

In Case 127/73

Reference to the Court under Article 177 of the EEC Treaty by the Tribunal de Première Instance at Brussels for a preliminary ruling in the actions pending before that court between

1. BELGISCHE RADIO EN TELEVISIE,

and

NV FONIOR;

2. SOCIÉTÉ BELGE DES AUTEURS, COMPOSITEURS ET ÉDITEURS,

and

NV FONIOR;

3. BELGISCHE RADIO EN TELEVISIE,

and

SV SABAM AND NV FONIOR

on the interpretation of Articles 86 and 90 (2) of the EEC Treaty,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and M. Sørensen, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore, H. Kutscher, C. Ó Dálaigh and Lord Mackenzie Stuart (Rapporteur), Judges,

Advocate-General: H. Mayras

Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

I — Facts and procedure

By its Judgment of 30 January 1974 ([1974] E.L.R. ...) the Court decided to hear the Advocate-General with regard to the merits of the case before giving a ruling on the questions referred by the Tribunal de Première Instance at Brussels.

By the first question it is asked whether 'the fact that an undertaking which enjoys a *de facto* monopoly in a Member State for the management of copyrights requires the global assignment of all such rights without drawing any distinction between specific categories [can] be regarded as an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty'.

By the second question it is asked whether 'abuse of a dominant position [can] also consist in the fact that such an undertaking stipulates that an author shall assign his present and future rights, and in particular in the fact that, without

having to give an account of its action, that undertaking may continue to exercise the rights assigned for five of the association's years following the withdrawal of the member'.

By the third question it is asked 'how the expression "undertaking entrusted with the operation of services of general economic interest" [should] be understood' and whether that expression implies 'that such undertaking should have definite privileges which are denied to other undertakings'.

By the fourth question it is asked whether 'the provisions of Article 90 (2) of the Treaty [can] create rights in respect of private parties which national courts must safeguard'.

The facts of the case, the subject-matter of the request and the views of the parties are set out in the above mentioned Judgment of the Court.

The Advocate-General delivered his opinion at the hearing on 12 February 1974.

Law

- 1 By judgment of 4 April 1973, filed at the Registry of the Court on 19 April 1973, the Tribunal de Première Instance at Brussels referred, in pursuance of Article 177 of the EEC Treaty, a number of questions on the interpretation of Articles 86 and 90 (2) of the said Treaty.
- 2 These questions are intended to enable the national court to decide on the validity of contracts concluded in 1963 and 1967 between the Belgian Association of Authors, Composers and Publishers ('SABAM') and two authors, in which the latter assigned some of their rights to SABAM.

- 3 By the first question it is asked whether an undertaking which enjoys a *de facto* monopoly in a Member State for the management of copyrights abuses its dominant position by demanding the global assignment of all copyrights without drawing any distinction between specific categories of such rights.
- 4 By the second question it is asked whether an abuse of a dominant position can consist in the fact that an undertaking stipulates that an author shall assign his present and future rights, and that, without having to give an account of its action, the undertaking continues to exercise the rights assigned for five years following the withdrawal of a member.
- 5 It is apparent from the order for reference that the national court, having found that the undertaking in question in fact exercised a quasi-monopoly within Belgian territory and consequently occupied a dominant position in a substantial part of the common market, considered it necessary to ascertain whether that undertaking was abusing its dominant position through its statutes and contracts with its members.
- 6 According to the terms of Article 86 (a) an abuse must be regarded as consisting, in particular, in directly or indirectly imposing unfair trading conditions.
- 7 It is therefore necessary to investigate whether the copyright association, through its statutes or contracts concluded with its members, is imposing, directly or indirectly, unfair conditions on members or third parties in the exploitation of works, the protection of which has been entrusted to it.
- 8 For this appraisal account must be taken of all the relevant interests, for the purpose of ensuring a balance between the requirement of maximum freedom for authors, composers, and publishers to dispose of their works and that of the effective management of their rights by an undertaking which in practice they avoid joining.
- 9 To determine whether, in these circumstances, the practices mentioned in the referring judgment constitute an abuse within the meaning of Article 86 of the Treaty account must however be taken of the fact that an undertaking of the type envisaged is an association whose object is to protect the rights and

interests of its individual members against, in particular, major exploiters and distributors of musical material, such as radio broadcasting bodies and record manufacturers.

- 10 For an association effectively to protect its rights and interests it must enjoy a position based on the assignment in its favour, by the associated authors, of their rights to the extent required for the association to carry out its activity on the necessary scale.
- 11 Consequently, it is desirable to examine whether the practices in dispute exceed the limit absolutely necessary for the attainment of this object, with due regard also to the interest which the individual author may have that his freedom to dispose of his work is not limited more than need be.
- 12 For this purpose, a compulsory assignment of all copyrights, both present and future, no distinction being drawn between the different generally accepted types of exploitation, may appear an unfair condition, especially if such assignment is required for an extended period after the member's withdrawal.
- 13 The inequitable nature of such provisions must be determined by the relevant court, bearing in mind both the intrinsic individual effect of those clauses and their effect when combined.
- 14 If abusive practices are exposed, it is also for the court to decide whether and to what extent they affect the interests of authors or third parties concerned, with a view to deciding the consequences with regard to the validity and effect of the contracts in dispute or certain of their provisions.
- 15 It must thus be concluded that the fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position within the meaning of Article 86 imposes on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright can constitute an abuse.

- 16 By the third question, this Court is asked to interpret the expression 'undertaking entrusted with the operation of services of general economic interest' and to state, in particular, whether this concept implies that the undertaking must have definite privileges which are denied to other undertakings.
- 17 By the final question it is asked whether the provisions Article 90 (2) of the Treaty create rights in respect of private parties which national courts must safeguard.
- 18 It emerges from the order for reference that the object of the third question is to ascertain whether an association entrusted by its members with the management of their copyrights can be covered by that expression.
- 19 As Article 90 (2) is a provision which permits, in certain circumstances, derogation from the rules of the Treaty, there must be a strict definition of those undertakings which can take advantage of it.
- 20 Private undertakings may come under that provision, but they must be entrusted with the operation of services of general economic interest by an act of the public authority.
- 21 This emerges clearly from the fact that the reference to 'particular tasks assigned to them' applies also to undertakings having the character of a revenue-producing monopoly.
- 22 It is thus the duty of the national court to investigate whether an undertaking which invokes the provisions of Article 90 (2) for the purpose of claiming a derogation from the rules of the Treaty has in fact been entrusted by a Member State with the operation of a service of general economic interest.
- 23 That is not the position in the case of an undertaking to which the State has not assigned any task and which manages private interests, including intellectual property rights protected by law.
- 24 It is, consequently, unnecessary to reply to the final question.

Costs

- 25 The costs incurred by the Commission of the European Communities and by the Government of the Federal Republic of Germany, which have submitted observations to the Court, are not recoverable.
- 26 As these proceedings are, insofar as the parties to the main action are concerned, a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

Upon reading the pleadings;

Upon hearing the report of the Judge-Rapporteur;

Upon hearing the oral observations of the Commission of the European Communities, the Government of the Federal Republic of Germany, the Belgische Radio en Televisie and SABAM;

Upon hearing the opinion of the Advocate-General;

Having regard to the Treaty establishing the European Economic Community, especially Articles 86, 90 (2) and 177;

Having regard to the Protocol on the Statute of the Court of Justice of the EEC, especially Article 20;

Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it by the Tribunal de Première Instance at Brussels by judgment of that court of 4 April 1973, hereby rules:

1. (a) The fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position within the meaning of Article 86 imposes on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright can constitute an abuse.
- (b) If abusive practices are exposed, it is for the national court to decide whether and to what extent they affect the interests of authors or third parties concerned, with a view to deciding the consequences with regard to the validity and effect of the contracts in dispute or certain of their provisions.

2. An undertaking to which the state has not assigned any task and which manages private interests, including intellectual property rights protected by law, is not covered by the provisions of Article 90 (2) of the EEC Treaty.

Lecourt	Donner	Sørensen	Monaco	Mertens de Wilmars
Pescatore	Kutscher	Ó Dálaigh	Mackenzie Stuart	

Delivered in open court in Luxembourg on 27 March 1974.

A. Van Houtte

Registrar

R. Lecourt

President

OPINION OF MR ADVOCATE GENERAL MAYRAS
DELIVERED ON 12 FEBRUARY 1974¹

Mr President,

Members of the Court,

By your Judgment of 30 January, in which you gave a ruling on the competence of the Court, you dismissed the two questions of a procedural nature raised by one of the parties to the main action and you requested me to express my opinion as to how the questions referred for a preliminary ruling by the Tribunal de Première Instance at Brussels should be answered.

I — Context of the problem

The first two questions concern the interpretation of Article 86 of the Treaty. Questioning the concept of abuse of a dominant position, the Belgian court asks this Court:

- firstly, whether such abuse is committed by an undertaking which, exercising a *de facto* monopoly in a Member State for the management of copyrights, requires of its members, who are authors, composers and publishers of music, the global assignment of all their rights without drawing any distinction between specific categories of such rights;
- secondly, whether abuse of a dominant position can also consist in the fact that such an undertaking stipulates that authors shall assign their present and future rights, and that the rights assigned continue to be exercised exclusively by that undertaking for five years following the withdrawal of a member.

Before giving my opinion on these problems, Gentlemen, it is to my mind

¹ — Translated from the French