played and for how long. In other words, SABAM's pricing can be better geared to the economic value of the service it provides.
- 11 Second, they criticise the fact that SABAM can calculate its tariffs on the basis of gross receipts from ticket sales or on the basis of the artistic budget of a festival, without offering the possibility of deducting all non-music-related costs from those gross receipts. They are of the view that this is problematic because the receipts from ticket sales are disproportionate to the economic value of the service

provided by SABAM. The reason people are prepared to pay a higher ticket price is, after all, independent of SABAM's performance, and is due to other factors such as the festival organisers' efforts to make the festival a total experience, the costs which the organisers incur for the benefit of festival-goers (lighting, art, hotspots, toilets, safety), and the quality of the performing artists. They therefore argue that those costs should be deductible from the calculation basis.

- 12 In support of the plea alleging infringement of Article 102 TFEU, they refer, inter alia, to the judgment of 18 March 1980, *Coditel and Others* (62/79, EU:C:1980:84), the judgment of 9 April 1987, *Basset* (402/85, EU:C:1987:197), the judgment of 13 July 1989, *Tournier* (395/87, EU:C:1989:319), and the judgment of 11 December 2008, *Kanal 5 and TV 4* (C-52/07, EU:C:2008:703).
- 13 According to BVBA Weareone.World and NV Wecandance, the levying of copyright charges on the basis of turnover is not permissible in all situations. They are of the view that in the judgment of 9 April 1987, *Basset* (402/85, EU:C:1987:197), and the judgment of 11 December 2008, *Channel 5 and TV 4* (C-52/07, EU:C:2008:703), it was ruled that there may be abuse of power if there is a mismatch between the price and the service that is rendered in making copyright material available. According to them, the latter judgment shows that, in order to assess whether a flat-rate copyright fee is reasonably proportionate to the economic value of the service provided by the copyright organisation, account must be taken of all the circumstances of the individual case, and therefore also of the actual use of the musical works protected by copyright.
- 14 According to SABAM, the tariff it applied is not contrary to Article 102 TFEU.
- 15 It points out that the judgment of 9 April 1987 in *Basset* (402/85, EU:C:1987:197) must be applied in the present case, which means that the collection of copyright charges based on the total (gross) turnover is permissible in all situations.
- 16 The case-law of the Court of Justice in the judgment of 11 December 2008, *Kanal 5 and TV 4* (C-52/07, EU:C:2008:703) is, in its view, irrelevant. After all, that case-law must be understood in the specific context of television broadcasts where only limited use is made of works protected by copyright. It cannot be applied where the playing of music constitutes an essential element of the activity.

### **Brief summary of the reasons for the referral**

- 17 The referring court explains that, in accordance with the relevant provisions of EU law, SABAM's tariffs may not be unfair. After all, in such a case there would be abuse of a dominant position, which is prohibited under Article 102 TFEU. Furthermore, Article 16(2) of Directive 2014/26 provides that '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'. That provision thus also contains a restriction with regard to the remuneration which management organisations may claim.

- 18 The referring court notes that the Court of Justice has already ruled on the concept of 'abuse of a dominant position' in the context of remuneration paid to management organisations.
- 19 It also notes that the Court of Justice has ruled that there may be an abuse of legal position if other methods might be capable of attaining the same legitimate aim — namely the protection of the interests of authors, composers and publishers of music publishers — without thereby increasing the costs of managing contracts and monitoring the use of protected musical works (judgment of 13 July 1989, *Tournier*, 395/87, EU:C:1989:319, paragraph 45, and of 11 December 2008, *Kanal 5 and TV 4*, C-52/07, EU:C:2008:703, paragraph 33).
- 20 Furthermore, the Court of Justice has held that it is conceivable that there may be abuse of a dominant position when another method exists which enables the use of those works and the audience to be identified and quantified more precisely, without however leading to a disproportionate increase in management costs (judgment of 11 December 2008, *Channel 5 and TV 4*, C-52/07, EU:C:2008:703, paragraph 40).
- 21 In that regard, the referring court observes that determining the reasonableness of copyright fees is a complex matter. SABAM responded to that by setting a flat rate for festival organisers (tariff 211).
- 22 As regards the basis for calculating that tariff, the referring court explains that it is unclear whether costs that are not related to music can also be taken into account.
- 23 It is of the view that, as regards the '1/3–2/3' rule, the question arises as to whether that rule is sufficiently precise. It notes in that regard that SABAM has recently amended the scales and is currently applying 10% tranches, but that it is not clear where the boundary lies, given the existence of new systems that allow the repertoire used to be calculated even more precisely.
- 24 In the light of the uncertainty about the correct interpretation of Article 102 TFEU and Directive 2014/26 as set out above, the referring court considers it necessary to request a preliminary ruling from the Court of Justice.