JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
24 January 1995 *

In Case T-5/93,

Roger Tremblay, of Vernantes (France),

François Lucazeau, of La Rochelle (France),

Harry Kestenberg, of Saint-André-les-Vergers (France),

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

applicants,

supported by

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

* Language of the case: French.

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

intervener,

v

Commission of the European Communities, represented by Julian Currall, of its Legal service, and by Géraud de Bergues, a national civil servant seconded to the Commission, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, also of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission Decision of 12 November 1992 rejecting the applications made by the applicants 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 Editeurs de Musique,

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

composed of: J. L. Cruz Vilaça, President of the Chamber, C. P. Briët, A. Kalogeropoulos, D. P. M. Barrington and A. Saggio, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 18 May 1994,

gives the following

Judgment

Facts giving rise to the action

1 Between 1979 and 1988 the Commission received numerous applications 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, hereinafter 'Regulation No 17'), for a finding that Société des Auteurs, Compositeurs et Editeurs de Musique (hereinafter 'SACEM'), the society which manages copyright in musical works in France, had infringed Articles 85 and 86 of the EEC Treaty. The applications emanated from groups of discothèque operators and individual operators, including the three applicants in the present case.

2 The parties agree that the complaints lodged by the applicants contain, essentially, the following allegations:

— the societies which manage copyright in the various Member States share the market amongst themselves by concluding reciprocal representation contracts under which copyright societies are prohibited from dealing directly with users established on the territory of another Member State;

— the royalty of 8.25% of turnover charged by SACEM is excessive by comparison with the rates of royalty paid by discothèques in the other Member States;

that rate, which the applicants claim is abusive and discriminatory, is not used to pay the management societies represented, in particular foreign societies, but accrues exclusively to SACEM, which passes on derisory sums to those whom it represents;

— SACEM refuses to allow use of its foreign repertoire alone, every user being required to acquire its entire repertoire, both French and foreign.

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 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, Poitiers, in which the issues raised included criticism, in relation to Articles 85 and 86 of the Treaty, of 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 contracts 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 and Joined Cases 110/88, 241/88 and 242/88 *Lucazeau and Others* v *SACEM and Others* [1989] ECR 2811, the Court held, *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' and that 'Article 86 of the Treaty must be interpreted as meaning that a national copyright-management society holding a dominant position in a substantial part of the common market imposes unfair trading conditions where the royalties which it charges to discothèques are appreciably higher than those

charged in other Member States, the rates being compared on a consistent basis. That would not be the case if the copyright-management society in question were able to justify such a difference by reference to objective and relevant dissimilarities between copyright management in the Member State concerned and copyright management in the other Member States.'

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. With a view to establishing a consistent basis of comparison, it devised five notional standard categories of discothèque. It then sent requests for information under Article 11 of Regulation No 17 to the copyright-management societies in the various Member States regarding the royalties that would be payable by those different types of discothèque on the basis of the tariffs applied by them before and after the abovementioned judgments of the Court of Justice.

6 The results of the Commission's investigation were set out in a report dated 7 November 1991. It refers first to the replies given by the Court in its judgments in *Tournier* and *Lucazeau* and draws attention to the difficulties of comparing the royalties charged in the different Member States on the basis of standard categories of discothèques. The report goes on to say that, prior to 1 January 1990, SACEM's tariffs differed considerably from those charged by the other copyright-management societies, with the exception of the Italian society. The report then expresses doubts regarding the two explanations given by SACEM to justify the difference, namely, first, the fact that there was a tradition in France of paying very high copyright fees and, secondly, that a very strict approach was taken in verifying which works were performed in order to determine to whom the royalties should be paid. The report also indicates that, after 1 January 1990, the royalties charged in France and Italy continued to be appreciably higher than those charged in the other Member States. Finally, the report considers whether SACEM accords to French discothèques different treatment which may fall within the scope of Article 86 of the Treaty.

7 On 18 December 1991 the applicants formally requested the Commission under Article 175 of the EEC Treaty to define its position concerning their complaints.

8 On 20 January 1992 the Commission sent a communication to Bureau Européen des Médias de l'Industrie Musicale (hereinafter '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 1963-4, p. 47, hereinafter 'Regulation No 99/63'). The Commission considers that the applicants in the present case had notice of that letter, either as members of BEMIM or through their lawyer, who also acted for BEMIM, so that it was unnecessary to send them individual communications.

9 The Commission states *inter alia*, in the part of its letter of 20 January 1992 entitled 'Legal Assessment', that 'at the present stage, the investigation provides no basis for concluding that the conditions for the application of Article 86 are fulfilled with regard to the level of the tariffs at present applied by SACEM'. The part of the letter of 20 January 1992 entitled 'Conclusions' reads as follows:

'In conclusion, pursuant to Article 6 of Commission Regulation No 17 No 99/63, I have the honour hereby to inform you that, having regard to the principles of subsidiarity and decentralization and in view of the fact that, because the practices criticized in your complaint 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 your complaint is such as to enable it to respond favourably thereto.

The Commission will forward to the French judicial and administrative authorities which have asked it to do so a copy of the report prepared by its staff comparing the rates of royalties charged in the Community and considering the question of discrimination between different users within the French market.'

10 On 20 March 1992, counsel for the the applicants submitted observations in response to the communication of 20 January 1992, in which he asked the Commission to pursue the investigation and to send a statement of objections to SACEM.

11 The applicants were notified by letter of 12 November 1992 from the Member of the Commission responsible for competition that their complaints had been definitively rejected.

12 Paragraphs 1 to 3 of the letter refer to the previous correspondence between the Commission and the complainants and paragraph 4 indicates that the letter contains the Commission's final decision. Paragraph 5 indicates that the Commission does not intend acting further on the complaints, for the reasons already set out in its letter of 20 January 1992.

13 In paragraphs 6 to 13 of its letter the Commission responds to the main arguments put forward by the applicants in their observations on the letter of 20 January 1992. After stating that the matter is not of any particular importance to the functioning of the common market and therefore that there is no sufficient Community interest in further investigation of it, the Commission points out, referring in particular to the judgment of the Court of First Instance in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223 (hereinafter '*Automec II*'), paragraph 88, that the commencement of proceedings before national courts may be a factor to be taken into consideration in order to justify a decision not to proceed with a case. In response to the applicants' argument that the position taken by the Commission amounts to inappropriate recourse to the principle of subsidiarity, the Commission emphasizes that the course followed represents not the abandonment of all and any official action but rather a choice, as between the competent authorities, of those which are best placed to deal with the issues involved. It states that only the national courts have jurisdiction to award damages and that, in its report of 7 November 1991, it provided them with the information needed to compare the tariffs of the various national copyright-management societies. In that regard, the Commission considers that the use of that report by the national courts as evidence is not restricted by its obligation to safeguard business secrets since the requests which it sent to the various national copyright-management societies were concerned not

with the levels of the tariffs in force, which by their nature are already in the public domain, but with a comparison of the practical results of applying those tariffs to five types of discothèque. Replying next to the applicants' criticisms concerning its failure to define its position regarding the period prior to 1 January 1990, the Commission maintains that it is not required to consider whether any infringements of the competition rules occurred in the past, since the main purpose of such an examination would be to facilitate the award of damages by the national courts. In response to the arguments advanced concerning the existence of a restrictive agreement between the various national copyright-management societies, it states that, whilst the existence of such an agreement, of which it has been unable to find any solid evidence, cannot be ruled out, it is apparent, on the other hand, that precise effects cannot be attributed to it regarding tariffs, some of which went down and some up following the *Tournier* and *Lucazeau* judgments. With regard, finally, to the applicants' observations alleging the existence of an agreement between SACEM and certain syndicates of discothèque operators, the Commission considers that if such an agreement existed its effects were necessarily limited to French territory.

14 In paragraph 14 of its decision the Commission informs the applicants that the application made by them under Article 3(2) of Regulation No 17 has been 'rejected and referred to the national courts'.

Procedure before the Court and forms of order sought

15 Those were the circumstances in which, by application received at the Registry of the Court of First Instance on 11 January 1993, the applicants brought the present action.

16 By order of the President of the Second Chamber of the Court of First Instance of 20 May 1993, Syndicat des Exploitants de Lieux de Loisirs (SELL) was granted leave to intervene in support of the applicants.

17 The written procedure followed the normal course and was concluded on 4 August 1993.

18 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. At the Court's request, the defendant produced a number of documents and answered a number of written questions.

19 The parties presented oral argument and answered questions put to them orally by the Court at the public hearing on 18 May 1994.

20 The applicants claim that the Court should:

— annul the Commission decision of 12 November 1992;

— order the Commission to pay the costs.

21 The Commission contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

22 The intervener claims that the Court should:

— annul the Commission decision.

Substance

23 The applicants put forward, essentially, four pleas in law in support of their application. The first alleges infringement of Article 190 of the EC Treaty, in that the contested decision is not supported by an adequate statement of the reasons on which it is based. In their second plea, the applicants claim that the contested decision is vitiated by an error of law and several manifest errors of appraisal. The third alleges breach of various general principles of Community law. The fourth alleges misuse of powers.

24 In its written observations, the intervener states that it endorses all the arguments put forward by the applicants in support of their application.

The plea as to infringement of Article 190 of the Treaty

Summary of the parties' arguments

25 The applicants claim that the contested decision does not state the reasons for which it rejects the allegation of concertation between the collective copyright-management societies in the various Member States. The applicants consider that the reasons given for the rejection of the other allegations contained in their complaints are contradictory. They claim that the statement made by the Commission in its communication of 20 January 1992 under Article 6 of Regulation No 99/63 (hereinafter 'the Article 6 letter') to the effect that 'at the present stage, the investigation provides no basis for concluding that the conditions for the application of Article 86 are fulfilled with regard to the level of the tariffs at present applied by SACEM' conflicts, first, with the terms of the contested decision which, referring to that letter, states that the Commission does not intend adopting a position regarding the points of law raised and, secondly, with the content of a letter of 17 December 1992, addressed to SACEM, in which the Commission stated that 'it

wishes ... to leave to the national courts to which the complaint is referred the widest possible freedom of appraisal'. There is also a contradiction, they maintain, in paragraph 9 of the contested decision, between the statement that the Commission made a comparison of the tariffs applied by the various copyright-management societies in the Community and the statement that the requests for information sent to those societies were concerned not with the level of the tariffs themselves but with the practical results of applying them, based on a comparison of five standard examples of discothèques.

26 The Commission replies that the contested decision sufficiently states the reasons on which it is based to enable the persons concerned to defend their interests and the Court to carry out its review of legality and therefore that it meets the requirements laid down in that regard by the Court of Justice and the Court of First Instance (judgment of the Court of First Instance in Case T-1/89 *Rhône Poulenc* v *Commission* [1991] ECR II-867). It also states that the Court of Justice and the Court of First Instance have consistently held that it is not required to give its views on all the arguments put forward by the persons concerned in support of their application and that it need merely set out the facts and legal considerations which are of decisive importance in the context of the decision (judgments of the Court of Justice in Joined Cases 43/82 and 62/82 *VBVB and VBBB* v *Commission* [1984] ECR 19 and of the Court of First Instance in Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1).

27 The Commission sees no contradiction between the terms of its Article 6 letter and the decision definitively rejecting the complaints. It contends that its finding in the Article 6 letter cannot be taken as defining its position with respect to the contested conduct of SACEM and that in any event the contested decision is based not on the existence of an infringement but on other grounds.

28 As regards the alleged contradiction between the contested decision and other communications from it, the Commission replies that possible discrepancies between the statement of the reasons for a decision and such positions as might be defined in other documents cannot affect the validity of the decision for the purposes of Article 190 of the Treaty, provided that it is established that the reasons on which the decision is based do not contradict each other or the operative part of it.

Findings of the Court

29 It has been consistently held that the statement of reasons on which a decision adversely affecting a person is based must, first, be such as to enable the person concerned to ascertain the matters justifying the measure adopted so that, if necessary, he can defend his rights and verify whether the decision is well founded and, secondly, enable the Community judicature to exercise its power of review as to the legality of the decision (judgments of the Court of Justice in *La Cinq*, cited above, paragraph 42, and Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraph 30). In that connection, the Commission is not obliged, in stating the reasons for the decisions which it takes to ensure the application of the competition rules, to adopt a position on all the arguments relied on by the persons concerned but need only set out the facts and legal considerations which are of decisive importance in the context of the decision (judgments of the Court of Justice in Case 55/69 *Cassella* v *Commission* [1972] ECR 887, paragraph 22, Case 56/69 *Hoechst* v *Commission* [1972] ECR 927, paragraph 22, *VBVB and VBBB*, cited above, paragraph 22, and of the Court of First Instance in *La Cinq*, cited above, paragraph 41, and *Asia Motor France*, cited above, paragraph 31).

30 It must be borne in mind that the complaints lodged by the applicants contained, essentially, three allegations. The first concerned sharing of the market — and the resultant total partitioning of it — between the copyright-management societies of the various Member States by means of the conclusion of reciprocal representation contracts. In view of the fact that the restrictions of competition mentioned in that allegation derive from the existence of an agreement between undertakings, the Court considers that, in the absence of any indication to the contrary, that allegation must be regarded as being based on Article 85(1) of the Treaty. The second and third allegations concerned, respectively, the excessive and discriminatory nature of the rates of royalties charged by SACEM and the latter's refusal to allow discothèques to use only the foreign repertoire. The Court considers that the latter two allegations must be regarded as being based, in the absence of any indication that the contested practices resulted from any agreement or concerted practice, on Article 86 of the Treaty.

31 In the first limb of their plea, the applicants claim that the contested decision does not adequately state the reasons for which it rejects the allegation of concertation

between the collective copyright-management societies in the various Member States, in breach of Article 85(1) of the Treaty.

32 The Court notes, first, that the letter of 12 November 1992 rejected the applicants' complaints in their entirety. Paragraph 14 of the contested decision states, without drawing a distinction between the allegations of infringements of Article 85 and of Article 86, that 'for the reasons set out above, I would inform you that your application to the Commission under Article 3(2) of Regulation No 17/62 has been rejected and referred to the national courts'.

33 It should be observed that the decision of 12 November 1992 essentially rejects the complaint on the grounds given in the Article 6 letter. Paragraph 5 of the contested decision states 'The Commission considers that, for the reasons set out in its letter of 20 January 1992, there are insufficient grounds for acting on your application for a finding of an infringement. The observations submitted by BEMIM and by you on 20 March 1992 contain no new factual or legal information such as to change the Commission's judgment and conclusions as set out in its letter of 20 January 1992'.

34 The Court considers, therefore, that in order to establish whether the contested decision contains a sufficient statement of the reasons on which it is based, both the grounds mentioned in the letter of 12 November 1992 and those mentioned in the Article 6 letter must be considered.

35 The Court finds that neither the Article 6 letter nor the report of 7 November 1991 annexed thereto contains anything to indicate that the Commission examined the applicants' allegation of an infringement of Article 85(1); on the contrary, they show that the Commission considered only the allegations concerning an

infringement of Article 86. In its Article 6 letter, the Commission states that its 'investigations related more particularly to a comparison of the levels of royalties in the EEC' (paragraph I E). It states that 'at the present stage, the investigation provides no basis for concluding that the conditions for the application of Article 86 are fulfilled with regard to the level of the tariffs at present applied by SACEM' (paragraph II). In the part of its Article 6 letter headed 'Conclusions', the Commission indicates that it is minded to reject the complaint 'in view of the fact that, because of the essentially national effect of the practices criticized in your complaint, there is no Community interest involved and the matter is at present before a number of French courts' (paragraph III). The essentially national effect derives, according to the Commission, from the fact that 'the effects of the alleged abuses are felt essentially only within the territory of a single Member State, or even only a part of that territory' (paragraph II). Similarly, in the Commission report annexed to the Article 6 letter, entitled 'Applicability of Article 86 EEC to the system of royalties applied by SACEM to French discothèques', there is no consideration of the alleged infringement of Article 85(1) by the various national copyright-management societies.

36 In its letter of 12 November 1992 the Commission reiterates, in paragraph 6, the finding already made in its Article 6 letter that 'the centre of gravity of the alleged infringement is in France; its effects in the other Member States can be only very limited; consequently this case is not of particular importance to the functioning of the common market; the Community interest does not therefore require the Commission to deal with these complaints but requires that they be referred to the French national courts and administrative authorities'. In order to justify the referral to the national courts, it alludes, in paragraph 7 of the decision, to the Opinion of Judge Edward, acting as Advocate General, in the *Automec II* and *Asia Motor France* cases cited above, and to the judgment in *Automec II*. It then considers the applicants' observations in response to its Article 6 letter, before concluding that they are not such as to undermine its finding in paragraph 6 of the contested decision (paragraphs 8 to 13).

37 The Court considers that paragraph 6 of the letter of 12 November 1992, which contains the essential reasons for the final rejection of the complaint, cannot reasonably be said to deal with the applicants' allegation as to the existence of a

restrictive agreement between the copyright-management societies in the various Member States. Indeed, it is only in the light of the allegations in the complaint concerning infringement of Article 86 of the EC Treaty — in particular the abusive and discriminatory nature of the level of the royalties charged by SACEM and SACEM's refusal to grant access to its foreign repertoire alone — that any reasonable meaning can be attributed to the Commission's finding that the centre of gravity of the infringement is in France.

38 The Court finds, next, that the only paragraphs of the contested decision which relate to the allegation of infringement of Article 85(1) of the Treaty are paragraphs 12 and 13, which read as follows:

'12 As regards the restrictive agreement which (counsel for the applicants) criticizes on page 12 of (his) letter of 20 March 1992, allegedly existing between SACEM and the other societies of authors in the Community, the Commission finds that whilst the existence of such an agreement, of which it has been unable to secure any solid evidence, or at least of a concerted practice between all those societies, in particular within GESAC, cannot be ruled out, it appears, conversely, that precise effects cannot be attributed to it regarding tariffs, some of which went down and some up following the judgments of the Court of Justice of 13 July 1989, and which continue, as all the complainants emphasize insistently, to display considerable variations from each other. However, if formal evidence of the effects of such a restrictive agreement were given to it, the Commission would be fully prepared to take account of it.

13. As regards the alleged restrictive agreement between SACEM and certain syndicates of discothèque operators complained of on page 13 of (the) letter of 20 March 1992 (from counsel for the applicants), the Commission considers that it could have produced effects only within French territory for the benefit of some discothèque operators and at the expense of others and that, therefore, having regard to the principles of cooperation and division of tasks between the Commission and the Member States, it is for the national authorities to give a ruling on the matter, particularly since, whilst it is true that the Commission shares with those

authorities the power to apply the Community competition rules, only the latter authorities have the right to award damages. Moreover, it should be borne in mind that no views expressed by the Commission regarding that agreement can in any way limit the freedom of appraisal of the national courts.'

39 The Court considers that paragraphs 12 and 13 of the contested decision contain the reasons for the rejection of two allegations made by the applicants in their observations on the Article 6 letter. Those allegations 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. The Court considers that paragraphs 12 and 13 of the contested decision do not, however, contain any statement of the reasons for which the part of the applicants's complaint alleging partitioning of the market was rejected.

40 In those circumstances, the statement of the reasons for the contested decision does not apprise the applicants of the grounds for rejecting their complaints in so far as the latter was concerned with an alleged partitioning of the market as a result of the reciprocal representation contracts concluded between the copyright-management societies in the various Member States. It follows that, on this point, the Commission did not comply with its obligation under Article 190 of the Treaty to state the reasons for its decision. The first limb of the present plea in law is therefore well founded.

41 In the second limb of their plea, the applicants claim that the statement of the reasons for the decision is contradictory so far as concerns the rejection of the other allegations contained in the complaint.

42 The Court considers that a contradiction in the statement of the reasons on which a decision is based constitutes a breach of the obligation laid down in Article 190

of the Treaty such as to affect the validity of the measure in question if it is established that, as a result of that contradiction, the addressee of the measure is not in a position to ascertain, wholly or in part, the real reasons for the decision and, as a result, the operative part of the decision is, wholly or in part, devoid of any legal justification (see in particular the judgment of the Court of Justice in Case 158/80 *REWE* v *Hauptzollamt Kiel* [1981] ECR 1805, paragraph 26).

43 The Court would point out that, in order to decide whether the reasons for the contested decision are adequately stated, both the grounds mentioned in the letter of 12 November 1992 and those mentioned in the Article 6 letter must be considered.

44 As regards the existence, alleged by the applicants, of contradictions between the grounds of the Article 6 letter and those of the contested decision, the Court finds that it is apparent from the part of the Article 6 letter headed 'Conclusions' (see paragraph 9 above) that the Commission was minded to reject the complaints received by it on the sole ground that they did not disclose a sufficient Community interest and that that insufficiency of interest derived, first, from the essentially national effect of the practices criticized and, secondly, from the fact that the matter was pending before a number of French courts. The finding in the Article 6 letter that 'at the present stage, the investigation provides no basis for concluding that the conditions for the application of Article 86 are fulfilled with regard to the level of the tariffs at present applied by SACEM' does not therefore constitute a ground on which the decision to reject the complaints is based.

45 Similarly, it is clear from paragraphs 12 to 14 of the letter of 12 November 1992, summarized above, that the final decision to reject the complaints was also based on the sole ground of lack of a sufficient Community interest in further investigation of the case, resulting, first, from the limited effects that the alleged infringements were capable of producing in the other Member States and, secondly, from

the fact that proceedings had been brought before several national courts and the French Conseil de la Concurrence (Competition Council) raising the same issues as the complaints.

6 It follows from the foregoing that there is no contradiction between the statement of reasons given in the Article 6 letter and that given in the contested decision to justify rejection of the complaints.

7 As regards the argument that the statement in paragraph 9 of the contested decision to the effect that the Commission did not compare the level of the tariffs themselves conflicts with another statement made by the Commission on the same point, the Court considers, having regard to the above analysis, that any contradiction between the considerations put forward by the Commission regarding the level of the tariffs applied by SACEM is not, in any event, of such a kind as to divest the operative part of the contested decision, based solely on the ground of lack of a sufficient Community interests, of its legal justification. Accordingly, even if the alleged contradiction were substantiated, that would not affect the validity of the contested decision.

8 Accordingly, the second limb of the present plea must be rejected.

9 It follows from the foregoing that the contested decision must be annulled to the extent to which it rejects the applicants' allegation of a partitioning of the market resulting from the existence of an alleged restrictive agreement between SACEM and the copyright-management societies in the other Member States having the effect of denying French discothèques direct access to the repertoire of those societies.

The plea in law alleging an error of law and a manifest error of appraisal

Summary of the parties' arguments

50 The applicants consider that the contested decision contains an error of law and manifest errors of appraisal such as to render it void.

51 First, the applicants consider that the Commission committed an error of law in rejecting their complaints for lack of a Community interest. They maintain that, by virtue of the judgment in *Automec II*, the Commission is entitled to take account of the Community interest displayed by a case only in order to determine the order of priority to be adopted by its staff in dealing with the complaint, not to justify rejection of the complaint.

52 Secondly, the applicants submit that the Commission committed a manifest error of appraisal in invoking the principle of subsidiarity to justify referring the complaints to the national courts, when it had in its possession all the information which it needed to enable it to enable it to make a determination regarding the contested practices.

53 Thirdly, the applicants, who consider, with respect to their allegation of sharing of the market and the resultant total partitioning of it, that the Commission committed a manifest error of appraisal in stating, in paragraph 6 of the contested decision, that the alleged infringements mainly concerned France and had only very limited effects in the other Member States, submit that the Commission, in any event, committed a manifest error of appraisal in evaluating the Community interest in the matter. They consider that in the present case the Commission was not entitled, in undertaking that evaluation, to rely on the fact that proceedings had been brought before several national courts in relation to the legal issues raised in their complaints. In that connection, they emphasize that in *Automec II* there was

only one action before a national court between the parties concerned and maintain that, since more than one action has been brought in the present case, the Commission was wrong to compare it with *Automec II*. Moreover, in any event, the referral to the national courts is unjustifiable in the present case because it is apparent from several decisions given by those courts that they are not able to apply the competition provisions of the Treaty correctly and uniformly. The applicants also criticize the fact that, in the report which it prepared for the national courts, the Commission, in comparing the tariffs applicable in the various Member States, referred only to notional types of discothèque.

54 The Commission contests the applicants' interpretation of *Automec II*. It considers that that judgment clearly shows that it is entitled to reject a complaint for lack of a Community interest.

55 The Commission also rejects the argument that it can take account of the fact that cases have been brought before national courts as a relevant factor in evaluating the Community interest in further investigation of a case only where a single action is pending between the same parties. As regards the allegation that the French courts are not capable of dealing with that litigation, the Commission points out that it does not have exclusive powers to apply Articles 85(1) and 86, provisions which directly confer on individuals rights which the national courts must safeguard. In its view, the risk of discrepancies between court decisions on the application of those articles of the Treaty is inherent in the right of individuals to rely on those provisions before the national courts. It adds that it is for the superior courts of the Member States to ensure unity and consistency of the case-law on the provisions concerned, if necessary by seeking preliminary rulings from the Court of Justice under Article 177 of the EC Treaty.

56 In response to the applicants' criticism of the method adopted for comparing tariffs, the Commission states that it included a detailed explanation of the choice of that method in its report, which the Court implicitly accepted in its judgments in

Tournier and *Lucazeau*, and that the applicants themselves conceded that the report was conducive to recognition of the alleged infringements.

The findings of the Court

57 Examination of the first plea in law, alleging inadequacy of the statement of reasons, has shown that the contested decision must be annulled in so far as it rejects the applicants' allegation concerning partitioning of the market. It follows that the limb of the present plea alleging a manifest error of appraisal committed by the Commission in evaluating the effects of the alleged partitioning of the market is no longer relevant.

58 It is also clear from the foregoing that the present plea must be examined solely in relation to the allegations contained in the complaints as to infringement of Article 86 of the Treaty, namely that the rates of royalties charged by SACEM are excessive and discriminatory and that SACEM refused to allow French discothèques to use only the foreign repertoire.

59 It must be borne in mind at the outset that it has been consistently held by the Court of Justice and the Court of First Instance that Articles 85(1) and 86 of the Treaty produce direct effects in relations between individuals and create direct rights for individuals which the national courts must safeguard (judgments of the Court of Justice in Case 127/73 *BRT* v *SABAM* [1974] ECR 51, paragraph 16, Case 37/79 *Lauder* v *Marty* [1980] ECR 2481, paragraph 13, Case C-234/89 *Delimitis* v *Henninger Bräu* [1991] ECR I-935, paragraph 45, and of the Court of First Instance in *Tetra-Pak*, cited above, paragraph 42). In view of the division of that power between the Commission and the national courts and of the resulting protection available to individuals before the national courts, it has been consistently held by the Court of Justice and the Court of First Instance that Article 3 of Regulation No 17 does not confer upon a person who lodges an application under that article the right to obtain from the Commission a decision, within the meaning of Article 189 of the EC Treaty, regarding the existence or otherwise of an

infringement of Article 85 or Article 86 of the Treaty or of both (judgment of the Court of Justice in Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, paragraph 17, and judgments of Court of First Instance in *Rendo and Others* v *Commission*, cited above, paragraph 98, and *Automec II*, cited above, paragraphs 75 and 76). The position is different only if the complaint falls within the exclusive purview of the Commission, as in the case of the withdrawal of an exemption granted under Article 85(3) of the Treaty (judgments in *Automec II*, paragraph 75, and *Rendo* v *Commission*, paragraph 99).

60 As regards the first limb of the present plea, namely that the Commission committed an error of law in rejecting the complaint on the basis of lack of a Community interest, the Court of First Instance made it clear, in its judgment in *Automec II*, that the Commission is entitled to assign different priorities to the examination of the complaints submitted to it and that it is legitimate for it to refer to the Community interest of a case as a criterion for determining priority (paragraphs 83 to 85). It is also apparent from that judgment, in which this Court adjudicated on the legality of a decision not to proceed with a case, that the Commission may reject a complaint through lack of a sufficient Community interest in further investigation of the case. Accordingly, the first limb of the present plea must be rejected.

61 As regards the second limb, alleging that the Commission committed a manifest error of appraisal in relying on the principle of subsidiarity in order to justify referral of the complaint to the national courts, the Court finds that 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. The Court therefore considers that the applicants are seeking, by this limb of their plea in law, to show that the contested decision is unlawful because the Commission, in the circumstances of the present case, should, instead of referring the case to the national courts, have taken a decision to the effect that SACEM's tariff practices constituted an infringement of Article 86 of the Treaty. However, it is apparent from settled case-law, as cited above in paragraph 59, that the applicants had no right to obtain such a decision from the Commission, even if the latter had become persuaded that the practices concerned constituted an infringement of Article 86 of the Treaty. It follows that this limb of the plea must also be rejected.

62 As regards the third limb of the plea, alleging an error on the part of the Commission in its evaluation of the Community interest concerned, it should be borne in mind that the Court made it clear in its judgment in *Automec II* that, in order to assess the Community interest in further investigation of a case, the Commission must take account of the circumstances of the case and in particular the matters of fact and law to which its attention is drawn in the complaint submitted to it. It must, in particular, balance the significance of the alleged infringement as regards the functioning of the common market, the probability of its being able to establish the existence of the infringement and the extent of the investigative measures required for it to perform, under the best possible conditions, its task of making sure that Articles 85 and 86 are complied with (paragraph 86). The fact that a national court or national competition authority is already dealing with a case concerning the compatibility of an agreement or practice with Article 85 or 86 of the Treaty is a factor which the Commission may take into account in evaluating the extent to which a case displays a Community interest. Contrary to the applicants' assertion, the right to take account of the fact that a case has been brought before national courts as a relevant criterion for evaluation of the Community interest in further examination of a case is not limited to cases where there is a single action pending between the complainant and the subject of the complaint.

63 The Court finds that, in paragraphs 6 to 8 of the contested decision, the Commission bases its view that there was not a sufficient Community interest on, first, the limited nature of the effects that the alleged infringements would have in Member States other than France and, secondly, the fact that cases raising the same issues as the complaints were pending before several French courts and the French Conseil de la Concurrence.

64 Since it is common ground, first, that the applicants do not contest the essentially national effect of the practices criticized in their complaints as constituting infringements of Article 86 of the Treaty and, secondly, that several French courts, in proceedings between SACEM and the applicants, and the French Conseil de la Concurrence have been called on to consider whether those practices are in conformity with the competition provisions of the Treaty, it is necessary to consider whether,

in the present case, the Commission, on the basis of that factual information, has committed a manifest error of appraisal regarding the Community interest in further investigation of the case.

65 The Court considers that where the effects of the infringements alleged in a complaint are essentially confined to the territory of one Member State and where proceedings have been brought before the courts and competent administrative authorities of that Member State by the complainant against the body against which the complaint was made, the Commission is entitled to reject the complaint through lack of any sufficient Community interest in further investigation of the case, provided however that the rights of the complainant or of its members can be adequately safeguarded, in particular by the national courts (*Automec II*, paragraphs 89 to 96).

66 The applicants consider, however, that the referral to the French courts was not justifiable in this case since, they maintain, the French courts are not able, in view of the complexity of the case, to ensure correct and uniform application of the competition provisions of the Treaty.

67 The Court considers, first, that the fact that the national court might encounter difficulties in interpreting Article 85 or 86 of the Treaty is not, in view of the possibilities available under Article 177 of the Treaty, a factor which the Commission is required to take into account in appraising the Community interest in further investigation of a case. Furthermore, that provision of the Treaty is designed in particular to ensure uniform application of the Treaty by providing that national courts against whose decisions there is no judicial remedy under national law are required to refer a question to the Court of Justice for a preliminary ruling where a question is raised before them concerning the interpretation of provisions of the Treaty.

68 The Court considers, on the other hand, that the rights of a complainant could not be regarded as sufficiently protected before the national court if that court were not reasonably able, in view of the complexity of the case, to gather the factual

information necessary in order to determine whether the practices criticized in the complaint constituted an infringement of Article 85 or Article 86 of the Treaty or of both.

69 In the present case, with regard to the allegation that the rate of royalties charged by SACEM is abusive, the Court notes that the Commission sent to the copyright-management societies of the various Member States requests for information under Article 11 of Regulation No 17 and that it thereafter drew up a report dated 7 November 1991 in which it compared, on a uniform basis, the levels of royalties charged by the copyright-management societies concerned. The Court observes that the only individual indications concerning the copyright-management societies in the Member States which were included in the report, in particular the level of royalties charged by those societies, constitute information which is in the public domain. In those circumstances, the Court considers that there is nothing in the documents before it to show that the disclosure of that report 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.

70 The Court considers, having regard to the operative part of the judgments in *Tournier* and *Lucazeau*, that in view of the factual information set out in the report of 7 November 1991, which contains a comparison on a uniform basis of the levels of royalties charged by copyright-management societies in the various Member States, 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.

71 The Court is unable to find in the arguments put forward by the applicants anything to call in question the merits of the method chosen by the Commission for comparing the tariffs. Moreover, the Court notes that the applicants claim, on page

8 of their application, 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'.

72 As regards the allegation that those rates of royalties are applied in a discriminatory manner, it should be noted that the Commission also examined, in its report of 7 November 1991, the facts relevant to that allegation, leaving the national courts to make determinations regarding those matters of fact.

73 Finally, as regards the allegation that SACEM refused to allow French discothèques to use only the foreign repertoire, the Court finds that the applicants have advanced no specific argument to call in question the powers of the French courts to gather the factual information needed to determine whether that practice by SACEM — a French association established in France — constitutes an infringement of Article 86 of the Treaty.

74 The Court considers, in view of the foregoing, that the applicants have adduced no specific evidence from which it might be inferred that their rights cannot be satisfactorily safeguarded by the French courts. In the circumstances of this case, the Commission could therefore properly reject the applicants's complaint on the ground of lack of a Community interest, solely because it had determined that the centre of gravity of the alleged infringements was in France and that the matter had already been brought before the French courts. It follows that, without its being necessary in this case to consider whether the referral of the matter to the French Conseil de Concurrence would in itself have been a sufficient reason for the Commission to reject the complaint, the third limb of the plea, alleging a manifest error of appraisal in the evaluation of the Community interest involved, is unfounded.

75 It follows from the foregoing that the Court's examination of the contested decision has disclosed neither an error of law nor any manifest errors of appraisal. The present plea in law must therefore be rejected.

The plea in law as to infringement of various general principles of Community law

76 The applicants claim that, by referring the case to the national courts after 14 years of investigation during which it has never raised the issue of lack of a sufficient Community interest, the Commission infringed the principle of the protection of legitimate expectations. They assert that, by acting as it did, the Commission encouraged them to entertain a legitimate expectation that it would itself deal with the issues of law raised in their complaints.

77 The applicants also claim that the contested decision breaches the principle of legal certainty in that, by allowing inconsistent national case-law to continue to exist, it is liable to be socially disruptive as regards both legislation and private interests. Similarly, by refusing in such circumstances to adopt a decision finding an infringement, the Commission neglected the need for uniform application of Community law and failed in its duty of sincere cooperation with the national courts. They add that the Commission has likewise failed to observe the principle of sound administration, as expounded by the Court of Justice in its judgment in Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ* v *Commission* [1983] ECR 3369), since it failed to examine several documents produced by the parties during that long investigation.

78 The Court points out that it has been consistently held that, outside the areas in which the Commission has exclusive competence, Regulations Nos 17 and 99/63 do not confer on complainants the right to obtain from the Commission a decision regarding the existence or otherwise of an infringement of Article 85 or Article 86 of the Treaty or of both (judgments in *GEMA* v *Commission*, cited above, paragraph 17, *Rendo and Others*, cited above, paragraph 98, and *Automec II*, cited above, paragraphs 75 and 76).

79 As regards the alleged infringement of the principle of the protection of legitimate expectations, it is clear from that case-law that the applicants were deemed, when lodging their complaint, to know that they had no right to obtain from the Commission a decision finding that the practices of SACEM which they criticized constituted an infringement of Article 85 or Article 86 of the Treaty or of both. The Court also finds that the applicants have not produced any specific evidence to show that, in the course of the administrative procedure, the Commission gave them any reason to believe that it would adopt such a decision. In particular, the Court considers that the length of the investigation is not in itself a basis for any such expectation.

80 It follows that the argument as to breach of the principle of the protection of legitimate expectations must be rejected.

81 As regards the claim that, in view of the divergent national case-law on Articles 85 and 86, the Commission breached the principle of legal certainty and its duty of sincere cooperation with the national courts by refusing to adopt a decision, the Court considers that the upshot of that argument is that the Commission is under an obligation, even in areas in which its powers are not exclusive, to adopt a decision on alleged infringements in order to ensure uniformity of national decisions on the application of Community competition law. However, that view is not only contrary to the settled case-law cited above in paragraph 78, according to which the Commission is not obliged to adopt a decision as to the existence or otherwise of infringements alleged in a complaint but is also based on a misconception as to the division of responsibility between the Commission and the national courts. It falls first to the national courts, which to that end may seek preliminary rulings from the Court of Justice under Article 177 of the Treaty, to ensure the uniform application of Community law.

82 It follows that that argument must also be rejected.

83 As regards the alleged breach of the principle of sound administration, the Court considers that that argument, as formulated by the applicants, does not enable it to

determine with sufficient precision the nature and subject-matter of the applicants' criticism of the Commission. In particular, the Court is not able to identify the documents which the Commission is said to have neglected to take into consideration or the reasons for which such an omission might constitute a breach of the principle of sound administration. Accordingly, that argument must also be rejected.

84 It follows from all the foregoing that the plea in law as to breach of various principles of Community law must be rejected.

The plea as to misuse of powers

Summary of the parties' arguments

85 The applicants consider that, by the manner in which it dealt with their complaints, the Commission misused its powers. They criticize, from the procedural point of view, the length of the investigation and the inadequacy of the investigative measures undertaken. They consider that the Commission deliberately delayed adopting a decision in order to maintain the uncertainty as to the anti-competitive nature of SACEM's practices. The applicants also claim that the Commission possessed sufficient evidence to make a determination regarding SACEM's practices in the light of Articles 85 and 86 of the Treaty but, as a result of political pressure, decided not to do so. To demonstrate such pressure, the applicants draw the attention of the Court to certain statements made by an official in the Directorate-General for the Internal Market (DG III) and by a representative of SACEM at a conference on copyright held in Madrid on 16 and 17 March 1992.

86 The Commission observes that the Court of Justice and the Court of First Instance have consistently held that an allegation of misuse of powers can be considered

only if the applicant puts forward objective, relevant and consistent factors such as to demonstrate its occurrence. In the present case, the Commission considers that the applicants have merely made vague allegations and have adduced no specific evidence to support the conclusion that the aim which it actually pursued was to avoid application of the competition rules to SACEM. Moreover, the criticism of the Commission is hardly appropriate, in view of its conduct throughout its investigation and the views put forward by it in the preliminary-ruling proceedings, cited above.

Findings of the Court

87 It has been consistently held that a decision is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken for the purpose of achieving an end other than those stated (judgments of the Court of Justice in Case 69/83 *Lux* v *Court of Auditors* [1984] ECR 2447, paragraph 30, and Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 24, and the judgment of the Court of First Instance in Case T-109/92 *Lacruz Bassols* v *Court of Justice* [1994] ECR-SC II-105, paragraph 52).

88 The Court considers that the evidence adduced by the applicants is not sufficient to support the conclusion that the Commission misused its powers.

89 As regards, in particular, the duration of the procedure, the Court observes that it is apparent from paragraph 1 of the contested decision that the applicant's complaints were not lodged before 1986. Moreover, it is undisputed that those complaints raised new issues of Community law and that the Commission suspended its investigation pending delivery, on 13 July 1989, of the judgments in *Tournier*

and *Lucazeau* following references to the Court of Justice for preliminary rulings in December 1987 and August 1988. Following those judgments, the Commission endeavoured to establish a uniform basis for the comparison of tariffs and sent requests for information to the various copyright societies. It then drew up its report, dated 7 November 1991, sent the Article 6 letter on 20 January 1992 and adopted the contested decision on 12 November 1992.

90 In view of the novelty of the legal issues raised by the complaints and their connection with the preliminary questions submitted in *Tournier* and *Lucazeau*, the Court considers that the Commission cannot be criticized for suspending its investigation of the complaints until the Court of Justice had given judgment in those cases. Moreover, this Court considers that the period which elapsed between, on the one hand, the date of those judgments, 13 July 1989, and, on the other, the issue of the report, on 7 November 1991, and the adoption of the contested decision, on 12 November 1992, is certainly not such as to justify the conclusion that the Commission deliberately delayed examination of the complaints in order to maintain uncertainty as to the allegedly anti-competitive nature of SACEM's conduct. Furthermore, the report of 7 November 1991 was drawn up by the Commission specifically in order to enable the national courts to consider whether SACEM's tariff practices were compatible with Article 86 of the Treaty.

91 The applicants also argue, in order to prove a misuse of powers, that the investigative measures undertaken were insufficient. The Court finds, however, that that argument is contradicted by another argument put forward by them, namely that the Commission had sufficient evidence — which necessarily implies that further investigative measures were unnecessary — to make a determination regarding SACEM's practices in the light of Articles 85 and 86 of the Treaty but failed to do so solely because of political pressure. In any event, the Court points out that the Commission is not required, on receiving a complaint under Article 3(2) of

Regulation No 17, either to undertake a complete investigation in every case or to adopt a decision as to the existence of the alleged infringement (judgment in *Automec II*, paragraphs 75 to 85).

92 Finally, in support of their argument that the decision resulted from political pressure brought to bear on the Commission, the applicants draw the attention of the Court to certain extracts from the record of the proceedings of a conference on copyright held in Madrid on 16 and 17 March 1992 (Annex 21 to the application). Those extracts concern, in particular, a comment on the Article 6 letter by a Commission official in the Directorate-General for the Internal Market and the observations of a SACEM representative on the policy adopted by that Directorate-General regarding copyright. The Court is unable to find in those extracts the evidence required to justify an inference that there was any misuse of powers.

93 It follows from all the foregoing that the plea as to misuse of powers must be rejected.

Costs

94 Under Article 87(3) of the Rules of Procedure, the Court of First Instance may order that the costs be shared or that each party bear its own costs if each party succeeds on some and fails on other heads. Since the applicant and the Commission have succeeded or failed on one or more heads, the Commission should be ordered to bear its own costs and to pay one half of the applicants' costs. The intervener should be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1) Annuls the Commission decision of 12 November 1992 in so far as it rejects the applicants' allegation that the market has been partitioned as a result of an alleged agreement between Société des Auteurs, Compositeurs et Editeurs de Musique and the copyright-management societies in the other Member States;

2) Dismisses the remainder of the application;

3) Orders the Commission to bear its own costs and to pay one half of the applicant's costs, the applicants to bear the other half of their costs; the intervener shall bear its own costs.

Cruz Vilaça Briët Kalogeropoulos

Barrington Saggio

Delivered in open court in Luxembourg on 24 January 1995.

H. Jung
Registrar

J. L. Cruz Vilaça
President