

Articles 85 and 86 is pleaded, from giving judgment. The competence of such a court to refer a request for a preliminary ruling to the Court of Justice cannot be fettered by Article 9 of Regulation No 17. Nevertheless if the Commission initiates a procedure

in application of Article 3 of Regulation No 17 such a court may, if it considers it necessary for reasons of legal certainty, stay the proceedings before it while awaiting the outcome of the Commission's action.

In Case 127/73

Reference to the Court under Article 177 of the EEC Treaty by the Tribunal de première instance of 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

## Issues of fact and of law

A — The facts of the case, the subject-matter of the request and the views of the parties may be summarised as follows:

## I — Facts and procedure

The Belgian Association of Authors, Composers and Publishers (hereinafter referred to as 'SABAM'), is a cooperative association governed by Belgian law with the object of exploiting, administering and managing, in the widest sense of those terms, all copyrights and kindred rights, ... on its own behalf, for its members and associates and for its clients and affiliated undertakings.

SABAM concluded standard form contracts with the composer, Mr Davis, and with the song writer, Mr Rosenstraten, in 1963 and 1967; under these contracts they assigned and transferred to SABAM their copyrights in all present or future compositions of which they are or will be owners, and all present and future rights as performers and producers of gramophone records.

Under these contracts SABAM had the right, without having to account for its decision, to retain the rights which had been assigned to it and to exercise them for 5 years following the member's withdrawal from the association.

On 11 March 1969 the Belgische Radio en Televisie (hereinafter referred to as 'BRT') concluded a separate contract with Mr Davis and Mr Rosenstraten by which they assigned to the BRT certain copyrights relating to the words and the music of a song. The special provisions of those contracts required in particular

that the author assign exclusively to the BRT all his rights in the script, without any limitation, for a period of two years and, where the agreement was incompatible with contracts already concluded, the other parties to such prior contracts were to sign a declaration permitting him to enter into this transaction with the BRT.

Repeated broadcasts of the song took place on radio and television.

A contract concluded between BIEM, the Bureau International d'Édition Mécanique (entrusted by SABAM with the task of managing the latter's repertoire as concerns the grant of permission for mechanical reproduction) and NV Fonior gave to the latter the nonexclusive right to exploit phonographically works from the repertoire of BIEM including the song in question.

NV Fonior recorded on tape the words of the song in question and marketed it in its own version on Decca records.

In March and April 1969 SABAM and the BRT attempted, in vain, to prohibit NV Fonior from publishing the song in issue. SABAM and the BRT both commenced actions in 1969 before the Tribunal de première instance of Brussels seeking to have NV Fonior condemned for this alleged illegal reproduction.

On 3 June 1970 the Commission initiated, of its own motion, the procedure under Article 3 of Regulation No 17 in respect of GEMA (Germany), SACEM (France) and SABAM. By a letter of 8 June 1970 the Commission informed SABAM of its objections concerning especially the articles of the contracts dealing with the global assignment of copyrights and the

duration of the period of management of the rights after withdrawal (5 years). This procedure is still in progress.

The main dispute relates *inter alia*, to the ownership of copyrights. SABAM and the BRT both claim title to the rights permitting the prohibition of reproduction of the records in question.

By its judgment of 4 April 1973 the Tribunal de première instance of Brussels decided to stay the proceedings and to ask the Court of Justice to give a preliminary ruling on the following questions:

1. Can 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 be regarded as an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty?
2. Can abuse of a dominant position 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?
3. How should the expression 'undertaking entrusted with the operation of services of general economic interest' be understood? Is it necessary that such an undertaking should have definite privileges which are denied to other undertakings?
4. Can the provisions of Article 90 (2) of the Treaty create rights in respect of private parties which national courts must safeguard?

It appears from the grounds of the order for reference that the Tribunal considered that it would be possible to

establish the existence of factors indicating abuse if it appeared that SABAM binds its members by provisions which are not necessary, by demanding, *inter alia*, a global assignment of all rights and by making withdrawal of members too difficult, by entailing possible financial loss.

The order for reference was filed at the Registry of the Court on 19 April 1973.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted on 31 July 1973 for the Commission of the European Communities by its Legal Advisers, Bastian van der Esch and René-Christian Béraud, on 2 August 1973 for the Belgische Radio en Televisie by Martin Denys, of the Brussels Bar, and on 30 July 1973 for the Cooperative Association SABAM by Jean Dasse and Louis Chabert, of the Brussels Bar.

By letter of 30 July 1973, the registrar of the Tribunal de Première Instance of Brussels notified the Court

'that the appeal brought by SABAM against the judgment of the 12 Chamber of this court of 4 April 1973 suspends the proceedings before the Court of Justice (Articles 1068 and 1397 of the Code Judiciaire)'.

By letter of 18 September 1973 the registrar of the said Tribunal informed the court that the Tribunal

'does not wish the examination of the case in question before the Court of Justice to be suspended.

Although one of the parties has let it be known that it intends bringing an appeal against the order for reference, this appeal — even if it is brought — cannot have the effect of suspending the proceedings before the Court.

In addition, such a suspension of proceedings is hardly desirable since the interpretation given by the Court of Justice of the provisions of the Treaty can be useful to this Tribunal as well as to the appeal court'.

The Court, having heard the report of the Judge-Rapporteur and the opinion of the Advocate-General, decided to open the oral procedure without any preparatory enquiry.

Observations submitted to the Court

*Observations of the Commission of the European Communities*

*As to the jurisdiction of the national court*

In May 1971 and 1973, following an exchange of views subsequent upon notification of the Commission's objections, SABAM amended its statutes with the result that it is now possible for any member to decide whether to assign his copyrights to SABAM for one or more categories of form of exploitation and whether to assign those rights for the whole world or only for certain countries. In the same way, the period of the Association's retention of those rights after the withdrawal of a member was reduced from five years to three.

The Commission is pursuing its examination of these amendments and the procedure which it initiated has not yet come to a close.

The Commission considers that as the procedure under Article 3 of Regulation No 17 has been initiated the national authorities, including the national courts, are no longer competent, according to Article 9 (3), to apply Article 86 of the Treaty.

It is of the opinion that in this case where it is clear that the national court has for the time being no jurisdiction, it is as yet too early for the Court of Justice to examine the questions referred by the court.

*As to the first question*

The Commission considers that the abuse of a dominant position within the common market or in a substantial part of it can consist, in the case of an undertaking, in binding those who use

its services in a manner which is not necessary for the realization of the objects of the undertaking. That is the decision it gave in respect of the German company GEMA (OJ L 134 of 20 June 1917).

The provision in the contracts of assignment whereby the contracting party undertakes to assign all copyrights, without distinction, in all his present or future works according to an obligation imposed by SABAM which is not absolutely necessary, constitutes an abuse of a dominant position.

However, the Commission does consider that as radio and television stations and the recording industry are in a position of strength within the market, it is in turn possible for them to exert undue influence over authors, especially those who are in the services of a particular station or record company, and the fact of their membership of an association like SABAM protects them against abuses.

The Commission draws up two lists, the first containing examples of forms of exploitation which are economically different, the second containing forms of exploitation divided into categories, which lend themselves to exercise by a particular association, as for example the category consisting in 'sound and vision broadcasting rights, including secondary reproduction rights'.

In its opinion, authors are justifiably bound to cooperative management associations if they have, under the statutes of such associations, the possibility of limiting the assignment of their rights to certain forms of exploitation or to certain categories. This argument underlies the second GEMA Decision (OJ L 166/72).

The Commission submits, finally, that the fact that it is impossible for a third party to obtain rights in individual works within the context of such forms of exploitation or categories does not constitute, for a market-structure characterized by the economic power of

those who operate within it (radio and television companies, record companies), an abuse of a dominant position within the meaning of Article 86.

*As to the second question*

The Commission considers that the assignment of existing and future rights is acceptable on condition that such assignment is also limited to certain forms of exploitation or to certain categories.

Where an author is given the possibility of assigning his rights over particular forms of exploitation, the association's entitlement to the exercise of those rights for a period of three years after withdrawal is reasonable. A maximum period of one year is reasonable where this possibility is granted to him only for specific categories of forms of exploitation. In the Commission's view, the continued exercise of copyrights for five years after the withdrawal of the member always constitutes an abuse of a dominant position within the meaning of Article 86 of the Treaty. In this case, any requirement that the undertaking should account for its decision to continue to exercise the copyrights is irrelevant.

*As to the third and fourth questions*

The phrase 'undertakings entrusted with the operation of services of general economic interest' which appears in Article 90 (2) of the EEC Treaty must be understood as referring to undertakings entrusted expressly, by means of a legal act, with the operation of those services.

SABAM can in no respect assert that it is entrusted with a specific task by the public authorities. Moreover, the Commission doubts whether the tasks accomplished by SABAM may be described as services of general economic interest.

The Commission points out that the undertakings referred to in Article 90 (2) enjoy, as a general rule, certain privileges

which compensate for the particular task falling on them. These privileges may in turn be subject to scrutiny as to their compatibility with Article 90 (2). But the fact that an undertaking possesses privileges does not necessarily imply that it comes under the provisions of, Article 90 (2).

With regard to the fourth question, which it considers to be irrelevant in view of the preceding comments, the Commission refers to the Judgment of the Court in Case 10/71, *Port de Mertert* (Rec. 1971, p. 723).

*Observations of the BRT*

The BRT considers that a global assignment of future rights is not legally defensible.

Authors can either work in a manner which is completely independent or else be bound, as agents, employees or producers of contract work, to whoever commission the work. The statutes of SABAM and the general philosophy underlying its operation are, in truth, reconcilable only with the activity of an independent author.

Where a piece of work is commissioned for performance by a broadcasting company, a global and absolute assignment of copyrights to that company is necessary so that the authors themselves are not tempted to use the broadcasting company as a means of advertisement for the work for which they have already been remunerated.

For many years the BRT has urged SABAM, in vain, to amend its statutes by providing an exception in the case of the works of persons bound to the BRT under administrative regulations or by contract. SABAM has always refused to amend its statutes and, because of the dominant position which SABAM enjoys, the BRT has been forced to accept this situation.

The statutes of SABAM do not allow for an exception in the case of a piece of work produced on commission. If the

author wishes to withdraw from the association on the occasion of such a commission, so as to be able to assign all his copyrights to whoever has commissioned the work, he runs the risk that SABAM, under Article 15, will retain all the rights for a further five years, *without having to account for its action*. This provision constitutes a grave abuse of a dominant position for which, moreover, there is no necessity.

### *Observations of SABAM*

#### *As to the reference to the Court*

It emerges from the opinion of the Advocate-General and the principles laid down by the Court in its Order of 3 June 1969 in Case 31/68, *SA Chanel v Cepeha* (Rec. 1970, p. 403) that proceedings in the case of any request for a preliminary ruling are stayed from the moment that the national court which has requested the ruling officially informs the Court of Justice that an appeal has been brought against its decision, and that that appeal suspends the execution of the decision.

On 17 July 1973 SABAM brought an appeal against the order for reference of 4 April 1973 which, according to the Belgian Code Judiciaire, suspends the decision of 4 April 1973. Under the same Code, any appeal against a final judgment or an interim order gives the appeal court jurisdiction as to the merits of the case. In this action, the decision of 4 April can have no further legal effect.

Consequently, SABAM requests the Court to stay the proceedings in this case until the appeal court has given a ruling on the appeal entered on 17 July 1973 against the order for reference.

#### *As to the first and second questions*

SABAM examines first the procedure prescribed by Regulation No 17 for implementing Article 86, a procedure which the Commission of the European Communities has initiated, and points

out that this procedure is still in progress. Following the Commission's intervention, SABAM made considerable amendments both to its statutes and general rules and to its contracts of assignment.

The Association considers that the Commission of the European Communities, by means of a decision, has already settled the issues of Community law raised by the Tribunal de Première Instance of Brussels. It refers to the GEMA Decisions of 2 June 1971 and 6 July 1972 and submits that the reply to be given to the first question is to be found in Article 1 of the Decision of 6 July 1972.

The reply to the second question, relating also to the application of Article 86 of the Treaty, can be inferred from those Decisions. In its Decision of 26 June 1971 the Commission considered the imposition by GEMA of a period of affiliation of 6 years on its members to be abusive. The Commission also considered that withdrawal does not affect the validity of contracts of assignment previously concluded by the withdrawing member.

In its decision of 6 July 1972 the Commission accepted that a minimum period of affiliation of 3 years is perfectly justifiable on economic grounds.

The Commission explained, in clear and precise terms, the need for this obligation: it was to protect the members of copyright associations against the pressures which could be put on them by powerful exploiters of musical material, such as broadcasting and recording companies.

Since contracts of assignment must be of a certain duration, to enable copyright associations to conclude long term licence agreements with those who exploit musical material, SABAM retained the right to make use, if it wished, of rights assigned for five of the association's years following an author's withdrawal. The amendment made to

the statutes by the extraordinary general meeting of 20 May 1973 expressly reduced SABAM's right in this respect to a period of three of the association's years. The same extraordinary general meeting amended the statutes in such a way that the decision can be limited to one or more categories of rights and to specified territories. Thus, in the words used by the Commission in the GEMA decision of 6 July 1972, the balance between the 'period of exercise of the rights by SABAM and the extent to which its members are bound' is maintained.

Basing itself on the Commission's Decisions, the referring Tribunal must at the very least recognize the legality of the contracts of assignment of SABAM in so far as they are consistent with the GEMA Decisions. The right of SABAM to require the assignment of all the works of an author, within any one category, including his future works, is perfectly legal. SABAM has the right to require the assignment of all rights in the works of an author in one or more categories, such as broadcasting rights, which would include the performing rights of works broadcast on the radio, as well as reproduction and mechanical broadcasting rights, including the performing rights of works reproduced mechanically. The contracts of assignment which gave rise to the request for interpretation were concluded before the Commission had initiated the procedure in application of Article 86 against SABAM and before the Commission's Decisions in respect of GEMA.

The provisions of the contracts of assignment of SABAM have recently been removed or modified. Consequently, the Court's interpretation of Article 86 of the EEC Treaty, in relation to the former version of those contracts, is no longer of any practical value. Only an appraisal by the Court as to whether the present statutes and rules of SABAM, in their recently amended form, are

consistent with Article 86, can therefore be of any interest.

*As to the third and fourth questions*

According to SABAM, the two problems raised by these questions have been decided by the Court in Case 10/71, *Port de Mertert* (Rec. 1971, p. 723), where the Court held, firstly, that an undertaking enjoying certain privileges in the accomplishment of the task legally entrusted to it and maintaining for such purpose close relations with the public authorities is covered by Article 90 (2) of the EEC Treaty and, secondly, that that Article does not have direct effect.

The Association does not believe that the definition given by the Court in the *Port Mertert* case applies to it.

B — During the oral procedure, which was opened on 13 November 1973, SABAM, the BRT, the Government of the Federal Republic of Germany and the Commission of the European Communities submitted oral observations.

*Me Dasse*, for SABAM, expressed the opinion that the Court should stay the proceedings in respect of a preliminary question when the appeal has the effect of

1. bringing the main action before a higher court having jurisdiction as to the facts;
2. giving the higher court jurisdiction to decide that the questions should no longer be referred;
3. depriving the lower court of its authority to send additional information to the Court: Case 31/68, *Chanel v Cepeba*, opinion of Mr Roemer.

He maintains that under Belgian law an appeal against the order for reference has such an effect.

With regard to the effect of Article 9 (3) of Regulation No 17, he maintains, in support of the Commission, that the national court now lacks competence. Consequently, once the Commission has

initiated a procedure in application of Article 86 of the Treaty the national authorities cease to be competent. All courts, even civil courts, are national authorities within the meaning of that provision: Case 43/69, *Bilger* (Rec. 1970, p. 127) and there is no further need to re-examine that finding: Case 48/72, *Haecht II* (Rec. 1973, p. 77).

The fact that the Commission has initiated the procedure after the commencement of the first two main actions does not affect this conclusion.

With regard to the substance of the preliminary questions he maintains that an authors' association must be considered as a union constituted for the defence of the rights of its members. The facts of this case demonstrate the erosion of copyrights which is caused by broadcasting companies requiring from authors a global assignment of their rights in a particular composition for a period of two years.

He contends, finally, that the fact that a copyright association requires the exclusive assignment of all rights in all the works, both present and future, of an author where they fall into a particular category does not constitute an abuse of a dominant position.

*Me Denys, for the BRT*, does not accept the argument of SABAM that an appeal brought against an order for reference has the effect, under Belgian law, of depriving the court making the reference of its competence.

He invokes the Belgian constitution to refute the proposition that an administrative procedure can suspend proceedings before a civil court.

He finds no legal basis in the Treaty capable of justifying the conclusions of SABAM and the Commission as to the interpretation of Article 9 (3).

As to the substance of the questions he maintains that, rather than by a sub-division into categories, it is by the temporary assignment of his rights in a

specific composition that an author can better protect his copyright.

A finding that SABAM has abused its dominant position is inevitable since it recognized this itself in amending its statutes following the Commission's suggestions.

*Mr Seidel, for the Government of the Federal Republic of Germany*, acting as agent, contests the argument of the Commission. He maintains that the Court in the *Bilger* Judgment merely wished to point out that the courts which have the duty of ensuring the implementation of procedures in the field of agreements are included in the category of national authorities within the meaning of Article 9 (3) and it did not wish to include therein the civil courts which have the task of protecting citizens against abuse. If it was not so, the direct effect of the rules of competition in the Treaty would be considerably reduced.

If the civil court no longer had jurisdiction once the Commission has initiated a procedure in application of Article 85 or 86 of the Treaty it would not even be able to take interim measures. Moreover, Regulation No 17 does not contain any procedure serving to ensure that the national courts are informed of the fact that the Commission had initiated such a procedure.

Consequently, he advocates a flexible system as defined by the Court in *Haecht II*, according to which the national court has the option of suspending the proceedings in order to enable the parties to refer the matter to the Commission.

*Mr van der Esch, Legal Adviser to the Commission*, points out that in the Order in Case 31/68, *Chanel*, the Court stayed the proceedings for two reasons: the factual circumstances and the communication from the national court. That Judgment must be explained as meaning that the Court, having regard to the actual facts, had the impression that



the order for reference might be quashed. In this case SABAM has based its appeal, *inter alia*, on the fact that, pursuant to Article 9 (3) of Regulation No 17, the national court lacks competence, a fact of which the Commission is also convinced.

The *Haecht II* case only related to the situation where the Commission had not yet initiated a procedure. When there is no uncertainty as to whether the procedure has been initiated by the Commission the latter is of the opinion that, for the duration of the procedure, no national authority exercises a competence which is parallel to that of the Commission, which is temporary and exclusive. In its opinion, Article 9 (3) does not prevent the national court from taking an interim decision to maintain the *status quo*.

The existence of the appeal and the temporary lack of jurisdiction of the national court leads him to suggest, in accordance with the principal '*festina lente*', that the Court should suspend its decision. Nevertheless, he suggests that the Advocate-General should present his opinion in the meantime.

While supporting the conclusions of the Commission in its statement, he adds several arguments in favour of the direct applicability of Article 90 (2):

1. The general scheme of this provision is similar to the provisions of Articles 7, 85 and 86: they are provisions which govern all legal relations *rationi personae*.
2. The obligations which flow from this provision are not conditional. Although the rules to be respected are complex, they are no more so than those of Articles 85 and 86.
3. Individuals are obliged to respect the very complex provisions of the last sentence of Article 36, without there being any necessity for an intervention on the part of the Community: Case 78/70, *Deutsche Grammophon* (Rec. 1971, p. 487, 500).
4. It emerges from a reading of Article 90 (2) and (3) as a whole, that the application of paragraph (2) can be 'if necessary' facilitated by an appropriate directive or decision addressed to Member States, but that the application of paragraph (2) does not in any way depend on the existence of such directive or decision.
5. Articles 85 to 90 lay down the general rules applicable to undertakings: Case 6/72, *Continental Can* (Rec. 1973, p. 215, 246).
6. The fact that Article 90 refers more specifically to Articles 85 to 94 inclusive does not exclude the fact that it refers to other provisions of the Treaty.

Thus, in principle, 'undertakings' within the meaning of paragraph (2) must respect the provisions of the Treaty like all other undertakings.

C — The Advocate-General presented his opinion at the hearing on 12 December 1973.

## Grounds of judgment

- 1 By an order of 4 April 1973, filed at the Registry of the Court on 19 April 1973, the Tribunal de première instance of Brussels referred several questions under Article 177 of the Treaty on the interpretation of Articles 86 and 90 (2) of the EEC Treaty.

- 2 The questions are put with the aim of enabling the national court to judge the conformity of certain articles of the statutes and standard form contracts of the Société Belge des auteurs, compositeurs et éditeurs (hereinafter referred to as 'SABAM') with the rules on competition in the EEC Treaty.
- 3 SABAM having brought an appeal against the order for reference, the Tribunal of Brussels informed the Court, by a letter of 18 September 1973, that it did not wish the examination of the preliminary questions before the Court to be suspended.
- 4 The appeal is based in particular on the alleged fact that, by virtue of Article 9 (3) of Regulation No 17 of the Commission (OJ No 13 of 21 February 1962), the national court lacks competence.
- 5 It emerges from the preparatory enquiry into the case before the Court of Justice that the Commission decided on 3 June 1970 to initiate, of its own motion, the procedure under Article 3 of the said Regulation in respect of SABAM and informed the latter of this decision on 8 June 1970.
- 6 In the particular circumstances of this case it is necessary, before giving a ruling on the questions referred, first to examine the regularity of the reference to the Court.

#### As to the jurisdiction of the Court

- 7 The Court has jurisdiction to give judgment on a request for a preliminary ruling, within the meaning of Article 177, notified by a national court in accordance with Article 20 of the Protocol on the Statute of the Court of Justice.
- 8 The Treaty confers on national courts the right to judge whether a decision on a point of Community law is necessary for their judgments.

- 9 Consequently, the procedure under Article 20 of the Protocol on the Statute of the Court of Justice continues as long as the request of the national court has neither been withdrawn nor become devoid of object.
- 10 It has been maintained that the Court is not obliged to reply to the questions referred by the Tribunal of Brussels since the Commission has initiated, of its own motion, a procedure in respect of SABAM in pursuance of Article 3 of Regulation No 17.
- 11 According to SABAM, as the civil courts must be considered to be 'authorities of the Member States' within the meaning of Article 9 (3) of the said Regulation, the Tribunal of Brussels ought to have stayed the proceedings as from 8 June until the Commission has given its decision.
- 12 Under Article 9 (3) 'as long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article 85 (1) and Article 86 in accordance with Article 88 of the Treaty'.
- 13 Consequently, as soon as the Commission has initiated such a procedure the authorities of the Member States cease to be competent to proceed against the same practices or agreements under the said provisions.
- 14 It must thus be examined whether the national courts, before which the prohibitions contained in Articles 85 and 86 are invoked in a dispute governed by private law, must be considered as 'authorities of the Member States'.
- 15 The competence of those courts to apply the provisions of Community law, particularly in the case of such disputes, derives from the direct effect of those provisions.
- 16 As the prohibitions of Articles 85 (1) and 86 tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard.

- 17 To deny, by virtue of the aforementioned Article 9, the national courts' jurisdiction to afford this safeguard, would mean depriving individuals of rights which they hold under the Treaty itself.
- 18 The fact that Article 9 (3) refers to 'the authorities of the Member States' competent to apply the provisions of Articles 85 (1) and 86 'in accordance with Article 88' indicates that it refers solely to those national authorities whose competence derives from Article 88.
- 19 Under that Article the authorities of the Member States — including in certain Member States courts especially entrusted with the task of applying domestic legislation on competition or that of ensuring the legality of that application by the administrative authorities — are also rendered competent to apply the provisions of Articles 85 and 86 of the Treaty.
- 20 The fact that the expression 'authorities of the Member States' appearing in Article 9 (3) of Regulation No 17 covers such courts cannot exempt a court before which the direct effect of Article 86 is pleaded from giving judgment.
- 21 Nevertheless, if the Commission initiates a procedure in application of Article 3 of Regulation No 17 such a court may, if it considers it necessary for reasons of legal certainty, stay the proceedings before it while awaiting the outcome of the Commission's action.
- 22 On the other hand, the national court should generally allow proceedings before it to continue when it decides either that the behaviour in dispute is clearly not capable of having any appreciable effect on competition or on trade between Member States, or that there is no doubt of the incompatibility of that behaviour with Article 86.
- 23 The competence of such a court to refer a request for a preliminary ruling to the Court of Justice cannot be fettered by Article 9 of Regulation No 17.
- 24 Consequently, as the preliminary questions of the Tribunal de première instance of Brussels have been duly referred to the Court the latter is bound to give a reply.

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 85, 86, 88 and 177;

Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;

Having regard to Regulation No 17 of the Council of the European Economic Community, being the first Regulation implementing Articles 85 and 86 of the Treaty, especially Articles 3 and 9;

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

## THE COURT

hereby:

**decides, before giving a ruling on the questions put, to hear the opinion of the Advocate-General.**

Lecourt          Donner          Sørensen          Monaco          Mertens de Wilmars

Pescatore          Kutscher          Ó Dálaigh          Mackenzie Stuart

Delivered in open court in Luxembourg, on 30 January 1974.

A. Van Houtte

Registrar

R. Lecourt

President