

**JUDGMENT OF THE COURT
OF FIRST INSTANCE (Second Chamber)
27 November 1997 ***

In Case T-224/95,

Roger Tremblay, residing in Vernantes (France),

Harry Kestenberg, residing in Saint-André-Les-Vergers (France), and

Syndicat des Exploitants de Lieux de Loisirs (SELL), an association governed by French law, having its seat 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,

applicants,

supported by

Music Users' Council of Europe (MUCE), an association governed by English law, established in Uxbridge (United Kingdom), represented by Jean-Louis Fourgoux, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Pierrot Schiltz, 4 Rue Béatrix de Bourbon,

* Language of the case: French.

Associazione Italiana Imprenditori Locali da Ballo (SILB), an association governed by Italian law, having its seat in Rome, 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,

interveners,

v

Commission of the European Communities, represented by Giuliano Marengo, Legal Adviser, and Guy Charrier, national official seconded to the Commission, acting as Agents, with an address for service in Luxembourg in the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

French Republic, represented by Kareen Rispal-Bellanger, Deputy Director of Legal Affairs in the Ministry of Foreign Affairs, and Jean-Marc Belorgey, special adviser in that ministry, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8b Boulevard Joseph II,

intervener,

APPLICATION for (i) annulment of the Commission decision of 13 October 1995 rejecting the complaints made on 4 February 1986, in particular by Roger Tremblay and Harry 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 1959-1962, p. 87), concerning market sharing and

complete partitioning of the market alleged to result therefrom, between the societies which manage copyright in the various Member States and (ii) an order requiring the Commission to carry out the investigations necessary to establish the existence of the restrictive arrangements complained of,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: C. W. Bellamy, President, A. Kalogeropoulos and J. D. Cooke,
Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 29 May 1997,

gives the following

Judgment

Facts and procedure

Factual background to the dispute

- 1 On 4 February 1986 application was made to the Commission 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 1959-1962, p. 87, hereinafter 'Regulation No 17') for a finding that Articles 85 and 86 of the EEC Treaty had been infringed by a group of discothèque operators called BEMIM

(Bureau Européen des Médias de l'Industrie Musicale) of which Roger Tremblay and Harry Kestenberg, individual operators of discothèques, were members at that time. That application cited the Société des Auteurs, Compositeurs et Éditeurs de Musique (hereinafter 'SACEM'), the society which manages copyright in musical works in France. Between 1979 and 1988 the Commission also received similar complaints from other complainants.

2 The abovementioned complaint of 4 February 1986 essentially made the following allegations. The first, alleging an infringement of Article 85(1) of the Treaty, complained of an alleged market-sharing arrangement — and complete partitioning of the market as a result — between the societies which manage copyright in the various Member States, through the conclusion of reciprocal representation contracts under which managing societies are prohibited from dealing directly with users established in the territory of another Member State. The two other allegations, based on Article 86 of the Treaty, concerned the excessive and discriminatory nature of the rate of royalties charged by SACEM, and its refusal to allow French discothèques to use its foreign repertoire alone.

3 In response to the complaints received by it, the Commission undertook investigations, requesting information under Article 11 of Regulation No 17.

4 The investigation conducted by the Commission was suspended following requests for preliminary rulings submitted to the Court of Justice, between December 1987 and August 1988, by the Appeal Courts of Aix-en-Provence and Poitiers and the Tribunal de Grande Instance (Regional Court), Poitiers. Amongst the issues raised under Articles 85 and 86 of the Treaty were the level of the royalties charged by SACEM, the conclusion of reciprocal representation agreements between national copyright-management societies and the fact that SACEM'S reciprocal representation agreements were all-embracing, covering the entire repertoire. In its judgments of 13 July 1989 in Case 395/87 *Ministère Public v Tournier* [1989] ECR 2521, at p. 2580 and Joined Cases 110/88, 241/88 and 242/88 *Lucazeau and Others v SACEM and Others* [1989] ECR 2811, at p. 2834, the Court ruled, *inter alia*, that: 'Article 85 of the EEC Treaty must be interpreted as

prohibiting any concerted practice by national copyright-management societies of the Member States having as its object or effect the refusal by each society to grant direct access to its repertoire to users established in another Member State. It is for the national courts to determine whether any concerted action by such management societies has in fact taken place.’

- 5 Following those judgments, the Commission resumed its investigations, more particularly with regard to the differences in the levels of royalties charged by the various copyright-management societies in the Community. The results of the Commission’s investigation were set out in a report dated 7 November 1991.

- 6 On 18 December 1991 the Commission was formally requested under Article 175 of the EEC Treaty, on behalf of Messrs Tremblay and Kestenberg, of BEMIM and of others, to take a position on their complaints.

- 7 On 20 January 1992 the Commission sent a communication to BEMIM pursuant to Article 6 of 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, hereinafter ‘Regulation No 99/63’). In that letter the Commission stated that, having regard to the principles of subsidiarity and decentralization, and in view of the fact that there was no Community interest involved because the practices complained of were essentially national and that the matter was before a number of French courts, it did not consider that the information contained in the complaints was such as to enable it to act upon it.

- 8 On 20 March 1992 the applicants’ counsel submitted observations on the letter of 20 January 1992 in which he requested the Commission to pursue the investigation and to send a statement of objections to SACEM.

- 9 By a letter dated 12 November 1992, sent by the Member of the Commission responsible for competition, the complainants were informed that their application for a finding that Articles 85 and 86 of the Treaty had been infringed had been definitively rejected.
- 10 Annulment proceedings were instituted before this Court against the decision of 12 November 1992 on 11 January 1993.
- 11 By judgment of 24 January 1995 in Case T-5/93 *Tremblay and Others v Commission* [1995] ECR II-188, hereinafter '*Tremblay I*'), the Court of First Instance (Second Chamber) annulled the decision of 12 November 1992 for infringement of Article 190 of the Treaty, in so far as the decision rejected the applicant's allegation that the market had been partitioned as a result of an alleged restrictive agreement between SACEM and the copyright-management societies in the other Member States, and dismissed the remainder of the application.
- 12 By an application lodged at the Court Registry on 24 March 1995, Messrs Tremblay and Kestenberg and the Syndicat des Exploitants de Lieux de Loisirs (hereinafter 'SELL') brought an appeal seeking the setting aside of the abovementioned judgment in so far as the Court of First Instance dismissed the action against that part of the Commission's decision of 12 November 1992 rejecting the allegations concerning infringement of Article 86 of the Treaty.
- 13 Following the judgment in *Tremblay I*, the Commission, on 23 June 1995, sent to the applicants' counsel a communication under Article 6 of Regulation No 99/63 (hereinafter 'the Article 6 letter').
- 14 In the Article 6 letter the Commission first recalled that, in *Tremblay I*, the Court of First Instance had taken the view that the statement of reasons underpinning the decision of 12 November 1992 had not apprised the applicants of the grounds on

which their complaint was rejected, in so far as the latter was concerned with a partitioning of the market as a result of the reciprocal representation contracts concluded between the copyright-management societies in the various Member States.

- 15 In the part of its Article 6 letter entitled 'Legal assessment', the Commission set out, first, the replies given by the Court in its abovementioned judgments in the *Tournier* and *Lucazeau* cases concerning the organization by national copyright-management societies of a network of reciprocal representation contracts, and on the practice followed by those societies of collectively refusing all direct access to their respective repertoires to users of recorded music established in other Member States.

- 16 The Commission pointed out that in its judgments the Court held that reciprocal representation contracts providing for exclusivity, in the sense that those societies had undertaken not to allow direct access to their repertoire to users of recorded music established abroad, could fall under the prohibition contained in Article 85(1) of the Treaty. However, since the exclusivity clauses in the reciprocal representation contracts had been deleted without any alteration of the behaviour of the copyright societies which refused to entrust their repertoire to a society other than that established in the territory in question, the Court had gone on to examine whether those societies had in fact maintained exclusivity by means of a concerted practice. In that connection, it stated that, whilst the Court had held that concertation between national copyright-management societies leading to systematic refusals to allow foreign users direct access to their repertoire was to be regarded as constituting a concerted practice in restraint of competition and likely to affect trade between Member States, it had also emphasized that concerted action of that kind could not be presumed where the parallel behaviour could be accounted for by reasons other than the existence of concerted action. However, the Commission pointed out that, in the Court's view, 'such a reason might be that the copyright-management societies of other Member States would be obliged, in the event of direct access to their repertoires, to organize their own management and monitoring system in another country.'

17 On the basis of those principles, the Commission went on to state, in its letter, that it continued to take the view that, even if certain parallel behaviour were to be found in the various copyright-management societies' refusals to grant requests by discothèques established in other Member States for direct access to their repertoire, such parallel behaviour could be attributed only to the similarity of the situations of the various copyright-management societies. In that connection, the Commission referred to the Opinion of Advocate General Jacobs in the *Tournier and Lucazeau and Others* cases ([1989] ECR, at p. 2536), in which he stressed the specific nature of the market for copyright whose protection, in order to be effective, requires continuous supervision and management within the national territories. It observed in that connection that any copyright-management society wishing to do business in a national territory other than its own would need to establish a management system enabling it to negotiate contracts with customers, verify the factors forming the basis of the assessment of royalties, monitor the use of its repertoire and take the necessary action in respect of infringements of its copyright, whereas each society can manage its repertoire more cheaply and more effectively by entrusting it to the society already established in that other territory.

18 Referring also to the judgment of the Court in the *Woodpulp* cases (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* [1993] ECR I-1307), the Commission stated that a concerted practice was not the only plausible explanation for the alleged behaviour of the copyright-management societies complained of, since, in its view, those societies had no interest in using any method other than that of granting authority to the society established in the territory in question.

19 It accordingly concluded:

'[...] not having received from the other complainants or from yourself proof or hard evidence of the existence of such a concerted practice, and not having obtained any such evidence itself, the Commission cannot attribute the parallel behaviour to the existence of an agreement or concerted practice between the copyright-management societies.'

20 In part of its letter of 23 June 1995 entitled 'Conclusions' the Commission stated that:

'Under those circumstances, the Commission considers that the complaints made by Messrs Roger Tremblay, François Lucazeau and Harry Kestenberg are unfounded in so far as they concern the existence of partitioning of national markets in copyright in music as a result of an alleged agreement or concerted practice between the copyright-management societies in the various Member States.

The Commission therefore informs you, under Article 6 of Commission Regulation No 99/63/EEC of 25 July 1963, of its intention officially to reject that aspect of the complaints made by Messrs Roger Tremblay, François Lucazeau and Harry Kestenberg.'

21 On 24 July 1995 the applicants' counsel submitted, on behalf of Messrs Tremblay and Kestenberg, observations in response to the communication of 23 June 1995 in which he contended in particular that in its Article 6 letter the Commission 'merely indicated that it had not been able to obtain any hard evidence of the existence of a concerted practice, without demonstrating that it had actually sought such evidence' and 'did not demonstrate that it had resumed the investigation as the judgment of the Court of First Instance ought to have prompted it to do.' Referring to an arrangement between national copyright-management societies to partition the market by the conclusion of reciprocal representation contracts, and to an agreement between those societies to maintain prices at a high level, the applicants' counsel argued that the grounds relied on by the Commission in rejecting that part of the complaint concerning the existence of an agreement were therefore not valid, and requested the Commission either to pursue the investigation or to stay a decision in the matter until the Court had given judgment on the appeal against the judgment given in *Tremblay I*.

22 By a letter of 13 October 1995 signed by the Member of the Commission responsible for competition, Messrs Tremblay and Kestenberg were informed that their complaints lodged on 4 February 1986 had been definitively rejected.

23 In its letter of 13 October 1995 the Commission stated that, for reasons already set out in the Article 6 letter, there were insufficient grounds for pursuing the complaints and that the observations submitted by the complainants in the letter of 24 July 1995 contained no new matters of fact or law liable to alter that conclusion. In particular, the Commission pointed out in that letter that it was requested to establish proof not only of a market-sharing agreement between the copyright-management societies in the various Member States by the conclusion of reciprocal representation contracts, but also of a second agreement between the same societies intended to maintain music prices at a high level.

24 With regard to the first alleged agreement, the Commission refers to the reasons already set out in the Article 6 letter. With regard to the second alleged agreement, the Commission claims first of all, referring to the judgment in *Tremblay I*, that that allegation was not made in the complaint but only in the complainants' observations of 20 March 1992 on the earlier Article 6 letter of 20 January 1992. It infers therefrom that it was not obliged to respond to that point, and considers that the Court of First Instance did not examine that part of the decision in its judgment. None the less, it stresses that the reasons already set out at point 12 of its decision of 12 November 1992 remain valid: even if it may not be ruled out that an agreement or concerted practice, though not proven, exists between the copyright-management societies represented within the Groupement Européen des Sociétés d'Auteurs et de Compositeurs, GESAC, it would appear that no precise effect in relation to prices may be attributed to any such concertation in any event since some prices have gone down and others risen since delivery of the judgments in the *Tournier* and *Lucazeau and Others* cases, and continue to display considerable variations.

Procedure

25 By application lodged at the Registry of the Court of First Instance on 13 December 1995, the applicants brought these proceedings.

- 26 By letter lodged at the Registry on 28 May 1996, the French Republic sought leave to intervene in support of the form of order sought by the defendant. The President of the Second Chamber (Extended Composition) granted the leave sought by order of 2 July 1996. Following the statement in intervention lodged by the French Republic, the applicants did not submit any observations within the period provided for.
- 27 By application lodged at the Registry on 30 May 1996, the Music Users' Council of Europe, MUCE, sought leave to intervene in support of the form of order sought by the applicants. By an application lodged at the Registry on 3 June 1996, the Associazione Italiana Imprenditori Locali da Ballo, SILB, also sought leave to intervene in support of the form of order sought by the applicants. By orders of 9 October 1996 the President of the Second Chamber (Extended Composition) granted the leave sought.
- 28 By judgment of 24 October 1996, the Court dismissed as unfounded the appeal by Messrs Tremblay and Kestenberg and by SELL against the judgment given at first instance in *Tremblay I* (Case C-91/95 P *Tremblay and Others v Commission* [1996] ECR I-5547).
- 29 On 6 November 1996, the plenary Court of First Instance decided, in accordance with Articles 14 and 51 of the Rules of Procedure, to refer the case, which had originally been assigned to the Second Chamber (Extended Composition), to the Second Chamber.
- 30 Since the interveners, MUCE and SILB, did not lodge statements in intervention within the period allowed, the written procedure was closed on 21 November 1996.

31 Upon hearing the report of the Judge Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure without any preparatory inquiry. The parties presented oral argument and answered questions put to them orally by the Court at the public hearing on 29 May 1997.

Forms of order sought by the parties

32 The applicants claim that the Court should:

- annul the Commission decision of 13 October 1995 in so far as it rejects the complaint;
- consequently, order the Commission to carry out the investigations necessary in order to establish proof of the agreement;
- order the Commission to pay the costs of the proceedings.

33 The Commission contends that the Court should:

- dismiss the action as unfounded in all its pleas;
- order the applicants to pay the costs.

34 The French Republic submits that the Court should:

- dismiss the action brought by Messrs Tremblay and Kestenberg, and by SELL.

The claim for a direction to be issued to the Commission

- 35 The applicants request the Court to order the Commission to carry out the investigations necessary to establish proof of the alleged agreement.
- 36 The Court recalls that, according to settled case-law, it is not for the Community judicature to issue directions to the institutions when exercising its power to review the legality of their acts. According to Article 176 of the Treaty, it is for the institution whose act has been declared void to take the necessary measures to comply with a judgment given in annulment proceedings (see the judgment of the Court in Case 53/85 *AKZO Chemie v Commission* [1986] ECR 1965, paragraph 23, and the judgment in Case T-109/94 *Windpark Groothusen v Commission* [1995] ECR II-3007, paragraph 61).
- 37 It follows that the form of order sought by the applicants, namely for a direction to be issued to the Commission, must be rejected as inadmissible.

The claim for annulment

- 38 The applicants rely on three pleas in support of their action: infringement of Article 176 of the Treaty; inadequacy of the statement of reasons on which the contested decision is based; infringement of the Treaty and misuse of powers.
- 39 The Court considers it appropriate to start by examining the second plea of inadequacy of the statement of reasons before going on to examine the first and third pleas.

Inadequacy of the statement of reasons on which the contested decision was based

Arguments of the parties

- 40 The applicants maintain, first of all, that the statement of reasons underpinning the decision is inadequate since it was not based on an investigation which the Commission ought to have carried out. In the contested decision, the Commission merely attempted to provide a general legal justification of the behaviour of the copyright-management societies based on a distinction between parallel behaviour and an agreement and for an appraisal of any concertation left this to the national courts. The applicants allege that the Commission has used the fact that no evidence of a concerted practice was provided as an excuse, thus putting the burden on the complainants to collect that evidence, whereas it has more effective means at its disposal for that purpose and has the duty to examine complaints with care, seriousness and promptness.
- 41 The applicants also consider that the statement of reasons on which the decision is based is inadequate in that the Commission's analysis is limited to an appraisal of the clauses in the reciprocal representation contracts relating to exclusivity for copyright-management societies in regard to access to foreign repertoires.
- 42 Finally, as regards the rejection of the complaint of an agreement to maintain royalties at a high level, the applicants criticize the Commission for reproducing in identical terms in its decision the grounds already set out at point 12 of its initial decision of 12 November 1992, in spite of the *pro tanto* annulment of that decision in *Tremblay I*. The statement of reasons is all the more inadequate since it is not accompanied by any comparative study of the rates charged by the various copyright-management societies. As to the Commission's argument that their challenge to this part of the contested decision is inadmissible on the ground that the

judgment in *Tremblay I* annulled the initial Commission decision only on the ground that the statement of reasons concerning rejection of the allegation of a partitioning of the market was inadequate, the applicants reply that the judgment at issue related to the entire concerted practice complained of, there being no reason to distinguish between this particular complaint and that concerning the existence of an agreement on royalties.

43 The Commission contends, first, that the applicants' plea is inadmissible in relation to the part of the decision concerning rejection of the complaint alleging an agreement between copyright-management societies on the matter of royalties. In the Commission's view, the Court of First instance annulled its initial decision only in regard to its decision to reject the complaint of a market-sharing and partitioning agreement, where it was the only allegation made in the original complaint, the allegation of a second agreement on prices being mentioned for the first time only in the complainants' observations on the Article 6 letter of 20 January 1992. The Commission infers therefrom that it was not required to answer that allegation and that, in the absence of a complaint, there was no decision on this point.

44 In regard, secondly, to the rejection of the allegation of market partitioning, the Commission observes that, in the contested decision, it rejected the complaint on its merits, taking the view that the alleged agreement was not proven, and not, as maintained by the applicants, on the ground that appraisal of the concerted practice was a matter for the national courts. Referring to all the matters set out in its Article 6 letter as well as in its decision, the Commission maintains that the decision contains a legally adequate statement of reasons and that, in the absence of solid evidence of an agreement, it was not under any obligation to carry out investigations. The Commission points out that the applicants had not adduced any fresh evidence in that regard, in particular in their observations of 24 July 1995 in reply to the Article 6 letter, and that its own conclusions were also corroborated by those of the French Competition Council.

45 In response to the applicants' argument that in the contested decision the Commission confined its appraisal to those clauses in the reciprocal representation contracts which concerned exclusivity, the Commission replies that, on the contrary, it analysed the functioning of the reciprocal representation system in its entirety.

- 46 The French Republic submits, first, that it is inadmissible for the applicants to challenge that part of the contested decision rejecting the allegation of an agreement between the copyright-management societies on royalties. Since the Court of First Instance did not annul the initial Commission decision on this point, the Commission's reply to the complainants was supererogatory; the complainants again made this charge in their observations on the Article 6 letter and for the sole purpose of having the Commission confirm to them the reasons why that charge had not been upheld. In any event, the applicants are not challenging the Commission's substantive appraisal but are merely arguing, wrongly, that no comparative study was made of royalty fees charged by copyright-management societies.
- 47 As regards, secondly, the rejection of the charge of market partitioning, the French Republic considers that the Commission provided a good statement of reasons for its decision. The Article 6 letter and the definitive decision to reject the complaints are sufficiently detailed and based on clear case-law of the Court. The conclusion reached by the Commission was also reached by the French Competition Council and by the Court of Cassation in its judgment of 14 May 1991. Under those circumstances, and given that there is no prima facie or solid evidence to contradict the position taken by the Commission, the French Republic considers that the Commission was under no obligation to undertake additional investigations.

Findings of the Court

- 48 By this plea the applicants claim that the statement of reasons on which the contested decision is based is inadequate as regards the rejection of the charge that the reciprocal representation contracts concluded amongst the copyright-management

societies led to market partitioning and as regards the rejection of the charge that there was an agreement between those societies to maintain royalty rates at a high level. Since the admissibility of this plea is contested by both the Commission and the French Republic to the extent to which it is directed against the part of the decision rejecting the latter charge, it is necessary to examine, first, whether it is admissible for the applicants to challenge the contested decision on this point.

49 On this point the Court observes first of all that, according to settled case-law, no action lies against decisions which merely confirm earlier decisions (judgments in Joined Cases 166/86 and 220/86 *Irish Cement v Commission* [1988] ECR 6473, paragraph 16, and Case C-480/93 P *Zunis Holding and Others v Commission* [1996] ECR I-1, paragraph 14). A decision which merely confirms an earlier decision does not afford the persons concerned the opportunity of reopening argument on the legality of the decision confirmed (judgment in Joined Cases 42/59 and 49/59 *SNUPAT v High Authority* [1961] ECR 53).

50 In the present case, the Commission had already rejected the complaints at issue in a decision of 12 November 1992 (see paragraph 9 above). In *Tremblay I*, the Court of First Instance, ruling on the question whether the Commission had provided an adequate statement of reasons for that decision in so far as it rejected the allegation of a concerted practice between the copyright-management societies of the various Member States, contrary to Article 85(1) of the Treaty, considered that 'paragraphs 12 and 13 of the contested decision [contained] the reasons for the rejection of two allegations made by the applicants in their observations on the Article 6 letter [which] concerned the existence of a restrictive agreement concluded between, on the one hand, the national copyright-management societies represented within GESAC with a view to standardizing their royalties at the highest possible rate and, on the other, SACEM and certain French syndicates of discothèque operators' (paragraph 39 of the judgment).

51 On the other hand, finding that the statement of reasons for the contested decision did not explain why their complaints had been rejected in so far as they concerned

a partitioning of the market as a result of the reciprocal representation contracts concluded between the copyright-management societies in the various Member States, the Court held that 'on that point, the Commission [had] not complie[d] with its obligation under Article 190 of the Treaty to state the reasons for its decision' (paragraph 40). Consequently, the Court annulled the decision only to the extent to which it rejected the applicants' allegation of market partitioning resulting from the existence of an alleged restrictive agreement between SACEM and the copyright-management societies having the effect of denying French dis-cothèques direct access to the repertoire of those societies (paragraph 49 of the judgment). The rest of the application was dismissed.

52 Following partial annulment, by the Court of First Instance, of the decision of 12 November 1992, the complainants, in their observations of 24 July 1995 on the Commission's Article 6 letter of 23 June 1995, not only challenged the Commission's intention to reject the complaint of market partitioning through reciprocal representation contracts but also reiterated their allegation that there was a second agreement between the copyright-management societies 'intended to maintain the price of music at a high level.' In the contested decision the Commission contended that it was under no obligation to answer that fresh charge made by the complainants and then went on to refer expressly to the grounds set out at paragraph 12 of its decision of 12 November 1992, stating that, in any event, it regarded them as still valid. The Court finds, on this point, as the applicants also accept, that the contested decision reproduces in identical terms the reasons already contained in the previous decision.

53 In view of those circumstances and since in *Tremblay I* the Court of First Instance annulled the Commission's initial decision for inadequacy of its statement of reasons only in so far as solely the allegation of market partitioning through reciprocal representation contracts had been rejected but considered that the decision did explain the reasons for rejection of the allegation of an agreement on royalty rates, the Commission was not obliged to reexamine, in its new decision, the reasons for which it had considered that the latter allegation could not be upheld. Whilst Article 176 of the Treaty requires the Commission to ensure that a decision intended to replace an annulled decision is not vitiated by the same irregularities as

those identified in the judgment annulling the decision (judgment in Case T-106/92 *Frederiksen v Parliament* [1995] ECR-SC II-99, paragraph 32), the Commission cannot be required to take a fresh position on aspects of its decision which were not called in question by that judgment.

- 54 Under those circumstances, as the French Republic rightly points out, the Commission's reply in its letter of 13 October 1995, in so far as it concerned rejection of the allegation of an agreement between copyright-management societies on royalties rates, constitutes a decision merely confirming its earlier decision of 12 November 1992. In that letter, it merely refers the complainant to, and unambiguously maintains, the reasons already contained in its first decision whose legality had not been called in question on this point by the judgment in *Tremblay I*.
- 55 That assessment is also corroborated by the fact that the circumstances and conditions in which the Commission rejected the allegation of an agreement on royalty rates are identical to those which prevailed upon the adoption of the decision of 12 November 1992. In fact, the only evidence relied on by the complainants, in their letter sent on 24 July 1995 to the Commission, in support of this allegation consisted of excerpted statements by the President of SACEM and GESAC at a conference on copyright, held on 16 and 17 March 1992, attended also by an official of the Commission assigned to the Directorate-General for Industry (DG III). However, as the applicants acknowledged at the hearing in response to a question put by the Court, the Commission was already aware of those statements, which are mentioned at paragraph 92 of the judgment in *Tremblay I*, when it adopted its decision of 12 November 1992, so that this was not in any event a new fact in relation to those already known to the Commission when it adopted its initial decision (see, in that regard, the judgment in Case C-480/93 P *Zunis Holding and Others v Commission*, cited above, paragraph 12).
- 56 Since no action lies against a decision merely confirming an earlier decision, it follows that it is inadmissible for the applicants to challenge in this action the part of the contested decision rejecting the allegation of an agreement between copyright-management societies on royalty rates and to claim an infringement of Article 190 of the Treaty in this regard.

- 57 As regards, secondly, the statement of reasons for the contested decision in so far as it rejects the allegation of a market partitioning, the Court recalls that, according to settled case-law, a statement of reasons must set out clearly and unequivocally the reasoning of the Community authority responsible for the contested decision so as to enable the applicant to ascertain the matters justifying the measure adopted so that he can defend his rights and so as to enable the Community judiciary to exercise its power of review (judgments in Case C-360/92 P *Publishers Association v Commission* [1995] ECR I-23, paragraph 39, Case T-7/92 *Asia Motor France and Others v Commission* [1993] ECR II-669, paragraph 30 and Case T-575/93 *Koelman v Commission* [1996] ECR II-1, paragraph 83). The Commission is not obliged to adopt a position, in stating the reasons for the decisions which it is required to take in order to apply the competition rules, on all the arguments relied on by the parties concerned in support of their request. It is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision (see, *inter alia*, the judgment in Case T-7/92 *Asia Motor France and Others v Commission*, cited above, paragraph 31).
- 58 In the present case, the Court considers that the applicants are misrepresenting the contested decision in maintaining, *inter alia*, that the Commission confined its analysis to the exclusivity clauses in the reciprocal representation contracts concluded between the copyright-management societies of the various Member States.
- 59 In fact, the Commission, particularly in its Article 6 letter to which the contested decision expressly refers, set out *in extenso* the replies given by the Court of Justice in its *Tournier* and *Lucazeau* judgments as to the assessment, in the light of Article 85(1) of the Treaty, of the reciprocal representation contracts concluded between the copyright-management societies. As the Commission explained in that letter (see paragraph 16 above), the appraisal of the Court of Justice took account of the fact that the exclusivity clauses in the reciprocal representation contracts had been deleted without any alteration in the behaviour of the copyright-management societies, which refused to allow direct access to their repertoire by foreign users and entrusted their repertoire only to a society established in the territory in question.

60 The Commission then went on to point out that, in this kind of context, according to the case-law of the Court of Justice cited above, mere parallel behaviour of the copyright-management societies mentioned by the complainants could not warrant the presumption, in the absence of evidence pointing in that direction, of an agreement or concerted practice between those societies, where there was a plausible explanation for that behaviour, namely the fact that, under the copyright-management scheme in force, it would not be in the interests of those societies to grant to users situated in other States direct access to their repertoire owing to the management and supervision costs which such access would entail.

61 Noting, finally, in its decision that the complainants had not raised in their observations of 24 July 1995 any new matters of fact or of law such as to alter the considerations set out in its Article 6 letter, the Commission accordingly concluded that the practices of the copyright-management societies referred to by the complainants did not entail the existence between them of an agreement or concerted practice contrary to Article 85(1) of the Treaty. Contrary, moreover, to the assertions of the applicants, the Commission did not therefore refer the matter to the national courts for examination, but concluded that there was no agreement contrary to Article 85(1) of the Treaty, in the absence of any evidence to that effect.

62 In attempting to demonstrate that the statement of reasons for the contested decision is inadequate, the applicants also seek to show that the Commission's investigation was inadequate. In particular, the applicants criticize it for not availing itself of the means it had to investigate for itself the behaviour complained of, and declining to do so on the sole ground that the complainants had not provided it with any proof or solid evidence of the existence of an agreement.

63 The Court finds, nevertheless, that the lack of probative value of the information provided by the complainants to the Commission is not disputed by the applicants, who in this connection do not plead any error of law or error of appraisal and who, moreover, acknowledged at the hearing that the information provided

was 'neither sufficient [nor] decisive'. Not having received any proof or sufficient hard evidence from the complainants for demonstrating the existence of an agreement contrary to Article 85(1) of the Treaty, the Commission cannot be criticized for not examining the complaint properly solely because it did not order additional measures of inquiry. The Court recalls in that connection that, according to settled case-law, the Commission's obligation, when a matter is brought before it under Article 3 of Regulation No 17, is not to conduct an investigation but to examine closely the matters of fact and of law brought to its attention by the complainant in order to ascertain whether there is any conduct liable to distort competition within the common market and to affect trade between Member States (judgments in Case C-19/93 P *Rendo and Others v Commission* [1995] ECR I-3319, paragraph 27, and Case T-24/90 *Automec v Commission* [1992] ECR II-2223, paragraph 79).

64 In view of all those circumstances, the Court considers that the Commission satisfied its obligation to indicate clearly, in rejecting a complaint, the reasons why close examination of the matters of fact and of law brought to its notice by the complainants did not lead it to initiate proceedings for infringement of Article 85 of the Treaty (see the order of the Court of Justice of 16 September 1997 in Case C-59/96 P *Koelman v Commission* [1997] ECR I-4809, paragraph 42, and the judgment given at first instance in *Koelman v Commission*, cited above, paragraph 40).

65 It follows from all the foregoing that the plea alleging inadequacy of the statement of reasons for the contested decision must be rejected.

Plea of infringement of Article 176 of the Treaty

Summary of the parties' arguments

66 The applicants maintain that, by adopting the contested decision, the Commission infringed its obligations under Article 176 of the Treaty.

67 According to them, in adopting the contested decision the Commission failed to heed the judgment in *Tremblay I* in that, following that judgment, the Commission did not undertake an inquiry, as the Court of First Instance requested it to do. In their view, the Court of First Instance condemned both the inadequacy of the inquiry preceding the adoption of the decision and the inadequacy of the statement of reasons on which it was based. The applicants accordingly conclude that, in order to comply with the Court of First Instance's direction to take action, even if it was only implicit, it was for the Commission to use the means available to it to undertake investigations.

68 Secondly, the applicants criticize the Commission for adopting the contested decision without awaiting the judgment of the Court of Justice on the appeal in *Tremblay I*, when the appeal proceedings and the proceedings in this case are interdependent.

69 The Commission replies that the argument that it did not heed the judgment in *Tremblay I*, in not undertaking the active investigations it entailed, is based on false premisses since the Court of First Instance annulled the part of the contested decision concerning the complaint of market partitioning for breach of Article 190 of the Treaty, and not on the ground of an error of law. It considers that the contested decision, which reached the same conclusion as that adopted by it on 12 November 1992, but this time satisfying the reasoning requirements of Article 190 of the Treaty, is unimpeachable.

70 In response to the applicants' argument that it ought to have awaited the judgment of the Court of Justice on the appeal against *Tremblay I* the Commission points out that the proceedings before the Court of Justice and the present proceedings have a distinct subject-matter, inasmuch as the appeal brought by the applicants

seeks only partial annulment of the judgment in *Tremblay I*, and then only in so far as it did not annul the part of the decision rejecting allegations other than that of the existence of an agreement. It therefore considers that it was obliged to resume examination of the part of the complaint relating to Article 85 of the Treaty without awaiting the judgment of the Court of Justice.

- 71 The French Republic, intervening, contends that the judgment in *Tremblay I* had become definitive in so far as it annulled the Commission's initial decision, in the absence of any appeal against that part of the judgment, and that the Commission was therefore obliged, under Article 176 of the Treaty, to reply to the complaint on this point. It also considers that, even if an appeal had been brought against the whole of the judgment in *Tremblay I*, the Commission would have been entitled to adopt a fresh decision if it considered that it had in its possession sufficient information to do so, since an appeal does not have suspensory effect, except in specific situations not relevant to the present case.

Findings of the Court

- 72 When the Court of First Instance annuls an act of an institution, it is required, under Article 176, to take the measures necessary to comply with the Court's judgment. In that connection, both Community courts have held that, in order to comply with their judgments and to implement them fully, the institution is required to observe not only the operative part of the judgment but also the grounds which led to the judgment and constitute its essential basis, inasmuch as they are necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the precise provision held to be illegal and, on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the annulled measure (judgments in Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris v Commission* [1988] ECR 2181, paragraph 27, and in *Frederiksen v Parliament*, cited above, paragraph 31).
- 73 In the present case, the applicants contend, first of all, that the Commission disregarded the judgment in *Tremblay I*, which, in their view, required it to conduct an inquiry. However, it follows from the operative part and grounds of that judgment

that the Court of First Instance partially annulled the earlier Commission decision of 12 November 1992 for breach of Article 190 of the Treaty on the ground that it did not apprise the applicants of the reasons justifying rejection of their complaints in so far as these concerned market partitioning. That conclusion did not therefore imply that the Court of First Instance was requesting the Commission to conduct investigations or, *a fortiori*, that it was giving it some kind of direction to take action in that regard, which is something which it does not have power to do in the context of its review of legality (see paragraph 36 above). Moreover, since in this judgment (see paragraph 64 above) the Court has found that the Commission has now satisfied its obligation under Article 190 of the Treaty to state reasons for its decision in regard to the allegation of market partitioning, the argument that the judgment in *Tremblay I* has been disregarded and that Article 176 of the Treaty has therefore been infringed cannot avail the applicant.

74 As to the argument that the Commission ought to have waited for the Court of Justice to give judgment on the applicants' appeal against the judgment in *Tremblay I* before adopting the contested decision, the Court considers that argument to be without relevance in the present case. That appeal sought only the partial setting aside of the judgment in *Tremblay I* in so far as it dismissed the action brought against that part of the Commission's initial decision which concerned the allegations of an infringement of Article 86 of the Treaty (see paragraph 12 above and the judgment of the Court of Justice in Case C-91/95 P *Tremblay and Others v Commission*, cited above). This Court notes, on the other hand, that no appeal has been brought against the judgment in *Tremblay I* for annulling the part of the Commission decision concerning its rejection of the allegation of market partitioning through an alleged agreement between copyright-management societies in breach of Article 85 of the Treaty. Since the judgment of this Court has thus become definitive on the latter point, it follows that the Commission did not have to wait for the Court of Justice to give its judgment in order to adopt a fresh decision on that issue.

75 It follows that this plea must be rejected.

The third plea: infringement of the Treaty and misuse of powers

Arguments of the parties

- 76 The applicants consider that the Commission's conduct constitutes an infringement of the Treaty and a misuse of powers. In their view, by deliberately refraining, despite their requests, from investigating the case or at any rate by confining itself to 'passive' investigations, the Commission kept the alleged restrictive agreement alive and thereby pursued objectives other than those for which the powers provided for in the Treaty were conferred on it (judgments in Joined Cases 3/64 and 4/64 *Chambre Syndicale de la Sidérurgie Française and Others v High Authority* [1965] ECR 567, Case 135/87 *Vlachou v Court of Auditors* [1988] ECR 2901 and Case C-107/90 P *Hochbaum v Commission* [1992] ECR I-157). In support of that plea, the applicants refer to extracts from statements made by the President of SACEM and GESAC at a conference on copyright held in Madrid on 16 and 17 March 1992.
- 77 The Commission emphasizes that an allegation of misuse of powers can be taken into consideration only if the contested decision appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (judgment in Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863). Besides, the fact that the contested decision did not accept the arguments put forward by the complainants during the procedure cannot in itself constitute a misuse of powers (judgment in Case C-69/89 *Nakajima v Council* [1991] ECR I-2069). In the present case, the Commission considers that the applicants have provided no information to substantiate their assertion that no investigations or only passive investigations were carried out with the objective of protecting a restrictive agreement on prices for the benefit of SACEM.
- 78 The French Republic submits no specific observations.

Findings of the Court

79 With regard first of all to the allegation that the Commission infringed the Treaty, the first paragraph of Article 19 of the Protocol on the EC Statute of the Court of Justice, which applies to the Court of First Instance pursuant to the first paragraph of Article 46 of that Statute, and Article 44(1) of the Rules of Procedure of the Court of First Instance provide that an application originating proceedings must contain a summary of the pleas in law on which it is based. That statement must be sufficiently clear and specific in order to enable the defendant to prepare its defence and the Court of First Instance to adjudicate on the action, if appropriate without any other information in support. The application must therefore specify the nature of the grounds on which it is based, so that a mere abstract statement of grounds does not satisfy the requirements of the Statute or of the Rules of Procedure (judgment in Case T-102/92 *Vihó v Commission* [1995] ECR II-17, paragraph 68).

80 In the present case, the applicants claim that the Commission has infringed the Treaty without making any specific reference to the provisions which they consider to have been infringed. In their application, they state generally that ‘an inadequate statement of reasons, which can often serve to cover up a Treaty infringement, as in this case, may stem from [...] inadequate handling of a case’, and, ‘akin to a breach of the Treaty, the Commission’s conduct also constitutes a misuse of powers.’

81 The Court considers that those allegations, as formulated by the applicants, do not enable it to determine sufficiently precisely the nature and subject-matter of the charge made against the Commission nor, *a fortiori*, to identify the Treaty provisions which the Commission is alleged to have disregarded. Furthermore, the applicants’ arguments have not enabled the Commission to submit specific observations on an alleged infringement of the Treaty and effectively to defend itself on this issue.

82 Under those conditions, the allegation of a Treaty infringement by the Commission must be rejected as inadmissible.

83 As regards the allegation of a misuse of powers, the Court notes that, in support of their allegation, the applicants cite excerpts from the report of a conference on copyright held in Madrid on 16 and 17 March 1992 (see paragraph 55 above). In its judgment in *Tremblay I*, cited above, the Court has already held that it was unable to find in those extracts the evidence required to justify an inference that there was any misuse of powers (see paragraph 92 of the judgment). It follows that this plea must be rejected.

84 It follows from all the foregoing considerations that the action must be dismissed in its entirety.

Costs

85 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful and the Commission has asked for an order of costs against them, the applicants must be ordered to pay the costs.

86 However, the French Republic, which intervened in the proceedings, is to bear its own costs under the first subparagraph of Article 87(4) of the Rules of Procedure.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders the applicants to pay the costs of the proceedings;**
- 3. Orders the French Republic to bear its own costs.**

Bellamy

Kalogeropoulos

Cooke

Delivered in open court in Luxembourg on 27 November 1997.

H. Jung

A. Kalogeropoulos

Registrar

President