Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

25 November 2020 *

(Reference for a preliminary ruling – Competition – Article 102 TFEU – Abuse of a dominant position – Concept of 'unfair prices' – Collective copyright-management company – De facto monopoly – Dominant position – Abuse – Performance of musical works at music festivals – Charging scheme based on gross receipts from ticket sales – Reasonableness in relation to the collective management company's service – Determination of the share of the collective management company's music repertoire actually performed)

In Case C-372/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Ondernemingsrechtbank Antwerpen (Companies Court, Antwerp, Belgium), made by decision of 28 February 2019, received at the Court on 10 May 2019, in the proceedings

Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)

v

Weareone.World BVBA,

Wecandance NV,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, K. Lenaerts, President of the Court, acting as a Judge of the Fifth Chamber, M. Ilešič (Rapporteur), C. Lycourgos and I. Jarukaitis, Judges,

Advocate General: G. Pitruzzella,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 27 May 2020,

after considering the observations submitted on behalf of:

– Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM), by B. Michaux, O. Sasserath, G. Ryelandt, E. Deturck and J. Vrebos, advocaten,

– Weareone.World BVBA, by C. Curtis, E. Monard and K. Geelen, advocaten,

* Language of the case: Dutch.

– Wecandance NV, by P. Walravens, T. De Meese and C. Lebon, advocaten,

– the Belgian Government, by J.-C. Halleux, S. Baeyens, L. Van den Broeck and C. Pochet, acting as Agents, assisted by P. Goffinet and S. Depreeuw, advocaten,

– the French Government, by P. Dodeller, A.-L. Desjonquères and A. Daniel, acting as Agents,

– the European Commission, by J. Samnadda, F. van Schaik and C. Zois, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 July 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 102 TFEU, read in conjunction, where applicable, with Article 16 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 two sets of proceedings, between Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) and Weareone.World BVBA and Wecandance NV respectively, regarding the copyright royalties claimed by SABAM from those companies.

Legal context

European Union law

3 Recital 8 of Directive 2014/26 states:

‘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 …’

4 Article 16 of that directive, headed ‘Licensing’, provides:

‘1. Member States shall ensure that collective management organisations and users conduct negotiations for the licensing of rights in good faith. Collective management organisations and users shall provide each other with all necessary information.

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. Collective management organisations shall inform the user concerned of the criteria used for the setting of those tariffs.

…'

Belgian law

5 Directive 2014/26 was transposed into Belgian law by the Wet van 8 juni 2017 tot omzetting in Belgisch recht van de richtlijn 2014/26/EU van het Europees Parlement en de Raad van 26 februari 2014 betreffende het collectieve beheer van auteursrechten en naburige rechten en de multiterritoriale licentieverlening van rechten inzake muziekwerken voor het online gebruik ervan op de interne markt (Law of 8 June 2017 transposing into Belgian law 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) (*Belgisch Staatsblad* of 27 June 2017, p. 68276).

6 Article 63 of that law amended Article XI.262 of the code de droit économique (Belgian Code of Economic Law) to provide as follows:

'1. 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 works and services, as well as in relation to the economic value of the service provided by the management organisation. Management companies shall inform the user concerned of the criteria used for the setting of those tariffs.

…'

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

7 SABAM is a for-profit, trading company which, by virtue of its position as the only collective copyright management organisation in Belgium, has a de facto monopoly in that territory in the market for the collection and distribution of the copyright royalties due for the reproduction and communication to the public of musical works.

8 Weareone.World and Wecandance have been organising the annual festivals Tomorrowland and Wecandance since 2005 and 2013 respectively. In the course of various editions of those events, use was made of musical works protected by copyright, the management of which is carried out by SABAM.

9 According to the order for reference, the level of royalties claimed by SABAM from those festival organisers is determined on the basis of SABAM's tariff '211' ('tariff 211').

10 The version of tariff 211 applicable to the disputes in the main proceedings includes two different charging schemes, which are applied at SABAM's discretion. It can apply either a 'minimum tariff', calculated on the basis of the size of the area with access to sound or on the basis of the number of seats available, or, as in this case, a 'basic tariff'.

11 The basic tariff is calculated on the basis of the gross receipts from ticket sales, including the value of tickets given out in return for sponsorship, after deduction of booking fees, value added tax (VAT) and any municipal taxes which may be due or, alternatively, on the basis of the artistic budget, that is to say the amounts made available to artists to perform their set, where the total artistic budget exceeds the gross receipts from ticket sales. That basic tariff includes eight separate revenue tranches, to which a degressive royalty rate is applied.

12 A festival organiser can obtain discounts on that basic tariff, according to the proportion of musical works from SABAM's repertoire which are actually performed at the event. Thus, provided that the organiser has communicated to SABAM, within a set period of time, a list of the works performed at the event, it is able to obtain a discount on the basic tariff, as follows: if less than 1/3 of the musical works performed come from SABAM's repertoire, SABAM charges 1/3 of the basic tariff; if less than 2/3 of the musical works performed come from that repertoire, SABAM charges 2/3 of the basic tariff; finally, if at least 2/3 of the musical works performed come from that repertoire, SABAM charges the basic tariff in full ('the 1/3-2/3 rule').

13 By applications of 13 April and 5 May 2017 before the referring court, against Weareone.World and Wecandance, SABAM sought an order for payment of sums corresponding to the copyright royalties which those festival organisers owed to it under tariff 211's basic tariff, for the 2014, 2015 and 2016 editions of the Tomorrowland festival and the 2013 to 2016 editions of the Wecandance festival, respectively.

14 Before the referring court, Weareone.World and Wecandance challenged the legality of tariff 211 on the ground that royalties calculated on the basis of that tariff do not correspond to the economic value of the services provided by SABAM, in breach of Article 102 TFEU.

15 In particular, those festival organisers argued, first, that the 1/3-2/3 rule is not sufficiently precise. It would, in that regard, be possible, by means of modern technology, to identify more precisely the musical works from SABAM's repertoire which are actually performed and the duration of those works.

16 Secondly, the festival organisers criticise SABAM for calculating the basic tariff on the basis of the gross receipts from ticket sales or on the basis of the artistic budget without, however, allowing them to deduct from those gross receipts all the expenses incurred in the organisation of those festivals which are not related to the musical works performed at those events.

17 In that context, those organisers point out that the receipts from ticket sales bear no relation to the economic value of the service provided by SABAM, which is able, for the use of the same works in its repertoire, to demand higher remuneration in the case of events for which the admission fee is higher. The readiness of festival goers to pay such a higher admission fee is, however, the result of factors independent of SABAM's services, such as the organisers' efforts to make a festival a 'total experience', the infrastructure made available or the quality of the performers.

18 The referring court points out that the question arises as to whether the pricing applied by SABAM is compatible with Article 102 TFEU and Article 16 of Directive 2014/26. In particular, it asks with what degree of precision pricing put in place by an organisation occupying a dominant position must operate in order that that organisation cannot be regarded as abusing such a dominant position on account of unfair pricing.

19 In those circumstances, the Ondernemingsrechtbank Antwerpen (Companies Court, Antwerp, Belgium) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 102 TFEU, whether or not read in conjunction with Article 16 of Directive 2014/26 …, 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?'

Consideration of the question referred

20 As a preliminary point, it must be observed that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court, 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. To that end, the Court may have to reformulate the questions referred to it (judgments of 18 December 2019, *IT Development*, C-666/18, EU:C:2019:1099, paragraph 26, and of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*, C-263/18, EU:C:2019:1111, paragraph 31 and the case-law cited).

21 In the present case, it must be observed that, whilst the referring court is requesting the Court to rule on the interpretation of Article 102 TFEU, where applicable read in conjunction with Article 16 of Directive 2014/26, it is apparent from the order for reference that that court's questioning specifically relates to the interpretation of the concept of 'abuse of a dominant position', which does not expressly appear in Article 16 or in any other provision of that directive, the aim of that directive being, inter alia, according to recital 8 thereof, 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. In those circumstances, it is necessary to examine the referring court's question exclusively in the light of Article 102 TFEU, subject, however, to the understanding that the second subparagraph of Article 16(2) of Directive 2014/26 contains criteria which are relevant for the purposes of assessing whether such an organisation, when collecting the copyright royalties due, imposes unfair tariffs.

22 It is also important to point out that, by the second part of that question, the referring court specifically asks the Court about the connection established, in tariff 211, between, on the one hand, the royalties claimed and, on the other, 'external elements', such as the admission price, the price of refreshments, the artistic budget for the performers and the budget for other elements, such as decor.

23 However, as is clear from the order for reference, the royalties at issue in the main proceedings were calculated on the basis of the gross receipts from ticket sales, and not on the basis of the organisers' artistic budget. Moreover, the issue of whether the costs incurred by the organisers, inter alia in respect of decor, should, contrary to what tariff 211 provides, be deductible from the gross receipts from ticket sales for the purposes of calculating the royalty due is specifically covered by the question referred.

24 In those circumstances, it must be held that, by its question, the referring court asks, in essence, whether Article 102 TFEU must be interpreted as meaning that it constitutes an abuse of a dominant position, within the meaning of that article, for a collective management company which has a de facto monopoly in a Member State to impose on organisers of musical events, in respect of the right to communicate musical works to the public, a charging scheme in which, on the one hand, the copyright royalties due are calculated on the basis of a tariff applied to the gross receipts from ticket sales, without its being possible to deduct from those receipts all the costs pertaining to the organisation of the festival which are not related to the musical works which are performed at it, and, on the other, a flat-rate system in tranches is used in order to determine the share of those works which is taken from that management company's repertoire.

25 Under the first paragraph of Article 102 TFEU, any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it is to be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. As is apparent from point (a) of the second paragraph of that article, the imposition of unfair trading conditions by an undertaking in a dominant position constitutes an abuse of that position.

26 At the outset, it is important to recall that a collective management company, such as SABAM, is an undertaking to which Article 102 TFEU applies (see, to that effect, judgment of 27 February 2014, *OSA*, C-351/12, EU:C:2014:110, paragraph 80).

27 Since such a collective management company has a monopoly over the management in the territory of a Member State of copyright relating to a category of protected works, it must be considered to have a dominant position in a substantial part of the internal market, within the meaning of that article (see, to that effect, judgment of 27 February 2014, *OSA*, C-351/12, EU:C:2014:110, paragraph 86 and the case-law cited).

28 With regard to the royalties demanded by collective management companies, the Court has repeatedly held that the conduct of such undertakings may constitute an abuse and, consequently, fall within the scope of the prohibition in Article 102 TFEU if, when they set the royalty level, such companies impose a price which is excessive in relation to the economic value of the service provided by those companies, which consists in making the entire repertoire of music protected by copyright, that those companies manage, available to users (see, to that effect, judgments of 11 December 2008, *Kanal 5 and TV 4*, C-52/07, EU:C:2008:703, paragraph 28 and the case-law cited; of 27 February 2014, *OSA*, C-351/12, EU:C:2014:110, paragraph 88; and of 14 September 2017, *Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība*, C-177/16, EU:C:2017:689, paragraph 35).

29 It is for the national court to determine whether such royalties may be excessive, in the light of the actual case before it and taking account of all the circumstances of that case (see, to that effect, judgments of 9 April 1987, *Basset*, 402/85, EU:C:1987:197, paragraph 19, and of 13 July 1989, *Tournier*, 395/87, EU:C:1989:319, paragraph 32).

30 In the context of that determination, it is obliged, inter alia, to take into consideration the particular nature of copyright and to seek an appropriate balance between the interest of composers of music protected by copyright in receiving remuneration for the use of those works and that of users in being able to use those works under reasonable conditions (see, to that effect, judgment of 11 December 2008, *Kanal 5 and TV 4*, C-52/07, EU:C:2008:703, paragraphs 30 and 31). In order to ascertain whether the level of the tariffs imposed by the collective management company is fair from the perspective both of the right of authors to appropriate remuneration and of the legitimate interests of users, it is necessary, inter alia, to take account not only of the economic value of the collective management service as such, but also of the nature and scope of the use of the works and of the economic value generated by that use.

31 In that regard, whilst the Court has recalled that the questions to be determined are whether the difference between the cost actually incurred and the price actually charged is excessive and, if the answer to that question is in the affirmative, whether a price has been imposed which is either unfair in itself or unfair when compared with competing services, it has also pointed out that there are other methods by which it can be determined whether a price may be excessive (see, to that effect, judgment of 14 September 2017, *Autortiesību un komunicēšanās konsultāciju aģentūra/Latvijas Autoru apvienība*, C-177/16, EU:C:2017:689, paragraphs 36 and 37and the case-law cited).

32 With regard, in particular, to the royalties imposed by collective management companies, those methods may, inter alia, as the Advocate General pointed out in point 33 of his Opinion, be based on a comparison between the price whose fairness is disputed and benchmarks such as prices previously charged by the dominant undertaking for the same services in the same relevant market, prices charged by such an undertaking for other services or for different types of customers, or prices charged by other undertakings for the same or comparable services in other national markets, provided, however, that that comparison is made on a consistent basis (see, to that effect, with regard, in particular, to the last basis for comparison, judgment of 14 September 2017, *Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība*, C-177/16, EU:C:2017:689, paragraph 38 and the case-law cited).

33 It is in the light of the foregoing considerations that the referring court's questions must be answered.

34 First, that court seeks to establish whether it is an abuse of a dominant position, within the meaning of Article 102 TFEU, for a collective management company to impose on organisers of musical events a charging scheme in which the copyright royalties due are calculated on the basis of a tariff applied to the gross receipts from ticket sales, without its being possible to deduct from those receipts all the costs pertaining to the organisation of the festival which are not related to the musical works which are performed at it.

35 Before that court, Weareone.World and Wecandance argued, as recalled in paragraph 17 of the present judgment, on the one hand, that the receipts from ticket sales bear no relation to the economic value of the service provided by SABAM, which is able, for the use of the same works in its repertoire, to demand higher remuneration in the case of events for which the admission fee is higher.

36 On the other hand, the level of the gross receipts of festivals such as those at issue in the main proceedings are the result of the organisers' efforts to make those festivals a 'total experience', of the infrastructure made available or of the quality of the performers. However, those elements, in

respect of which SABAM refuses to allow a deduction from the gross receipts for the purposes of calculating the royalties due by festival organisers, are not related to the economic service provided by SABAM.

37 In that connection, first, with regard to the question of whether a collective management company may infringe Article 102 TFEU by imposing on festival organisers a charging scheme for royalties based on the gross receipts from ticket sales, it must be observed that the Court has already found, in relation to copyright royalties collected for the public performance, in discotheques, of recorded musical works, the amount of which was calculated on the basis of the gross turnover of those discotheques, that such royalties must be regarded as constituting a normal exploitation of copyright and that their collection did not, in itself, constitute abusive conduct for the purposes of Article 102 TFEU (see, to that effect, judgments of 9 April 1987, *Basset*, 402/85, EU:C:1987:197, paragraphs 15, 18, 20 and 21, and of 13 July 1989, *Tournier*, 395/87, EU:C:1989:319, paragraph 45).

38 The Court has also held, with regard to the collection of royalties corresponding to a percentage of the revenue of television broadcasting companies arising from television broadcasts directed at the general public, advertising or subscription sales, that, in so far as such royalties are calculated on the basis of the revenue of the television broadcasting companies, they are, in principle, reasonable in relation to the economic value of the service provided by the collective management company (see, to that effect, judgment of 11 December 2008, *Kanal 5 and TV 4*, C-52/07, EU:C:2008:703, paragraphs 34 and 37).

39 Such case-law, from which it follows that a collective management company's charging scheme for royalties based on a percentage of the receipts from a musical event must be regarded as being a normal exploitation of copyright and is, in principle, reasonable in relation to the economic value of the service provided by that company, is applicable to a charging scheme for royalties, such as that at issue in the main proceedings, based on the gross receipts from a festival's ticket sales, so that the imposition, by a collective management company, of such a charging scheme does not, in itself, constitute abusive conduct for the purposes of Article 102 TFEU.

40 By imposing such a charging scheme, SABAM pursues a legitimate aim from a competition law standpoint, namely safeguarding the rights and interests of its members vis-à-vis the users of their musical works (see, to that effect, judgment of 13 July 1989, *Tournier*, 395/87, EU:C:1989:319, paragraph 31).

41 Moreover, the royalties resulting from such a charging scheme represent the consideration paid for the communication to the public of those musical works. That consideration must be analysed with respect to the value of that use in trade (see, to that effect, judgment of 11 December 2008, *Kanal 5 and TV 4*, C-52/07, EU:C:2008:703, paragraph 36), which depends, in particular, on the actual number of persons who enjoy the protected works (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, paragraph 109 and the case-law cited) and the extent of the use of the musical works for the event at issue.

42 Secondly, with regard to the organisers' efforts to make those festivals a 'total experience', the infrastructure made available or the quality of the performers, the possibility cannot be excluded, as Weareone.World and Wecandance argued, that such investments may have an effect on the admission fees which can be charged and, therefore, on the level of royalty which can legitimately be demanded by SABAM.

43 However, that position cannot call into question the conclusion drawn from the case-law recalled in paragraph 39 of the present judgment.

44 On the one hand, as the Advocate General pointed out, in essence, in points 63 and 68 of his Opinion, those judgments were given in respect of charging schemes for royalties imposed by collective management companies on users on the basis of their gross turnover, without deducting all the expenses incurred in connection with their services, notwithstanding the fact that that turnover could depend, to a significant extent, on elements that were unrelated to the use of protected musical works. Thus, factors such as those referred to in paragraph 42 of the present judgment do not, as such, preclude the calculation of the royalties due to a collective management company on the basis of such a charging scheme, provided that that scheme takes account of all the relevant circumstances, and in particular those mentioned in the case-law cited in paragraph 41 of the present judgment.

45 On the other hand, it can prove particularly difficult to determine in an objective manner, from among those factors, the specific elements which are not related to the musical works performed and, therefore, to the service of the collective management company, or to quantify, in the same way, the economic value of those elements and their effect on the receipts from the sale of tickets for the festivals at issue.

46 Moreover, obliging a collective management company, in all cases, to take into account such elements, which are of a particularly heterogeneous and subjective nature, in establishing a charging scheme for royalties for the use of protected musical works, and actually to verify those elements, or risk that that charging scheme may be classified as abusive, within the meaning of Article 102 TFEU, would be liable to lead to a disproportionate increase in the costs incurred for the purposes of managing contracts and monitoring the use of musical works protected by copyright.

47 It follows that the imposition by a collective management company of a charging scheme in which the copyright royalties due are calculated on the basis of a tariff based on the gross receipts from ticket sales, without its being possible to deduct from those receipts all the costs pertaining to the organisation of such events, does not, in itself, constitute abusive conduct, within the meaning of Article 102 TFEU.

48 Notwithstanding the foregoing considerations, as stated, in paragraphs 28 and 29 of the present judgment, the imposition, by a collective management company, of a charging scheme for royalties based on the gross receipts from tickets sales may fall within the scope of the prohibition in that article if the royalty level actually set pursuant to that charging scheme is unreasonable in relation to the economic value of the service provided, which it falls to the national court to determine in the light of the actual case before it and taking account of all the circumstances of that case, including the royalty rate set and the receipts on which that rate is based.

49 Secondly, the referring court seeks to establish whether it is an abuse of a dominant position, within the meaning of Article 102 TFEU, for a collective management company to impose on organisers of musical events royalties based on a charging scheme in which a flat-rate system in tranches, such as that provided for by the 1/3-2/3 rule, is used in order to determine the share of the works performed which is taken from that management company's repertoire.

50 As the Court has already had occasion to state, the royalty applied by a collective management organisation must take account of the number of musical works protected by copyright actually used (see, to that effect, judgments of 11 December 2008, *Kanal 5 and TV 4*, C-52/07, EU:C:2008:703, paragraph 39, and of 16 July 2009, *Der Grüne Punkt – Duales System Deutschland* v *Commission*, C-385/07 P, EU:C:2009:456, paragraph 143).

51 In that regard, it must be held, in the present case, that tariff 211 takes account, to some extent, of the number of musical works protected by copyright actually performed, since, as was recalled in paragraph 12 of the present judgment, the 1/3-2/3 rule allows a festival organiser to obtain a flat-rate reduction in the basic tariff according to the proportion of musical works from SABAM's repertoire which are actually performed at the event concerned.

52 That said, it is also clear from the case-law of the Court that the application of a charging scheme for royalties which takes account of the number of musical works actually performed may amount to an abuse when an alternative method exists which enables the use of those works to be identified and to be quantified more precisely and that method is capable of achieving the same legitimate aim, which is the protection of the interests of composers and music editors, without, however, leading to a disproportionate increase in the costs incurred for the purposes of the management of contracts and the supervision of the use of musical works protected by copyright (see, to that effect, judgment of 11 December 2008, *Kanal 5 and TV 4*, C-52/07, EU:C:2008:703, paragraph 40).

53 It appears that the 1/3-2/3 rule takes account only in a very imprecise manner of the number of musical works actually performed which come from SABAM's repertoire. As Wecandance, Weareone.World and the European Commission pointed out, the effect of that rule is that SABAM almost systematically collects revenue which may be considerably higher than the revenue which corresponds to such number.

54 SABAM argues, in that regard, that the current identification technology is very expensive and that additional management costs would arise from its being obliged to identify more precisely, at the collection stage, the share of its repertoire which is used by the organiser.

55 As follows from paragraph 29 of the present judgment, it is for the national court to ascertain, in the light of the actual case before it and taking account of all the circumstances thereof, including, in a case such as that in the main proceedings, the availability and reliability of the data provided, relating to the use of the works forming part of the repertoire of the collecting society at issue, and the technological tools in existence, whether an alternative method exists which enables that use to be identified and to be quantified more precisely, in the light of the conditions recalled in paragraph 52 of the present judgment.

56 In the present case, it appears that several factors attest to its being possible for SABAM to use such an alternative method, which it is nevertheless for the referring court to verify.

57 First, it must be observed that the 1/3-2/3 rule requires, for its application, a precise determination of the share of the works performed which comes from SABAM's repertoire, since that rule is used by SABAM, as stated in paragraph 12 of the present judgment, only provided that the organiser has made available to it, within a set period of time, a list of the works actually performed at the event concerned, to enable SABAM to determine if less than one third or less than two thirds of

the works performed come from its repertoire. In principle, such a list enables the proportion of the works performed which comes from SABAM's repertoire to be determined even more precisely.

58 Secondly, Wecandance and Weareone.World referred to technical developments, including the development of musical recognition software, which would enable the works performed which come from SABAM's repertoire to be identified precisely. It is conceivable that such technological tools may be capable of identifying and quantifying more precisely the works performed.

59 Finally, thirdly, Weareone.World referred to the existence of other methods for identifying and quantifying the works performed, approved by SABAM in other versions of tariff 211, such as the use of an authorised monitoring company or the replacement, on a temporary basis, of the 1/3-2/3 rule by a rule which enables the proportion of the musical works performed which come from its repertoire to be taken more precisely into account.

60 In the light of all the foregoing considerations, the answer to the question referred is that Article 102 TFEU must be interpreted as meaning that it does not constitute an abuse of a dominant position, within the meaning of that article, for a collective management company which has a de facto monopoly in a Member State to impose on organisers of musical events, in respect of the right to communicate musical works to the public, a charging scheme in which:

– on the one hand, the copyright royalties due are calculated on the basis of a tariff applied to the gross receipts from ticket sales, without it being possible to deduct from those receipts all the costs pertaining to the organisation of the festival which are not related to the musical works which are performed at it, provided that, in the light of all the relevant circumstances of the case, the royalties actually imposed by the management company pursuant to that charging scheme are not excessive in relation, inter alia, to the nature and scope of the use of the works, the economic value generated by that use and the economic value of the services of that management company, which it is for the national court to ascertain, and

– on the other hand, a flat-rate system in tranches is used in order to determine the share of the musical works performed which is taken from that management company's repertoire, provided that no other method exists which enables the use of those works to be identified and to be quantified more precisely and that is capable of achieving the same legitimate aim, which is the protection of the interests of composers and music editors, without, however, leading to a disproportionate increase in the costs incurred for the purposes of the management of contracts and the supervision of the use of musical works protected by copyright; it is for the national court to ascertain that, in the light of the actual case before it and taking account of all the relevant circumstances, including the availability and reliability of the data provided and the technological tools in existence.

Costs

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

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

Article 102 TFEU must be interpreted as meaning that it does not constitute an abuse of a dominant position, within the meaning of that article, for a collective management company which has a de facto monopoly in a Member State to impose on organisers of musical events, in respect of the right to communicate musical works to the public, a charging scheme in which:

– **the copyright royalties due are calculated on the basis of a tariff applied to the gross receipts from ticket sales, without it being possible to deduct from those receipts all the costs pertaining to the organisation of the festival which are not related to the musical works which are performed at it, provided that, in the light of all the relevant circumstances of the case, the royalties actually imposed by the management company pursuant to that charging scheme are not excessive in relation, inter alia, to the nature and scope of the use of the works, the economic value generated by that use and the economic value of the services of that management company, which it is for the national court to ascertain, and**

– **a flat-rate system in tranches is used in order to determine the share of the musical works performed which is taken from that management company's repertoire, provided that no other method exists which enables the use of those works to be identified and to be quantified more precisely and which is capable of achieving the same legitimate aim, which is the protection of the interests of composers and music editors, without, however, leading to a disproportionate increase in the costs incurred for the purposes of the management of contracts and the supervision of the use of musical works protected by copyright; it is for the national court to ascertain that, in the light of the actual case before it and taking account of all the relevant circumstances, including the availability and reliability of the data provided and the technological tools in existence.**

[Signatures]