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 1974 [1]

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

necessary to decide on the method to be followed, which means choosing between two lines of approach.

Is it preferable within the framework of Article 177 of the Treaty, to give an abstract interpretation and, consequently, to reply in a general manner to the questions referred by the national court which has the task of applying the guiding principles of that reply to the case before it?

Or, must this Court endeavour to supply the national court with an interpretation which will be really useful to it in the settlement of the dispute brought before it, by drawing that interpretation from the concrete data given in the grounds of the referring judgment, as well as in the written and oral observations submitted to this Court by the parties to the main action and the Commission?

The case law of this Court has followed the second course, as can be seen in particular from the Judgment of 30 June 1966 *(Société Technique Minière (L.T.M.) v Maschinenbau Ulm* (M.B.U.), Case 56/65, Rec. 1966, p. 357) in which you pointed out 'that the need to come to a practical interpretation of the provisions in dispute justifies the national court outlining the legal context to which the requested interpretation must relate; the Court may therefore draw from the elements of law described (by the national court) the information necessary for an understanding of the questions referred and for the elaboration of an adequate reply'.

In the same way, in the Judgment of 1 December 1965, *Decker* (Case 31/65, Rec. 1965, p. 1116), you held that the question referred contains elements relating to the interpretation of Community law which may be distinguished by reference to the actual data supplied by the national court.

In this case we cannot therefore disregard the elements of fact and law which emerge from the proceedings before the Brussels court and from the submissions made before this Court.

The undertaking which is the subject of the questions put to you is the Société belge des auteurs, compositeurs et éditeurs, the statutes and regulations of which, defining its relations with its members, are the specific matters at issue.

Nor can we fail to notice that the Commission has of its own motion initiatied a procedure based on Article 86 of the Treaty against this association, as it has also done in respect of other similar associations in other Member States.

The market in the provision of services with regard to the management of copyrights in musical compositions displays, within the Community, characteristics which led the Commission to consider it necessary to undertake an examination of the conditions under which undertakings entrusted with such management operate, for the purpose of determining the regularity of their behaviour in relation to the Community rules on competition.

In the eyes of the Commission, the *de facto* monopoly exercised by these associations within the Member States concerned, the uniform limitation of their direct activities to their national territory and the existence of reciprocal agreements between them for the exploitation of their repertoires appeared to have the result that any author, composer or publisher established in one of those States was obliged — the individual management of copyrights being in fact impossible in most cases — to make use of the services of a national copyright association.

The Commission has moreover produced in an annex to its written observations the statement of objections made against SABAM; this document reveals the clauses of the statutes and the provisions of the regulations of that association the application of which has been considered as evidence of abuse of the dominant position which it occupies in Belgium.

Even though unfortunately the Commission has not yet drawn up its decision with regard to SABAM, it is an established fact that, following an exchange of views which took place during the course of the administrative procedure, the association agreed, in 1971 and in 1973, to amend some of the statutes in question.

Moreover, at the conclusion of its action against the German company GEMA the Commission, in a Decision of 2 June 1971, listed specifically the provisions of the statutes of that undertaking which infringed Article 86 of the Treaty. Although this individual Decision is not in issue in this case it does throw light on the Commission's thinking in respect of copyright associations and on the appraisal which it has undertaken with regard to the activity of such associations in view of Article 86.

Gentlemen, that is the general framework within which we must examine the preliminary questions referred by the Brussels court. The above information will enable me to place those questions in their factual and legal context and so propose to you a reply which, if possible, will put the Belgian court in a position to make its own decision in full knowledge of the issues.

The national court is in fact concerned with the question whether, at the time when the dispute was brought before it, the contracts made between SABAM and Messrs Rozenstraten and Davis in accordance with the statutes and regulations of SABAM are based on an illegal motive (cause illicite) in that these contracts were allegedly concluded by an undertaking abusing the dominant position which it occupies.

It is thus necessary to examine the provisions of the statutes and regulations on the basis of which the disputed contracts were concluded and to analyse from those provisions whether SABAM's conduct satisfies the conditions for the application of Article 86.

II — Conditions for the application of Article 86 of the Treaty

What are those conditions?

A — The abuse prohibited by Article 86 must, firstly, be committed by

— one or more undertakings,

— occupying a dominant position,

— within the common market or in a substantial part of it.

1. Although it seems that the Belgian court considers the question of whether SABAM is in fact an undertaking within the meaning of Article 86 as being settled, it is useful to recall that the authors of the Treaty intended the term 'undertaking' to have an economic significance in the way Professor Goldman has described it as 'a coordinated group of people and goods, set up for a specific purpose, the activities of which are directed towards fulfilment of that purpose'.

In your Judgment of 13 July 1962 *(Mannesmann AG v High Authority,* Case 19/61, Rec. 1962, p. 705) delivered, it must be admitted, on the basis of the ECSC Treaty, you adopted a similar definition: 'an undertaking is constituted by a single organisation of personal, tangible and intangible elements, attached to an autonomous legal entity and pursuing a given long term economic aim'.

The additional element which emerges from this definition is the existence of an autonomous legal personality.

But the application of competition law is not affected to any great extent by the legal mould in which the undertaking is cast. If it has its own legal personality no particular attention is paid to the legal form adopted, namely, whether it is a commercial, cooperative or civil company, or even an association.

Article 86, like Article 85, thus applies to any undertaking exercising an economic activity, in other words, indulging in any commercial transaction, whether involving goods or services.

An association whose object is to exploit and manage copyrights for gain 'pursues a business activity consisting in the provision of services in respect of composers, authors, and publishers, as well as users of musical material' as the Commission explains in its GEMA Decision.

I would be all the more inclined to subscribe to this definition as, in the Judgment delivered on 8 June 1971 *(Deutsche Grammophon,* Case 78/70, Rec. 1971, p. 487), you did not hesitate to apply Article 86 to a 'manufacturer of sound recordings, the owner of rights akin to copyrights'.

Moreover, the fact that SABAM is a cooperative association representing its members in the exercise of their copyrights does not mean that it is not an undertaking, for it exploits, in its own name, rights assigned to it. It bears the expenses relating to the exercise of these rights and it has complete freedom to fix the level of royalties.

Thus it cannot be regarded as the 'agent' of its members; it is not in a position of legal dependence with regard to them.

Finally, the fact that SABAM groups together, in the main, authors and composers exercising liberal professions is not such as to affect its character as an undertaking, since its activity consists in the economic exploitation of their copyrights.

2. The concept of a dominant position, which is not defined by Article 86, must be interpreted in the light of the principle, stated in Article 3 (f) of the Treaty, that the activity of the Community shall include the institution of a system ensuring that competition in the common market is not *distorted.*

As you pointed out in the Judgment of 21 February 1973 *(Europemballage and Continental Can,* Case 6/72, Rec. 1973, p. 245) this principle requires *'a fortiori* that competition must not be eliminated'. So, if an appreciable reduction in actual competition can suffice to establish the existence of a dominant position within a particular market, the exercise of a monopoly, resulting in the total elimination of competition, covers and even goes beyond the concept of a dominant position.

Moreover, the Brussels court used the expression *'de facto* monopoly' to describe SABAM's position in Belgium. It is not disputed that this association has, since 1940, been the only undertaking in Belgium having the task of exploiting copyrights, in particular in the field of musical compositions. As is the position with GEMA in the Federal Republic of Germany, it has no competitor.

The result of this situation is that no composer, author or music publisher can in practice avoid the obligation to have recourse to SABAM's services in order to exercise his rights.

Exploitation of his rights by the individual concerned is in fact impracticible, as it presupposes very substantial resources and would undoubtedly entail enormous expense.

From another point of view, even if there is, in theory, nothing to prevent a Belgian author or publisher entrusting the management of his rights to an association set up in another Member State, it is well-established that, on the one hand, the individual concerned can only do it if he is willing to accept the position of a member enjoying only limited rights of association and that, on the other hand, the various national copyright associations confine their direct activities, by means of reciprocal agreements, to the country where they have their registered office. Thus, as regards the exercise of rights in Belgium, an author or publisher in such a position would be no more successful in avoiding SABAM's monopoly.

There is therefore no doubting the existence of the dominant position occupied by this undertaking.

3. A dominant position must also be assessed in relation to a particular market, namely the 'relevant market', a

concept deriving from American antitrust law as it has been developed by their Federal courts.

The question which usually arises in respect of markets in industrial products, namely whether substitute products exist, is not relevant in the case of copyrights held by composers or music publishers.

But the 'relevant market' must be determined not only in relation to the products or services involved but also on a territorial basis and in accordance with its size, as is required by Article 86 when it refers to the existence of a dominant position 'in a substantial part of the common market'.

In this connection, it is not necessary for such domination to extend over a market covering two or more Member States. Nor is the geographical extent of the market a determining factor. What is essential is the quantitative assessment of the market in relation to the whole of the common market, that is to say, its relative economic importance. For this purpose, one must consider above all the density of the population, the level of its resources, and the extent of its purchasing power. There is no doubt that on the basis of these criteria Belgium can be described as a 'substantial part of the common market'.

B — The prohibition laid down by Article 86 applies not to the existence of a dominant position but to its abuse, insofar as it may affect trade between Member States.

1. Even though the concept of abuse can be objective in character and does not necessarily imply behaviour which is intentionally wrongful, as you accepted in the Judgment of 18 February 1971 (*Sirena*, Case 40/70, Rec. 1971, p. 69) it is not defined by Article 86, which only goes so far as to give some examples of abuse. It must thus be determined according to the individual case.

In the questions which it refers to this Court, the Brussels court decided to cite only two examples of abuse by SABAM in relation to its members and exploiters of musical material.

The first consists in the fact that according to article 10 of its statutes, as drawn up in 1968, SABAM requires the exclusive assignment in its favour of all copyrights, without drawing any distinction between specific categories of such rights. The second is drawn from the fact that that assignment applies to existing and future rights, as well as from the fact that the association assumes the power to retain the exclusive exercise of those same rights for a period of five years following the withdrawal of the member.

The above correspond to some, though only some, of the objections levelled at SABAM by the Commission, which considers that it cannot be maintained that the protection of an author always and without exception requires recourse to a copyright association: it would be enough if a composer could turn to the services of SABAM if he were confronted with excessive economic pressure exerted by exploiters of musical material.

The first question arising from that assertion is whether it is not contrary to the very nature of things, i. e. to economic reality. In fact, an author or composer, and even a publisher of musical material — unless, in respect of this last case, it is a very powerful undertaking — has not, in practice, the power to exercise his rights himself. He does not have at his disposal the means to supervise the different uses which can be made of his work. In addition, some exploiters of musical material (record manufacturers, public authorities and private companies concerned with radio and television broadcasting) occupy such a strong position on the market that it enables them completely to control authors and composers by requiring the assignment of some of their works, especially those which are very successful and whose exploitation is particularly profitable.

The Commission has itself recognized the danger in this situation and has admitted that the fact of being bound to an association such as SABAM ensures the necessary protection for those concerned.

However, the matter at issue is not the principle of membership of a copyright association, but, on the one hand, the extent and degree of inflexibility of the requirement of exclusive assignment of rights imposed by article 10 of the statutes and repeated in article 11 of the standard form contracts, and on the other hand, the provisions which in practice prohibit members from having direct relations with foreign authors' associations.

The abuse which the Commission considers it has exposed in respect of these provisions consists in the fact that SABAM is thereby imposing on its members obligations which are not absolutely necessary for the attainment of its object and which encroach unfairly on a member's ability to move from one association to another.

In other words, as the Commission moreover pointed out in its Decision relating to GEMA, an undertaking occupying a dominant position is prohibited from exceeding a limit of fairness, and the measures which it chooses to attain its object must be the least restrictive possible.

Such conduct can be approximated to the first example of abuse described by Article 86 (a) as consisting in 'directly or indirectly imposing . . . unfair trading conditions'.

The element of unfairness can moreover also be deduced in this case from the duration of the exclusive assignment, which applies for as long as membership itself (article 3 of the statutes) and from the generalized nature of the assignment which, as has been seen, applies to both present and future rights.

In fact, not only can one find no real justification for these provisions in the practical requirements inherent in the exercise of copyrights but they seem rather to have the aim of binding members completely and of inhibiting their membership of any other association.

It was natural that, faced with stipulations which it considered to be incompatible with the provisions of Article 86, but nevertheless taking account of the necessary protection which associations such as SABAM provide for authors of musical material, the Commission should try to define what it calls 'commitments of an acceptable nature' (liens acceptables).

It did so by distinguishing between different categories of rights capable of being exploited by a copyright association and by stipulating amendments to the statutes, the effect of which would be to enable members to limit the assignment of their rights, as regards all their compositions, to certain forms of exploitation.

That is the compromise solution which appears in the second Decision taken in respect of GEMA and in which SABAM finally acquiesced when, in 1971, it agreed to amend article 10 of its statutes in the way the Commission wished. It is interesting to note that the Société Française des auteurs et compositeurs de musique (SACEM) came to share this point of view during the procedure initiated against it and that the Dutch Association BUMA took the same decision on its own initiative.

It was under similar circumstances that the Commission obtained the amendment to the provision in the statutes (article 15 of the statutes of SABAM) stipulating that an association for the exploitation of copyrights can continue to exercise rights assigned for five years following the withdrawal of a member.

The Commission, considering that the termination of contracts still in force does not require the stipulation of such a long period and, consequently, that this provision is too inflexible and binds members to a greater extent than is

strictly necessary, thought it advisable that this period should be reduced to three years when the author is offered the opportunity of assigning his rights for particular forms of exploitation and to one year when he has assigned his rights for specific categories of forms of exploitation.

Without passing judgment on these solutions, which the Commission alone has the power to evaluate, we can accept that SABAM, by agreeing to incorporate these solutions into its statutes, recognised that the latter, in their previous form, contained, with regard to the points amended, provisions which were incompatible with those of Article 86 of the Treaty.

I am thus led to reply in the affirmative to the first two questions referred by the Brussels court.

My conviction is further strengthened by a consideration which the Belgian court did not invoke in its referring judgment but which merits your attention. One of the other grounds for objection levelled at SABAM was in fact that of discrimination against nationals of Member States other than Belgium, as enshrined in the statutes in force in 1970. In fact, Article 6 excluded such nationals from membership of SABAM as associates or trainees.

Nationals of other Member States could only become full members of the association and in this position, despite the use of that description, they acquired no rights in the administration of the association and were denied any benefits from the mutual aid fund, although they were obliged to contribute to the financing of the latter.

Moreover, in view of the fact that parallel provisions existed in the statutes of the other national copyright associations and that these associations had agreed among themselves to limit their direct activity to the territory of the State in which each one had its registered office, it is clear that in fact the operation of these undertakings had the effect of walling off national markets in musical material, contrary to the aims of the common market and in a way likely to affect trade between Member States.

III — Interpretation of the expression 'undertaking entrusted with the operation of services of general economic interest'

Examination of the last two questions referred by the Brussels court will take up less of our time.

The Brussels court thought it necessary to consider the possibility of abuse of a dominant position by SABAM in the light of the provisions of Article 90 (2) of the Treaty and it therefore asks this Court to interpret the expression 'undertaking entrusted with the operation of services of general economic interest', and to declare whether that concept implies that the undertaking must enjoy definite privileges refused to others.

The aim of this question is clear: Article 90 (2) lays down exceptional rules to be applied, in particular, to undertakings entrusted with the operation of services of general economic interest; the latter are subject to the rules on competition laid down by the Treaty only to the extent that the application of those rules does not frustrate the attainment of their particular task. Consequently, if SABAM is entrusted with such a task and is to be regarded as an undertaking covered by the special rules of Article 90 (2), should its conduct escape the application of Article 86, at least insofar as is justified by the requirements of its task?

The question referred was indirectly yet clearly inspired by the Commission's Decision in the GEMA case.

The German association had, during the procedure, maintained that it was entrusted with the operation of a service

of general economic interest by the provisions of the Federal Law of 9 September 1965 relating to the management of copyrights.

The Commission rejected this argument, pointing out that such a task had been conferred on it neither by the provisions of that Law nor by the authorization granted to GEMA in accordance with paragraph 1 of that Law. The Law merely provided that GEMA must fulfil certain obligations with regard to financial guarantees, in the same way, for example, as banks and insurance companies. The additional obligations prescribed by paragraph 6 of the Law (Obligation to manage rights), paragraph 11 (obligation to conclude a contract) and paragraph 12 (global contracts) derive from the position of *de facto* monopoly occupied by GEMA and correspond to the legal situation in Germany of all monopolies which are obliged to enter into contracts and are prohibited from exercising discrimination.

For the Commission, the reason for taking the Decision lay, in that case, in the fact that the German association had not been entrusted, by law or by any legislative act of the public authority, with the task of general interest which it claimed to undertake.

In my opinion, this view is consistent with an accurate interpretation of Article 90 (2).

Although the concept of general economic interest is in fact extremely wide and overlaps with that of public economic services or of public services of an industrial or commercial nature, it is nevertheless necessary that the operation of the service envisaged in Article 90 (2) should have been entrusted to an undertaking by a legislative act of the public authority.

That is the finding which appears to me to emerge from the Judgment of this Court of 14 July 1971 *(Hein,* Case 10/71, Rec. 1971, p. 730) in which you held that 'an undertaking may be covered by the provisions of Article 90 (2) when it enjoys definite privileges for the exercise of the task *entrusted to it by law* and when it maintains, for this purpose, close relations with the public authorities . . .'

That case was concerned with the undertaking entrusted with the management of the river port of Mertert on the Moselle, the traffic through which is important for the general economic activity of the Grand Duchy of Luxembourg. There was thus no doubt as to the criterion of general economic interest, but a second factor, necessary for the application of Article 90 (2), lay in the fact that the management of this port had been entrusted to the undertaking by a unilateral act of the public authority, in that particular case a law.

But in this case there no connection between SABAM and the State. The undertaking in question has not been entrusted with its task by the public authority; it is a cooperative association the creation of which is due solely to private initiative and which is governed by the ordinary Belgian law relating to that category of association. It enjoys no special legal privilege.

In these circumstances, it seems to me to be unnecessary to examine whether in fact SABAM's functions correspond to the general economic interest.

The last question, by which the Brussels court asks this Court whether the provisions of Article 90 (2) of the Treaty can create rights in respect of private parties which national courts must safeguard, thus becomes devoid of object.

Nevertheless, we must recall that by the *Hein* Judgment of 14 July 1971 you answered this question to the effect that Article 90 (2) does not lay down an unconditional rule. In fact, the application of that provision involves a consideration of the requirements inherent, on the one hand, in the

fulfiment of the particular task assigned to the undertakings in question and, on the other hand, in the protection of the interests of the Community. This consideration derives from the aims of the general economic policy pursued by the States under the supervision of the Commission. Consequently, and without prejudice to the exercise by the Commission of the powers provided in Article 90 (3), paragraph 2 of that Article cannot, at the present time, create individual rights which national courts must safeguard.

The reservation which you took care to indicate by your reference to Article 90 (3) and which justifies the use of the expression 'at the present time' implies only that you retained the possibility of modifying your interpretation if the Commission were to explain the constituent elements of Article 90 (2) through the implementing decision which it has power to take under paragraph 3. To my knowledge, that has so far not been the case. The solution which you adopted in 1971 thus still applies today.

It is therefore my opinion that the Court should rule:

1. That the abuse prohibited by Article 86 of the Treaty can in particular consist, for an undertaking occupying a dominant position in a substantial part of the common market in the field of exploitation of copyrights,

   (a) in the requirement that authors, composers and publishers of musical material who are its members, must make a global assignment of all their rights in all their present and future works,

   (b) in the stipulation that a member, in the event of his withdrawal, shall not recover possession of his rights until after a period of several years,

   insofar as, by those provisions, that undertaking imposes on its members unfair obligations which, because of their extent and their degree of inflexibility, exceed those necessary for the protection of members and for the economic exploitation of their rights.

2. That, by the expression 'undertaking entrusted with the operation of services of general economic interest', Article 90 (2) of the Treaty refers only to undertakings which have been entrusted by law with such a task under a legislative act of the national authority.

3. That, without prejudice to the exercise by the Commission of the powers ascribed to it by Article 90 (3) of the EEC Treaty, paragraph 2 of the same Article cannot, at the present time, create individual rights which national courts must safeguard.