JUDGMENT OF THE COURT (Sixth Chamber)
24 October 1996 *

In Case C-91/95 P,

Roger Tremblay, residing at Vernantes, France,

Harry Kestenberg, residing at Saint-André-les-Vergers, France,

Syndicat des Exploitants de Lieux de Loisirs (SELL), an association governed by the French Code du Travail, having its head office in Paris,

represented by Jean-Claude Fourgoux, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Pierrot Schiltz, 4 Rue Béatrix de Bourbon,

appellants,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber) of 24 January 1995 in Case T-5/93 *Tremblay and Others* v *Commission* [1995] ECR II-185, seeking to have that judgment partially set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Giuliano Marenco, Legal Adviser, and Géraud de Bergues, a national civil servant seconded to its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

* Language of the case: French.

THE COURT (Sixth Chamber),

composed of: J. L. Murray, President of the Fourth Chamber, acting for the President of the Sixth Chamber, C. N. Kakouris, P. J. G. Kapteyn (Rapporteur), G. Hirsch and H. Ragnemalm, Judges,

Advocate General: F. G. Jacobs,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 20 June 1996,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 24 March 1995, Mr Tremblay, Mr Kestenberg and the Syndicat des Exploitants de Lieux de Loisirs (SELL) ('the appellants') brought an appeal under Article 49 of the Statute of the Court of Justice of the EC against the judgment of 24 January 1995 in Case T-5/93 *Tremblay and Others* v *Commission* [1995] ECR II-185 ('the judgment under appeal'), by which the Court of First Instance partially dismissed their application for annulment of the Commission's decision of 12 November 1992 ('the contested decision') rejecting the complaints lodged by, *inter alia*, Mr Tremblay and Mr Kestenberg under Article 3(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87), concerning the conduct of the Société des Auteurs, Compositeurs et Éditeurs de Musique ('SACEM').

2 In paragraph 2 of the contested decision, the Commission stated that:

'having regard to the principles of subsidiarity and decentralization and in view of the fact that, because the practices criticized in the various complaints received are essentially national, there is no Community interest involved and the fact that the matter is at present before a number of French courts, the Commission does not consider that the information contained in those complaints is such as to enable it to respond favourably thereto ...'.

3 It went on to inform the complainants that their application under Article 3(2) of Regulation No 17 was 'rejected and referred to the national courts' (paragraph 14 of the contested decision).

4 In the judgment under appeal, the Court of First Instance annulled that decision, on the ground that it infringed Article 190 of the Treaty, in so far as it rejected the allegation in the complaints that the market had been partitioned. The complainants had alleged that there was an agreement between SACEM and the copyright societies in the other Member States, contrary to Article 85 of the EEC Treaty. Having dismissed the remainder of the application, the Court of First Instance consequently upheld the decision in so far as it rejected the allegation that SACEM had infringed Article 86.

5 For a fuller account of the facts of the case, reference is made to paragraphs 1 to 14 of the judgment under appeal.

6 The appellants claim that the Court should:

(1) set aside the part of the judgment under appeal which dismissed the application for the annulment of that part of the contested decision which referred the matter back to the national courts;

(2) pursuant to Article 54 of the Statute of the Court of Justice of the EC,

— annul the contested decision in so far as it rejects the complaint and refers the matter to the national courts;

— rule that the Commission must notify to SACEM the objections which are inexorably to be inferred from the conclusions of the report of 7 November 1991 and, in the alternative, that it must resume the procedure at the point at which it discontinued it, with a view to issuing a statement of objections at the same time as considering the restrictive agreement;

(3) order the Commission to pay the costs.

7 The Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs.

8 In support of their appeal, urging the Court partially to set aside the judgment under appeal, the appellants put forward, in substance, seven pleas in law: (i) failure by the Court of First Instance to determine the date from which the Commission had been seised of the matter; (ii) error in finding that the questions of law raised with the Commission were new; (iii) failure by the Court of First Instance to address the Commission's reference to the principle of subsidiarity; (iv) failure to identify the errors of law alleged against the Commission; (v) fundamental misreading by the Court of First Instance of the contested decision; (vi) contradictory

reasoning in the judgment under appeal; and (vii) the confidentiality of the items on the Commission's file constitutes an obstacle to communicating that file to the national courts and to the proper administration of justice.

9 The Commission submits that the appeal is inadmissible and that the appellants' pleas are unfounded.

Admissibility of the appeal

10 The Commission submits, first of all, that the appeal does not contain the names of the other parties to the proceedings before the Court of First Instance, contrary to Article 112(1)(b) of the Rules of Procedure of the Court of Justice, and that the appellants have failed to mention the date on which the judgment under appeal was notified to them, contrary to Article 112(2) of those Rules.

11 As the Advocate General has rightly pointed out at paragraph 16 of his Opinion, those deficiencies are not sufficient to render the appeal inadmissible. First, no evidence has been put forward that the other parties to the proceedings before the Court of First Instance were prejudiced by the omission of their names. Secondly, the appeal was lodged within the prescribed period even if it must be considered that time ran from the date of the judgment.

12 The appeal is thus admissible.

The first plea

13 The appellants submit that the Court of First Instance erred in law by wrongly considering, at paragraph 89 of the judgment under appeal, that only the procedure before the Commission as from the lodging of their complaints in 1986 was relevant when assessing their claim of misuse of powers, which was based, in particular, on the abnormally long duration of the procedure, and that the procedure thus lasted only six years before the decision was taken in 1992. They consider that several comparable complaints were in fact joined, so that the procedure commenced in 1979 and the Commission was seised of the matter for 14 years.

14 That plea seeks to challenge a finding of fact made by the Court of First Instance since the point in issue is whether or not the appellants' complaints were joined with the previous complaints. It has been consistently held that, pursuant to Article 168a of the EC Treaty and Article 51 of the Statute of the Court of Justice of the EC, an appeal may rely only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts (see Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667).

15 The first plea in law must therefore be dismissed.

The second plea

16 The appellants submit that the Court of First Instance erred in law by wrongly finding, at paragraph 89 of the judgment under appeal, that their complaints raised new questions of Community law. They consider that those questions had invariably been the same since 1979, when the first complaints were lodged against the practices followed by SACEM.

17 Here again, the appellants' argument concerns an appraisal of the facts, since the point in issue is whether or not the questions had been similar since 1979. As has

been stated in paragraph 14 above, an appeal may rely only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts.

18 The second plea in law must therefore be dismissed.

The third and fifth pleas

19 In view of their tenor, the third and fifth pleas in law fall to be considered together.

20 At paragraph 61 of the judgment under appeal, the Court of First Instance stated:

'it is apparent from paragraphs 6 to 8 of the contested decision that the Commission based its rejection of the applicants' complaints not on the principle of subsidiarity but solely on the ground of lack of a sufficient Community interest'.

21 The appellants submit that the Commission essentially and explicitly based its position on the application of the principle of subsidiarity and referred to lack of Community interest only as an ancillary consideration. The Court of First Instance therefore erred in law by finding that the Commission did not base its decision on the principle of subsidiarity and by consequently failing to rule on the Commission's erroneous application of that principle. They further consider that, by inaccurately reproducing the unequivocal terms of the contested decision in that regard and by taking that inaccurate finding as its basis for dismissing their pleas, the Court of First Instance fundamentally misread the Commission's decision.

22 It must be noted that in its letter of 20 January 1992 pursuant to Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition

1963-1964, p. 47) and in the contested decision, the Commission considered that the complaints were to be rejected 'having regard to the principles of subsidiarity and decentralization and in view of the fact that, because the practices criticized in the various complaints received are essentially national, there is no Community interest involved and the fact that the matter is at present before a number of French courts' (see point III of the letter of 20 January 1992 and point 2 of the contested decision).

23 Whilst that passage refers explicitly to the concept of subsidiarity, it must none the less be read in the context of the overall reasoning of the contested decision. It is clear in particular from points 6 to 8 of that decision that the basis of the Commission's reason for referring the complaints to the national courts was lack of Community interest. It referred in particular to Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, in which the Court of First Instance accepted that the Commission was entitled to reject a complaint on that ground.

24 The Court of First Instance could thus properly consider that the Commission had not used subsidiarity as an independent ground for its decision. Consequently, the Court of First Instance did not fundamentally misread the contested decision.

25 The Court of First Instance therefore did not err in law by not examining the reference to the principle of subsidiarity as an independent basis for the Commission's reasoning.

26 These pleas in law must therefore be dismissed.

The fourth plea

27 The appellants consider that the Court of First Instance wrongly failed to identify the errors of law alleged against the Commission. They further claim that their allegation that the Commission misused its powers relates to two points which the

Court of First Instance did not examine, namely that the Commission explicitly acknowledged that it had sufficient evidence to issue a statement of objections and that it refused to perform its duties in disregard of its obligations under the Treaty.

28 The only justification put forward in support of the first part of that plea, to the effect that the Court of First Instance erred in law by not identifying the Commission's errors of law, is a reference to a paragraph in the part of the application seeking annulment of the contested decision, asserting that the Commission was in the best position to rule on the alleged breach of Article 86. This plea therefore alleges that the Court of First Instance erred in law by failing to accept that, in the circumstances of the case, the Commission should itself have taken a decision finding that SACEM had infringed Article 86.

29 On that point, it need merely be noted that the Court of First Instance expressly addressed the issue by observing that the applicants had no right to obtain such a decision from the Commission, even if the latter had been persuaded that the practices concerned constituted an infringement of Article 86 of the Treaty (paragraph 61 of the judgment under appeal) and that their rights could be sufficiently safeguarded by the national courts (paragraphs 68 to 74).

30 As regards the second part of this plea, to the effect that the allegation of misuse of powers related to two points which the Court of First Instance did not deal with; the Court of First Instance expressly addressed those points. It stated, in particular at paragraph 91 of the judgment under appeal, that the Commission is not required to undertake a complete investigation in every case or to adopt a decision as to the existence of the alleged infringement.

31 This plea in law must therefore be dismissed.

The sixth plea

32 In their sixth plea in law, the appellants allege that the Court of First Instance contradicted itself by, on the one hand, accepting that there was insufficient Community interest for the Commission to deal with the part of their complaints relating to Article 86 of the Treaty and, on the other hand, annulling the decision in so far as it dealt with the part relating to Article 85. Such partial annulment means that the Commission must itself investigate the complainants' allegation of an agreement between SACEM and the other copyright societies. The Community interest in the complaints was thus recognized by the Court of First Instance itself. That contradiction constitutes a breach of the obligation imposed by Article 190.

33 It must be noted that the Court of First Instance partially annulled the contested decision on the ground that it did not contain 'any statement of the reasons for which the part of the applicants' complaint alleging partitioning of the market was rejected' (paragraph 39 of the judgment under appeal). In those circumstances, it considered that, contrary to Article 190 of the Treaty, the contested decision did not apprise the applicants of the grounds for rejecting their complaints in that regard (paragraph 40). That assessment in no way implies that the Court of First Instance considered that it was for the Commission rather than the national courts to take a decision on the alleged infringement of Article 85. No contradiction as regards the Community interest in the complaints can be inferred, therefore, from the judgment under appeal.

34 This plea in law must therefore be dismissed.

The seventh plea

35 The appellants submit, in substance, that the Court of First Instance erred in law in considering, at paragraphs 68 to 72 of the judgment under appeal, that referral of the complaints to the national courts did not constitute an obstacle to the satisfactory safeguarding of their rights.

36 At paragraph 69 of the judgment under appeal, the Court of First Instance considered that 'there is nothing in the documents before it to show that the disclosure of [the Commission's report of 7 November 1991 comparing the rates of royalties charged in the Community and considering the question of discrimination between different users within the French market] to the national courts and the use of it by them are restricted by requirements concerning observance of the rights of the defence and of business secrets'. The appellants argue, however, that the duty of confidentiality precludes the Commission from making other evidence in the file available to those courts. In addition, the report is to be forwarded only to courts which request it, although such courts cannot know of its existence. As a result, sincere cooperation between the Commission and the national courts cannot take place satisfactorily, and the complainants cannot obtain sufficient protection of their rights before those courts.

37 In that regard, the appellants do not challenge the observation of the Court of First Instance to the effect that the duty to preserve confidentiality is no obstacle to communicating the report of 7 November 1991 to the national courts.

38 Nor do they call into question the finding, at paragraph 70 of the judgment under appeal, that 'in view of the factual information set out in the report of 7 November 1991 ... the French courts are certainly in a position to determine whether the level of royalties charged by SACEM is such that it constitutes an abuse of a dominant position within the meaning of Article 86 of the Treaty'.

39 On the contrary, as the Court of First Instance noted at paragraph 71 of its judgment, the appellants consider that 'the report [of 7 November 1991] is an extremely important document since it shows, unambiguously, the abuse of a dominant position of which SACEM is and continues to be guilty'. It may be inferred that the appellants consider, like the Court of First Instance, that communication of the report alone is sufficient to enable the national courts to assess the complaints.

40 The appellants further submit that the national courts cannot know of the existence of the report of 7 November 1991, since the decision was not published.

41 It has been consistently held that, where concrete application of Article 85(1) or Article 86 of the Treaty raises particular difficulties, a national court may contact the Commission in order to obtain the economic and legal information which that institution can supply to it. That possibility is dealt with in the Commission's Notice of 13 February 1993 on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty (OJ 1993 C 39, p. 6), which states that national courts can obtain factual data, such as statistics, market studies and economic analyses, from the Commission. In addition, as the Commission has pointed out, the fact that the report is available for the national courts was made public in a press statement of 27 November 1992. Finally, there is nothing to prevent the appellants from drawing the national courts' attention to the existence of the report when they seek protection of their rights before those courts.

42 In those circumstances, the Court of First Instance did not err in law in considering, at paragraphs 68 to 72 of the judgment under appeal, that on the basis of the Commission's report of 7 November 1991, which is available for them, the national courts are reasonably able to gather the factual information necessary in order to determine whether the practices criticized in the complaints constitute an infringement of Article 86 of the Treaty.

43 This plea in law must therefore also be dismissed.

44 Since all the appellants' pleas in law claiming that the judgment under appeal should be partially set aside have been dismissed, the appeal must be dismissed.

Costs

45 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the appellants have been unsuccessful, they must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the appeal;

2. Orders the appellants to pay the costs.

Murray Kakouris Kapteyn

Hirsch Ragnemalm

Delivered in open court in Luxembourg on 24 October 1996.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber