

Provisional text

JUDGMENT OF THE COURT (Second Chamber)

4 July 2019(*)

(Reference for a preliminary ruling — Freedom to provide services — Directive 2010/13/EU — Audiovisual media services — Television broadcasting — Article 3(1) and (2) — Freedom of reception and retransmission — Incitement to hatred on grounds of nationality — Measures taken by the receiving Member State — Temporary obligation for media service providers and other persons providing services relating to the distribution of television channels or programmes via the internet to distribute or retransmit a television channel in the territory of that Member State only in pay-to-view packages)

In Case C-622/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania), made by decision of 26 October 2017, received at the Court on 3 November 2017, in the proceedings

Baltic Media Alliance Ltd

v

Lietuvos radijo ir televizijos komisija,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Second Chamber, T. von Danwitz, C. Vajda (Rapporteur) and P.G. Xuereb, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: M. Aleksejev, head of unit,

having regard to the written procedure and further to the hearing on 28 November 2018,

after considering the observations submitted on behalf of:

- Baltic Media Alliance Ltd, by R. Audzevičius, advokatas, and H. Stelmokaitis,
- Lietuvos radijo ir televizijos komisija, by A. Iškauskas and J. Nikė, advokatai,
- the Lithuanian Government, by K. Juodelytė, R. Dzikovič and D. Kriaučiūnas, acting as Agents,
- the European Commission, by A. Steiblytė, G. Braun and S.L. Kalėda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 February 2019,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 3(1) and (2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ 2010 L 95, p. 1).
- 2 The request has been made in proceedings between Baltic Media Alliance Ltd ('BMA') and Lietuvos radijo ir televizijos komisija (Lithuanian Radio and Television Commission) ('the LRTK') concerning that authority's decision of 18 May 2016 ('the decision of 18 May 2016') requiring media service providers carrying on their activities in Lithuanian territory and other persons providing Lithuanian consumers with services relating to the distribution of television channels or broadcasts via the internet, for 12 months from the date on which the decision became effective, to broadcast or retransmit the channel NTV Mir Lithuania in Lithuanian territory only in pay-to-view packages.

Legal context

European Convention on Transfrontier Television

- 3 Article 4 of the European Convention on Transfrontier Television, signed at Strasbourg on 5 May 1989, headed 'Freedom of reception and retransmission', reads as follows:

'The Parties shall ensure freedom of expression and information in accordance with Article 10 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms [signed at Rome on 4 November 1950] and they shall guarantee freedom of reception and shall not restrict the retransmission on their territories of programme services which comply with the terms of this Convention.'

EU law

Directive 89/552/EEC

- 4 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23) stated in its 4th, 9th, 10th and 15th recitals:

'Whereas the Council of Europe has adopted the European Convention on Transfrontier Television;

...

Whereas the laws, regulations and administrative measures in Member States concerning the pursuit of activities as television broadcasters and cable operators contain disparities, some of which may impede the free movement of broadcasts within the Community and may distort competition within the common market;

Whereas all such restrictions on freedom to provide broadcasting services within the Community must be abolished under the Treaty;

...

Whereas the requirement that the originating Member State should verify that broadcasts comply with national law as coordinated by this Directive is sufficient under Community law to ensure free movement of broadcasts without secondary control on the same grounds in the receiving Member States; whereas, however, the receiving Member State may, exceptionally and under specific conditions provisionally suspend the retransmission of televised broadcasts.'

- 5 Article 2(2) of that directive provided:

‘Member States shall ensure freedom of reception and shall not restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive. Member States may provisionally suspend retransmissions of television broadcasts if the following conditions are fulfilled:

...’

Directive 97/36/EC

- 6 Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Directive 89/552 (OJ 1997 L 202, p. 60) replaced Article 2 of Directive 89/552 by a new provision and inserted in Directive 89/552 a new Article 2a, which provided in paragraphs 1 and 2:

‘1. Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive.

2. Member States may, provisionally, derogate from paragraph 1 if the following conditions are fulfilled:

...’

Directive 2010/13

- 7 Directive 2010/13 codified and replaced Directive 89/552, as amended by Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 332, p. 27). Recitals 1, 4, 5, 8, 26, 35, 36, 41, 43, 54 and 104 of Directive 2010/13 state:

‘(1) Directive 89/552 ... has been substantially amended several times ... In the interests of clarity and rationality the said Directive should be codified.

...

(4) In the light of new technologies in the transmission of audiovisual media services, a regulatory framework concerning the pursuit of broadcasting activities should take account of the impact of structural change, the spread of information and communication technologies (ICT) and technological developments on business models, especially the financing of commercial broadcasting, and should ensure optimal conditions of competitiveness and legal certainty for Europe’s information technologies and its media industries and services, as well as respect for cultural and linguistic diversity.

(5) Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy — in particular by ensuring freedom of information, diversity of opinion and media pluralism — education and culture justifies the application of specific rules to these services.

...

(8) It is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole.

...

(26) For the purposes of this Directive, the definition of media service provider should exclude natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties.

...

(35) The fixing of a series of practical criteria is designed to determine by an exhaustive procedure that only one Member State has jurisdiction over a media service provider in connection with the provision of the services which this Directive addresses. Nevertheless, taking into account the case-law of the Court ... and so as to avoid cases where there is a vacuum of jurisdiction, it is appropriate to refer to the criterion of establishment within the meaning of Articles 49 to 55 [TFEU] as the final criterion determining the jurisdiction of a Member State.

(36) The requirement that the originating Member State should verify that broadcasts comply with national law as coordinated by this Directive is sufficient under Union law to ensure free movement of broadcasts without secondary control on the same grounds in the receiving Member States. However, the receiving Member State may, exceptionally and under specific conditions, provisionally suspend the retransmission of televised broadcasts.

...

(41) Member States should be able to apply more detailed or stricter rules in the fields coordinated by this Directive to media service providers under their jurisdiction, while ensuring that those rules are consistent with general principles of Union law. In order to deal with situations where a broadcaster under the jurisdiction of one Member State provides a television broadcast which is wholly or mostly directed towards the territory of another Member State, a requirement for Member States to cooperate with one another and, in cases of circumvention, the codification of the case-law of the Court of Justice ..., combined with a more efficient procedure, would be an appropriate solution that takes account of Member State concerns without calling into question the proper application of the country of origin principle. The concept of rules of general public interest has been developed by the Court of Justice in its case-law in relation to Articles 43 and 49 [EC] (now Articles 49 and 56 [TFEU]) and includes, inter alia, rules on the protection of consumers, the protection of minors and cultural policy. The Member State requesting cooperation should ensure that the specific national rules in question are objectively necessary, applied in a non-discriminatory manner and proportionate.

...

(43) Under this Directive, notwithstanding the application of the country of origin principle, Member States may still take measures that restrict freedom of movement of television broadcasting, but only under the conditions and following the procedure laid down in this Directive. However, the Court of Justice has consistently held that any restriction on the freedom to provide services, such as any derogation from a fundamental principle of the Treaty, must be interpreted restrictively ...

...

(54) Member States are free to take whatever measures they deem appropriate with regard to audiovisual media services which come from third countries and which do not satisfy the conditions laid down in Article 2, provided they comply with Union law and the international obligations of the Union.

...

(104) Since the objectives of this Directive, namely the creation of an area without internal frontiers for audiovisual media services whilst ensuring at the same time a high level of protection of objectives

of general interest, in particular the protection of minors and human dignity as well as promoting the rights of persons with disabilities, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, 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]. ...’

8 Article 1 of Directive 2010/13, which forms part of Chapter 1, ‘Definitions’, of the directive, provides in paragraph 1(a) and (c) to (f):

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

(a) “audiovisual media service” means:

(i) a service as defined by Articles 56 and 57 [TFEU] which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC [of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33)]. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;

...

...

(c) “editorial responsibility” means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided;

(d) “media service provider” means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised;

(e) “television broadcasting” or “television broadcast” (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule;

(f) “broadcaster” means a media service provider of television broadcasts.’

9 In accordance with Article 2(1) to (3) of Directive 2010/13:

‘1. Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.

2. For the purposes of this Directive, the media service providers under the jurisdiction of a Member State are any of the following:

(a) those established in that Member State in accordance with paragraph 3; ...

...

3. For the purposes of this Directive, a media service provider shall be deemed to be established in a Member State in the following cases:

- (a) the media service provider has its head office in that Member State and the editorial decisions about the audiovisual media service are taken in that Member State;
- (b) if a media service provider has its head office in one Member State but editorial decisions on the audiovisual media service are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates. If a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in each of those Member States, the media service provider shall be deemed to be established in the Member State where it has its head office. If a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in neither of those Member States, the media service provider shall be deemed to be established in the Member State where it first began its activity in accordance with the law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State;
- (c) if a media service provider has its head office in a Member State but decisions on the audiovisual media service are taken in a third country, or vice versa, it shall be deemed to be established in the Member State concerned, provided that a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in that Member State.'

10 Article 3(1) and (2) of that directive provides:

'1. Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive.

2. In respect of television broadcasting, Member States may provisionally derogate from paragraph 1 if the following conditions are fulfilled:

- (a) a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 27(1) or (2) and/or Article 6;
- (b) during the previous 12 months, the broadcaster has infringed the provision(s) referred to in point (a) on at least two prior occasions;
- (c) the Member State concerned has notified the broadcaster and the Commission in writing of the alleged infringements and of the measures it intends to take should any such infringement occur again;
- (d) consultations with the transmitting Member State and the Commission have not produced an amicable settlement within 15 days of the notification provided for in point (c), and the alleged infringement persists.

The Commission shall, within 2 months following notification of the measures taken by the Member State, take a decision on whether the measures are compatible with Union law. If it decides that they are not, the Member State will be required to put an end to the measures in question as a matter of urgency.'

11 Article 4(2) to (5) of the directive provides:

'2. In cases where a Member State:

- (a) has exercised its freedom under paragraph 1 to adopt more detailed or stricter rules of general public interest; and

- (b) assesses that a broadcaster under the jurisdiction of another Member State provides a television broadcast which is wholly or mostly directed towards its territory;

it may contact the Member State having jurisdiction with a view to achieving a mutually satisfactory solution to any problems posed. On receipt of a substantiated request by the first Member State, the Member State having jurisdiction shall request the broadcaster to comply with the rules of general public interest in question. The Member State having jurisdiction shall inform the first Member State of the results obtained following this request within 2 months. Either Member State may invite the contact committee established pursuant to Article 29 to examine the case.

3. The first Member State may adopt appropriate measures against the broadcaster concerned where it assesses that:

- (a) the results achieved through the application of paragraph 2 are not satisfactory; and
- (b) the broadcaster in question has established itself in the Member State having jurisdiction in order to circumvent the stricter rules, in the fields coordinated by this Directive, which would be applicable to it if it were established in the first Member State.

Such measures shall be objectively necessary, applied in a non-discriminatory manner and proportionate to the objectives which they pursue.

4. A Member State may take measures pursuant to paragraph 3 only if the following conditions are met:

- (a) it has notified the Commission and the Member State in which the broadcaster is established of its intention to take such measures while substantiating the grounds on which it bases its assessment; and
- (b) the Commission has decided that the measures are compatible with Union law, and in particular that assessments made by the Member State taking those measures under paragraphs 2 and 3 are correctly founded.

5. The Commission shall decide within 3 months following the notification provided for in point (a) of paragraph 4. If the Commission decides that the measures are incompatible with Union law, the Member State in question shall refrain from taking the proposed measures.'

12 Under Article 6 of the directive:

'Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.'

Lithuanian law

13 Article 19(1)(3) of the Lietuvos Respublikos visuomenės informavimo įstatymas (Law of the Lithuanian Republic on the provision of information to the public) of 2 July 2006 (Žin., 2006, No 82-3254), in the version applicable to the dispute in the main proceedings ('the Law on information for the public'), which transposed Article 6 of Directive 2010/13, provides:

'It is prohibited to distribute in the media information

...

- (3) which consists in war propaganda, incites war or hatred, ridicule or contempt, which incites discrimination, violence or harsh physical treatment of a group of persons or a person belonging to

that group on grounds of age, sex, sexual orientation, ethnic origin, race, nationality, citizenship, language, origin, social status, belief, convictions, views or religion; ...’

14 Article 33(11) and (12) of that law provides:

‘11. Bodies that retransmit television channels and other persons providing Lithuanian consumers with a service relating to the distribution on the internet of television channels and/or programmes composed of packages of channels which are retransmitted and/or distributed via the internet must comply with the rules adopted by the [LRTK] regarding the composition of packages and ensure the right of consumers to impartial information, a diversity of opinions, cultures and languages and the adequate protection of minors from the detrimental effects of public information. For a period of 12 months following the adoption of the decision referred to in paragraph 12(1) of this article, television channels on which information falling under the prohibition laid down in Article 19(1)(3) of the [present law] may be retransmitted or distributed on the internet only in pay-to-view packages, in which case those packages must not be subject to subsidisation, support or concessions of any kind, and their price may not be lower than the costs incurred by the service provider for the acquisition, retransmission and/or distribution via the internet of the channels which make up those packages.

12. Where the [LRTK] establishes that, on a television channel retransmitted and/or distributed via the internet from Member States of the European Union, States of the European Economic Area and other European States that have ratified the [European Convention on Transfrontier Television] or in programmes by that channel, information falling under the prohibition laid down in Article 19(1)(1), (2) and (3) of the [present law] has been published, distributed and disseminated:

- (1) it shall adopt a decision to the effect that the channel in question may be distributed only in pay-to-view packages and shall inform television broadcasters and other persons providing Lithuanian consumers with a service relating to the distribution on the internet of television channels and/or programmes accordingly;
- (2) it shall adopt without delay the measures provided for in Article 34¹ of that law in order to ensure that the distribution of television channels and/or programmes complies with the requirements of that law.

...’

15 Article 34¹(1) and (3) of the Law on information for the public transposes Article 3(1) and (2) of Directive 2010/13. Article 34¹(1) of that law provides that freedom of reception of audiovisual media services from, in particular, the Member States, is to be guaranteed in Lithuania. Article 34¹(3) of the law provides that that freedom may be ‘temporarily suspended’ where four conditions corresponding to those laid down in Article 3(2) of Directive 2010/13 are fulfilled.

16 According to the order for reference, a basic package is a package of television channels compiled and offered to consumers by a broadcaster or other person providing those consumers with services of distribution of television channels or programmes via the internet, in return for payment of a fixed fee. A pay-to-view package is a package of channels distributed to consumers in return for payment of an additional fee not included in the price of the basic package.

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

17 BMA, a company registered in the United Kingdom, holds a licence granted by the Office of Communications (United Kingdom) to broadcast the television channel NTV Mir Lithuania.

- 18 The LRTK, pursuant to Article 33(11) and (12)(1) of the Law on information for the public, adopted the decision of 18 May 2016. That decision was based on the fact that a programme broadcast on 15 April 2016 on the channel NTV Mir Lithuania, entitled ‘*Ypatingas įvykis. Tyrimas*’ (Special event: investigation), contained information that incited hatred based on nationality, which was prohibited under Article 19(1)(3) of that law.
- 19 On 22 June 2016 the LRTK adopted a new decision amending the decision of 18 May 2016. It deleted the obligation to distribute the channel NTV Mir Lithuania only in pay-to-view packages, and decided to open a procedure for the temporary suspension of that channel in accordance with Article 34¹(3) of the Law on information for the public. In that connection, it notified BMA of the infringement found in its decision of 18 May 2016 and of the measures it intended to take if such an infringement reoccurred. The LRTK also informed the Office of Communications of the infringement.
- 20 On the same date, BMA brought an action before the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania) seeking the annulment of the decision of 18 May 2016. In this connection BMA submits in particular that the decision was taken in breach of Article 3(2) of Directive 2010/13 and that it restricted the retransmission of a television channel from a Member State. The reasons stated for that restriction and the procedure followed for the adoption of the decision should thus have been consistent with that provision. However, that was not the case.
- 21 In those circumstances the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘(1) Does Article 3(1) and (2) of Directive [2010/13] cover only cases in which a receiving Member State seeks to suspend television broadcasting and/or retransmission, or does it also cover other measures taken by a receiving Member State with a view to restricting in some other way the freedom of reception of programmes and their transmission?
- (2) Must recital 8 and Article 3(1) and (2) of Directive [2010/13] be interpreted as prohibiting receiving Member States, after they have established that material referred to in Article 6 of that directive was published, transmitted for distribution and distributed in a television programme retransmitted and/or distributed via the internet from a Member State of the European Union, from taking, without the conditions set out in Article 3(2) of that directive having been fulfilled, a decision such as that provided for in Article 33(11) and (12)(1) of the Law [on information for the public], that is to say, a decision imposing an obligation on broadcasters operating in the territory of the receiving Member State and other persons providing services relating to the distribution of television programmes via the internet to ensure, on a provisional basis, that the television programme may be retransmitted and/or distributed via the internet only in television programme packages that are available for an additional fee?’

Consideration of the questions referred

Admissibility

- 22 The LRTK and the Lithuanian Government submit that the request for a preliminary ruling is inadmissible.
- 23 In the first place, they submit that the questions referred are hypothetical. Since the LRTK, on the very day that BMA brought proceedings before the referring court, amended the decision of 18 May 2016, deleted the obligation to distribute the channel NTV Mir Lithuania only in pay-to-view packages, and started a procedure for suspension in accordance with Article 3(2) of Directive 2010/13, the dispute in the main proceedings has become devoid of purpose, as BMA no longer has any interest in obtaining a declaration from the court that that decision was unlawful.

- 24 In that regard, it should be recalled that, according to settled case-law, the procedure provided for by Article 267 TFEU is an instrument for cooperation between the Court of Justice and the national courts, by means of which the former provides the latter with the points of interpretation of EU law which they require in order to decide the disputes before them (see, *inter alia*, judgment of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, paragraph 18).
- 25 It also follows from that case-law that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of a rule of EU law, the Court is in principle bound to give a ruling (judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 26 and the case-law cited).
- 26 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 of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 27 and the case-law cited).
- 27 Moreover, according to settled case-law, the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 28 and the case-law cited).
- 28 In the present case, the referring court stated in the order for reference that, notwithstanding the amendment to the decision of 18 May 2016 by which the LRTK withdrew the measures challenged by BMA, it will have to rule on whether the LRTK infringed BMA's rights by that decision and whether the decision was lawful when it was adopted.
- 29 In this respect, BMA submits that the decision of 18 May 2016 was in force from 23 May to 27 June 2016, that during that period it had harmful effects for BMA, and that, when it amended the decision, the LRTK did not acknowledge its unlawfulness or remove the effects it had already produced. BMA further submits that a finding that the decision of 18 May 2016 was unlawful would in particular make it possible to avert the risk of the alleged unlawfulness reoccurring in future.
- 30 It is thus apparent that, since the LRTK's withdrawal of the measures contested by BMA on the date of bringing the main proceedings did not give BMA satisfaction, there is indeed a dispute pending before the referring court.
- 31 In those circumstances, it is not obvious that the dispute in the main proceedings has become devoid of purpose, so that the questions submitted bear no relation to the actual facts of the main action or its purpose or concern a hypothetical problem.
- 32 In the second place, the Lithuanian Government submits that a measure imposing an obligation to distribute a television channel, for 12 months, only in pay-to-view packages, such as that at issue in the main proceedings, restricts the accessibility of that channel in national territory without thereby suspending the retransmission of an audiovisual service. Such a measure therefore falls outside the scope of Article 3(1) and (2) of Directive 2010/13 and constitutes an autonomous measure taken under national law, with the consequence that an interpretation of the provisions of that directive is not necessary.
- 33 In this respect, it must be stated that this argument does not relate to the admissibility of the request for a preliminary ruling but goes to the substance of the dispute in the main proceedings and, more particularly,

is the subject of the first question referred (see, by analogy, judgment of 4 October 1991, *Society for the Protection of Unborn Children Ireland*, C-159/60, EU:C:1991:378, paragraph 15).

34 In the light of the above considerations, the request for a preliminary ruling must be regarded as admissible.

Substance

Preliminary observations

35 In the first place, it is appropriate to consider the argument put forward by the LRTK and the Lithuanian Government that a television channel, such as that at issue in the main proceedings, whose programmes are produced in a third State does not fall within the scope of Directive 2010/13, and cannot therefore enjoy the freedom of reception and retransmission laid down by that directive.

36 The Lithuanian Government submits that the programmes of the channel NTV Mir Lithuania are produced by a company established in Russia and that BMA, established in the United Kingdom, confines itself to offering a mere distribution service for that channel in Lithuanian territory, without exercising any editorial responsibility over its content.

37 On this point, it must be noted that Directive 2010/13, as may be seen from recital 35, lays down a series of practical criteria to determine which Member State has jurisdiction over a media service provider in connection with the provision of the services which are the subject of the directive.

38 In accordance with Article 2(2)(a) of Directive 2010/13, the jurisdiction of a Member State extends to media service providers within the meaning of Article 1(1)(d) of that directive who are regarded as established in that Member State in accordance with Article 2(3).

39 First, the concept of ‘media service provider’ is defined in Article 1(1)(d) of Directive 2010/13 as meaning the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised.

40 The concept of ‘editorial responsibility’ is defined in Article 1(1)(c) of that directive as ‘the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services’. It is the exercise of that control entailing the taking of editorial decisions and the consequent assumption of editorial responsibility that characterise a media service provider defined in Article 1(1)(d) of that directive.

41 Consequently, a natural or legal person established in a Member State assumes editorial responsibility within the meaning of Article 1(1)(c) of Directive 2010/13 for the programmes of a television channel it distributes if it selects that channel’s programmes and organises them in a chronological schedule. In that case, it is therefore a media service provider within the meaning of Article 1(1)(d) of that directive.

42 On the other hand, as follows from recital 26 of Directive 2010/13, the definition of a media service provider excludes natural or legal persons who merely distribute programmes for which third parties have editorial responsibility.

43 As regards the various factors to be taken into account in this respect, the fact that the person in question has been licensed by the regulatory body of a Member State, while it may be an indication that that person has assumed editorial responsibility for the programmes of the channel he distributes, cannot — as the Advocate General observes in point 40 of his Opinion — be decisive, since the EU legislature did not harmonise in Directive 2010/13 the grant of licences or administrative authorisations for the provision of audiovisual media services. It must additionally be assessed whether the person has power to make a final decision as to the audiovisual offer as such, which presupposes that he has sufficient material and human

resources available to him to be able to assume such responsibility, as the Advocate General observes in points 43 to 45 of his Opinion.

44 Second, Article 2(3)(a) to (c) of Directive 2010/13 sets out the cases in which a media service provider is regarded as established in a Member State, and consequently falls within the scope of that directive.

45 It follows from Article 2(3)(a) of Directive 2010/13 that a media service provider is regarded as established in a Member State if it has its head office in that Member State and ‘the editorial decisions about the audiovisual service are taken in that Member State’.

46 Consequently, for the purposes of determining whether a natural or legal person falls within the scope of Directive 2010/13, in accordance with Article 2(3)(a) of that directive, it must be ascertained not only whether the person in question who assumes editorial responsibility for the audiovisual media services provided has his head office in a Member State, but also whether the editorial decisions relating to those services are taken in that Member State.

47 While that is a question of fact which is for the referring court to assess, the Court may nevertheless provide that court with the points of interpretation of EU law which it requires in order to decide the dispute before it.

48 For the purposes of the assessment referred to in paragraph 46 above, it must be ascertained whether the editorial decisions about the audiovisual media services mentioned in paragraph 40 above are taken in the Member State in whose territory the media service provider concerned has its head office.

49 It should be noted, in this connection, that the place where those editorial decisions relating to the audiovisual media services are taken is also of relevance for the application of the material criteria laid down in Article 2(3)(b) and (c) of Directive 2010/13.

50 In that respect, it follows from the first sentence of Article 2(3)(b) of Directive 2010/13 that ‘if a media service provider has its head office in one Member State but editorial decisions on the audiovisual media service are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates’. In addition, Article 2(3)(c) of that directive provides that ‘if a media service provider has its head office in a Member State but decisions on the audiovisual media service are taken in a third country, or vice versa, it shall be deemed to be established in the Member State concerned, provided that a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in that Member State’.

51 Moreover, as may be seen from the wording of Article 2(3)(b) and Article 2(3)(c) of Directive 2010/13, the place of the head office of the media service provider and the place where the workforce involved in the pursuit of those services operates are also relevant for the application of those provisions.

52 It follows from the observations in paragraphs 38 to 51 above that the exercise of editorial responsibility with respect to audiovisual media services characterises a provider of those services within the meaning of Article 1(1)(d) of Directive 2010/13. Moreover, the place where a media service provider has its head office and the place where the editorial decisions about those services are taken, and also, as the case may be, the place where the workforce involved in the pursuit of those services operates, are relevant criteria for ascertaining whether the provider is established in a Member State pursuant to Article 2(3) of that directive, with the result that the services it provides fall within the scope of the directive. On the other hand, the fact that the programmes of a television channel distributed in the territory of a Member State may be produced in a third country is of no relevance for that purpose.

53 In the second place, it is appropriate to consider the Lithuanian Government’s argument that Lithuanian legislation should be applied because the channel NTV Mir Lithuania is directed exclusively towards

Lithuanian territory and BMA became established in a Member State other than the Republic of Lithuania with the intent of circumventing that legislation.

54 On this point, it suffices to note that Article 4(2) to (5) of Directive 2010/13 provides for a special procedure to regulate situations in which a broadcaster under the jurisdiction of one Member State provides a television broadcast which is wholly or mostly directed towards the territory of another Member State. Subject to compliance with the conditions and procedure laid down by that provision, the receiving Member State may apply to such a broadcaster its rules of general public interest or other stricter rules in the fields coordinated by that directive.

55 In the present case, however, it is common ground that the LRTK did not follow that procedure for the adoption of the decision of 18 May 2016.

56 Accordingly, neither the fact that the programmes of the channel NTV Mir Lithuania may be produced in a third country nor, since the Republic of Lithuania did not comply with the special procedure provided for by Directive 2010/13, the fact that that channel, whose provider is established in another Member State, is directed exclusively towards Lithuanian territory dispenses the Republic of Lithuania from applying that directive.

Question 1

57 By its first question, the referring court asks in substance whether Article 3(1) and (2) of Directive 2010/13 must be interpreted as meaning that a public policy measure adopted by a Member State, consisting in an obligation for media service providers whose programmes are directed towards the territory of that Member State and for other persons providing consumers of that Member State with services relating to the distribution of television channels or programmes via the internet to distribute or retransmit in the territory of that Member State, for a period of 12 months, a television channel from another Member State only in pay-to-view packages, is covered by that provision.

58 The Court's answer to that question is founded on the premiss that BMA, to which the measures at issue in the main proceedings are addressed, is a media service provider established in a Member State other than the Republic of Lithuania, namely the United Kingdom of Great Britain and Northern Ireland, falling within the scope of Directive 2010/13 in accordance with Articles 1 and 2 of that directive, which is for the referring court to ascertain, taking into account the indications in paragraphs 37 to 52 above.

59 On the other hand, in so far as other persons providing Lithuanian consumers with services relating to the distribution of television channels or programmes via the internet do not have the status of 'media service provider' within the meaning of Article 1(1)(d) of Directive 2010/13, they are not covered by Article 3(1) and (2) of that directive.

60 Moreover, it should be noted that a media service provider established in Lithuania is subject to the jurisdiction of that Member State, as follows from Article 2 of Directive 2010/13, so that Article 3(1) and (2) of that directive does not apply to that provider.

61 In order to answer Question 1, it must be recalled that Article 3(1) of Directive 2010/13 provides that Member States are to ensure freedom of reception and not to restrict retransmissions in their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by that directive, among which are the measures against incitement to hatred referred to in Article 6 of the directive. As regards television broadcasting, Article 3(2) of the directive nonetheless allows Member States to derogate provisionally from Article 3(1), subject to a number of substantive and procedural conditions.

62 According to the order for reference, BMA on the one hand, and the LRTK and the Lithuanian Government on the other, are in disagreement as to the scope of Article 3(1) and (2) of Directive 2010/13. While BMA argues that that provision refers to any restriction by the receiving Member State of the

freedom of reception and retransmission of television programmes, restriction being understood as a restriction within the meaning of Article 56 TFEU, the LRTK and the Lithuanian Government take the view that that provision covers only cases of the complete suspension of reception and retransmission of television programmes.

- 63 According to settled case-law of the Court, when a provision of EU law is being interpreted, account must be taken not only of its wording and the objectives it pursues, but also of its context and the provisions of EU law as a whole. The origin of a provision of EU law may also contain factors relevant to its interpretation (see, *inter alia*, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 50).
- 64 As regards, first, the wording of Article 3(1) and (2) of Directive 2010/13, that does not in itself allow the nature of the measures covered by the provision to be determined.
- 65 As regards, second, the context of Article 3(1) and (2) of Directive 2010/13 and the objectives of the directive, it must be noted — as the Advocate General does in point 59 of his Opinion — that, while that directive gives expression to the freedom to provide services guaranteed in Article 56 TFEU in the field of audiovisual media services by introducing, as stated in recital 104, ‘an area without internal frontiers’ for those services, account is taken at the same time, as stated in recital 5, of the cultural as well as economic nature of those services and their importance for democracy, education and culture, justifying the application of specific rules to those services.
- 66 Furthermore, it followed from the 9th and 10th recitals of Directive 89/552 that the restrictions the EU legislature intended to abolish were those resulting from disparities between the provisions of the Member States concerning the pursuit of broadcasting activities and the distribution of television programmes. The fields coordinated by that directive were thus coordinated only in so far as television broadcasting proper, as defined in Article 1(a) of that directive, was concerned (see, to that effect, judgment of 22 September 2011, *Mesopotamia Broadcast and Roj TV*, C-244/10 and C-245/10, EU:C:2011:607, paragraphs 31 and 32).
- 67 It follows from recitals 1 and 4 of Directive 2010/13 that that directive codifies Directive 89/552 in the light of new technologies in the transmission of audiovisual media services. Consequently, the fields coordinated by Directive 2010/13 are coordinated only with respect to the provision of audiovisual media services as such.
- 68 As regards, third, the origin of Article 3 of Directive 2010/13, it must be observed that in its original version the second sentence of the first subparagraph of Article 2(2) of Directive 89/552 mentioned the right of Member States provisionally to ‘suspend’ retransmissions of television broadcasts if the conditions stated were fulfilled. Although the EU legislature, when Directive 89/552 was amended by Directive 97/36, introduced a new Article 2a, the first subparagraph of paragraph 2 of which reproduced in substance the original wording of the second sentence of the first subparagraph of Article 2(2) of Directive 89/552, while replacing the verb ‘suspend’ by the verb ‘derogate’, there is — as the Advocate General observes in point 57 of his Opinion — no indication in the preamble to Directive 97/36 that, by that amendment, the EU legislature intended to reconsider the nature of the measures covered. On the contrary, the 15th recital of Directive 89/552 continued despite that amendment to mention the receiving Member State’s power to ‘provisionally suspend the retransmission of televised broadcasts’, that power now being mentioned in recital 36 of Directive 2010/13.
- 69 It should also be observed that the European Convention on Transfrontier Television, which was drawn up at the same time as Directive 89/552 and to which the fourth recital of that directive refers, requires in Article 4, which contains a similar provision to Article 3(1) of Directive 2010/13, that the parties to the convention shall ‘guarantee freedom of reception’ and ‘not restrict the retransmission’ in their territory of services which are within the scope of the convention and comply with its terms.

- 70 The fact that the EU legislature, in the wording of Article 3(1) of Directive 2010/13, took its lead from Article 4 of the European Convention on Transfrontier Television suggests that the terms ‘freedom of reception’ and ‘restrict’ have a specific meaning in that directive that is narrower than that of the concept of ‘restrictions on freedom to provide services’ in Article 56 TFEU.
- 71 In this connection, it should be noted that the Court has held, in relation to Directive 89/552 as amended by Directive 97/36, Article 2a(1) and (2) of which corresponds in substance to Article 3(1) and (2) of Directive 2010/13, that Directive 89/552 established the principle of recognition by the receiving Member State of the control function of the originating Member State with respect to the audiovisual media services of providers falling within its jurisdiction (see, to that effect, judgment of 22 September 2011, *Mesopotamia Broadcast and Roj TV*, C-244/10 and C-245/10, EU:C:2011:607, paragraph 35).
- 72 The Court held in that respect that it is solely for the Member State from which audiovisual media services emanate to monitor the application of the law of the originating Member State applicable to those services and to ensure compliance with Directive 89/552 as amended by Directive 97/36, and that the receiving Member State is not authorised to exercise its own control for reasons which fall within the fields coordinated by that directive (see, to that effect, judgment of 22 September 2011, *Mesopotamia Broadcast and Roj TV*, C-244/10 and C-245/10, EU:C:2011:607, paragraph 36 and the case-law cited).
- 73 On the other hand, Directive 2010/13 does not in principle preclude the application of national rules with the general aim of pursuing an objective of general interest, provided that they do not involve a second control of television broadcasts in addition to that which the broadcasting Member State is required to carry out (see, to that effect, judgment of 9 July 1997, *De Agostini and TV-Shop*, C-34/95 to C-36/95, EU:C:1997:344, paragraph 34).
- 74 It follows from the judgment of 9 July 1997, *De Agostini and TV-Shop* (C-34/95 to C-36/95, EU:C:1997:344), that a national measure pursuing an objective of general interest which regulates certain aspects of the broadcasting or distribution of audiovisual media services does not fall within Article 3(1) and (2) of Directive 2010/13, unless it introduces a second control of television broadcasts in addition to that which the broadcasting Member State is required to carry out.
- 75 The Court stated in paragraph 50 of the judgment of 22 September 2011, *Mesopotamia Broadcast and Roj TV* (C-244/10 and C-245/10, EU:C:2011:607), that legislation of a Member State which does not specifically concern the broadcast and distribution of programmes and which, in general, pursues a public policy objective, without however preventing retransmission as such, on its territory, of audiovisual media services from another Member State does not fall within Directive 89/552 as amended by Directive 97/36.
- 76 However, paragraph 50 of the judgment of 22 September 2011, *Mesopotamia Broadcast and Roj TV* (C-244/10 and C-245/10, EU:C:2011:607), should not be interpreted as meaning that a national measure constitutes a restriction within the meaning of Article 3(1) of Directive 2010/13 where the legislation on the basis of which it is adopted regulates certain aspects of the broadcasting or distribution of audiovisual media services, such as the ways in which those services are broadcast or distributed.
- 77 A national measure does not constitute such a restriction if, in general, it pursues a public policy objective and regulates the methods of distribution of a television channel to consumers of the receiving Member State, where those rules do not prevent the retransmission as such of that channel. Such a measure does not introduce a second control of the channel’s broadcasts in addition to that which the broadcasting Member State is required to carry out.
- 78 As regards the measure at issue in the main proceedings, first, according to the observations submitted by the LRTK and the Lithuanian Government, by adopting Article 33(11) and (12)(1) of the Law on information for the public, on the basis of which the decision of 18 May 2016 was taken, the national legislature intended to combat the active distribution of information discrediting the Lithuanian State and threatening its status as a State in order, having regard to the particularly great influence of television on the formation of public opinion, to protect the security of the Lithuanian information space and guarantee

and preserve the public interest in being correctly informed. The information referred to in that provision is the information covered by the prohibition in Article 19 of that law, which includes material inciting the overthrow by force of the Lithuanian constitutional order, inciting attacks on the sovereignty of the Republic of Lithuania, its territorial integrity and its political independence, consisting in war propaganda, inciting war or hatred, ridicule or contempt, or inciting discrimination, violence or harsh physical treatment of a group of persons or a person belonging to that group on grounds inter alia of nationality.

- 79 In its observations before the Court, the LRTK stated that the decision of 18 May 2016 had been taken on the ground that a programme broadcast on the channel NTV Mir Lithuania contained false information which incited hostility and hatred based on nationality against the Baltic countries concerning the collaboration of Lithuanians and Latvians in connection with the Holocaust and the allegedly nationalistic and neo-Nazi internal policies of the Baltic countries, policies which were said to be a threat to the Russian national minority living in those countries. That programme was addressed, according to the LRTK, in a targeted manner to the Russian-speaking minority in Lithuania and aimed, by the use of various propaganda techniques, to influence negatively and suggestively the opinion of that social group relating to the internal and external policies of the Republic of Lithuania, the Republic of Estonia and the Republic of Latvia, to accentuate the divisions and polarisation of society, and to emphasise the tension in the Eastern European region created by Western countries and the Russian Federation's role of victim.
- 80 It does not appear from the documents before the Court that those statements are contested, which is, however, for the referring court to ascertain. On that basis, a measure such as that at issue in the main proceedings must be regarded as pursuing, in general, a public policy objective.
- 81 Second, the LRTK and the Lithuanian Government stated in their written observations that the decision of 18 May 2016, which requires media service providers whose broadcasts are directed towards Lithuanian territory and other persons providing Lithuanian consumers with services relating to the distribution of television channels or broadcasts via the internet, for a period of 12 months, to broadcast or retransmit the channel NTV Mir Lithuania in that territory only in pay-to-view packages, governs exclusively the methods of distribution of that channel to Lithuanian consumers. At the same time, it is common ground in the main proceedings that the decision of 18 May 2016 does not suspend or prohibit the retransmission of that channel in Lithuanian territory, since, despite that decision, it can still be distributed legally in that territory and Lithuanian consumers can still view it if they subscribe to a pay-to-view package.
- 82 Consequently, a measure such as that at issue in the main proceedings does not restrict the retransmission as such in the territory of the receiving Member State of television programmes from another Member State of the television channel to which that measure is directed.
- 83 Such a measure is not therefore covered by Article 3(1) and (2) of Directive 2010/13.
- 84 In the light of all the above considerations, the answer to Question 1 is that Article 3(1) and (2) of Directive 2010/13 must be interpreted as meaning that a public policy measure adopted by a Member State, consisting in an obligation for media service providers whose programmes are directed towards the territory of that Member State and for other persons providing consumers of that Member State with services relating to the distribution of television channels or programmes via the internet to distribute or retransmit in the territory of that Member State, for a period of 12 months, a television channel from another Member State only in pay-to-view packages, without however restricting the retransmission as such in the territory of the first Member State of the television programmes of that channel, is not covered by that provision.

Question 2

- 85 In view of the answer to Question 1, there is no need to answer Question 2.

Costs

- 86 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 (Second Chamber) hereby rules:

Article 3(1) and (2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) must be interpreted as meaning that a public policy measure adopted by a Member State, consisting in an obligation for media service providers whose programmes are directed towards the territory of that Member State and for other persons providing consumers of that Member State with services relating to the distribution of television channels or programmes via the internet to distribute or retransmit in the territory of that Member State, for a period of 12 months, a television channel from another Member State only in pay-to-view packages, without however restricting the retransmission as such in the territory of the first Member State of the television programmes of that channel, is not covered by that provision.

[Signatures]

* Language of the case: Lithuanian.