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

In Case T-114/92,

Bureau Européen des Médias de l'Industrie Musicale (BEMIM), an association governed by French law, established in Paris, represented by Michel Gautreau, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Rita Reichling, 11 Boulevard Royal,

applicant,

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,

* Language of the case: French.

APPLICATION for the annulment of the Commission Decision of 20 October 1992 rejecting the application made by the applicant 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
(Second Chamber),
OF THE EUROPEAN COMMUNITIES

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 vise to the action

1 On 4 February 1986, the applicant, which represents a number of discothèque operators, submitted 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 1959-62, p. 87, hereinafter 'Regulation No 17'),

an application 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 Commission received numerous such complaints between 1979 and 1988.

2 The complaint lodged by the applicant contains, essentially, the following allegations:

— the societies which manage copyright in musical works 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 applicant claims is abusive and discriminatory, is not used to pay the management societies represented, in particular the 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 the representation contracts entered into between SACEM and the French discothèques 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 dicta of 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 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, and found that there were differences in the rates of royalties charged and in the conditions under which discounts were granted.

7 On 18 December 1991 the applicant formally requested the Commission under Article 175 of the EEC Treaty to define its position concerning the applicant's complaint.

8 On 20 January 1992 the Commission informed the applicant, 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'), that it intended to reject the applicant's complaint. A copy of the report of 7 November 1991 was enclosed with its letter.

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 the applicant submitted its observations on the letter of 20 January 1992. It asked the Commission to pursue the investigation and to send a statement of objections to SACEM.

11 The applicant was notified by letter of 20 October 1992 from the Member of the Commission responsible for competition that its complaint had been definitively rejected.

12 Paragraphs 1 to 3 of the letter refer to the previous correspondence between the Commission and the complainant 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 complaint, 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 applicant in its 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 applicant's 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 applicant's 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 applicant's 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 applicant that the application made by it 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 24 December 1992, the applicant brought the present action.

16 The written procedure followed the normal course and was concluded on 16 June 1993.

17 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.

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

19 The applicant claims that the Court should:

— declare

— that the applicant is entitled to obtain the annulment of the Commission decision of 20 October 1992 in that the Commission failed to give a ruling on the factual points contained in the report of its investigation dated 7 November 1991 in the light of the principles laid down in Articles 85 and 86 of the Treaty, as interpreted by the *Tournier* and *Lucazeau* judgments;

— that the contractual practices of SACEM are based on the complete partitioning of the national markets in relation to the grant of copyright in music;

— that the Community interest under the guidelines in the judgments of the Court of Justice requires examination of the reciprocal representation agreements between all the collective copyright-management societies in Europe and of the contracts making available to music broadcasting undertakings all or part of the protected repertoires of which they request the use for broadcasting to their customers; and that the Commission should draw up a report for that purpose enabling standard agreements to be concluded safeguarding the interests of copyright holders and those of undertakings exploiting their works, whilst ensuring that French discothèques have free access to the collective management society of their choice;

— exonerate the applicant from the costs and expenses it is likely to incur in the event that its application it dismissed as inadmissible or unfounded.

20 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Admissibility

Summary of the parties' arguments

21 First, the Commission queries the applicant's interest in bringing proceedings since any adverse effect which might result from the decision would affect not the applicant, which is an association of undertakings, but the discothèque operators which make up its membership.

22 Secondly, and without prejudice to the question of the applicant's interest in bringing proceedings, the Commission considers that the action is admissible only to the extent to which it seeks annulment of the decision rejecting its complaint. Referring to the judgments of the Court of Justice in Case 53/85 *AKZO Chemie and Others* v *Commission* [1986] ECR 1965 and of the Court of First Instance in Case T-16/91 *Rendo and Others* v *Commission* [1992] ECR II-2417, the Commission maintains that the Community judicature has no jurisdiction to issue directions in connection with a review of legality of an act under Article 173 of the EC Treaty and that therefore the claim that the Court of First Instance should order the Commission to draw up a report 'enabling standard agreements to be drawn up safeguarding the rights of copyright holders and those of undertakings exploiting works, whilst ensuring that French discothèques have free access to the collective-management societies of their choice' is inadmissible.

23 As regards the first plea of inadmissibility, the applicant considers that the Commission's argument is untenable since, throughout the administrative procedure, it treated the applicant as the agent of all its members in dealings with SACEM. The applicant adds that, like all other syndicates of discothèque operators, it can properly aspire to entering into an agreement with SACEM and that it therefore has a direct interest in ensuring that the various tariffs applied by SACEM are beyond criticism under Article 86.

24 As regards the second plea of inadmissibility, the applicant replies that the Court of First Instance, by asking the Commission to draw up the report concerned, would merely be verifying the existence of the Community interest attaching to its complaint. It would not be issuing a direction to the Commission but indicating how its judgment was to be put into effect.

The findings of the Court

The applicant's interest in bringing proceedings

25 On 4 February 1986, the applicant, an association representing a number of discothèque operators, submitted to the Commission under Article 3(2)(b) of Regulation No 17 an application for a finding of an infringement of Articles 85 and 86 of the Treaty. Pursuant to that article, 'natural or legal persons who claim a legitimate interest' are entitled to submit such an application.

26 As regards the applicant's interest in bringing proceedings against the decision rejecting its complaint, it should be borne in mind that the Court of Justice and Court of First Instance have consistently held that natural or legal persons who are entitled to submit an application under Article 3(2)(b) of Regulation No 17 should be able, if their request is not complied with either wholly or in part, to institute proceedings in order to protect their legitimate interests (judgments of the Court of Justice in Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 13, Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045, paragraph 14, and of the Court of First Instance in Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraph 36).

27 It follows that if, in the present case, the applicant had a legitimate interest in submitting an application to the Commission under Article 3(2)(b) of Regulation No 17, it must be regarded as having a sufficient interest in bringing proceedings against the Commission decision rejecting its application.

28 The Court considers that an association of undertakings may claim a legitimate interest in lodging a complaint even if it is not directly concerned, as an undertaking operating in the relevant market, by the conduct complained of, provided however that, first, it is entitled to represent the interests of its members and, secondly, the conduct complained of is liable adversely to affect the interests of its members. Moreover, certain procedural advantages accrue to the Commission as a result of the right of associations of undertakings to lodge complaints in defence of the interests of their members collectively, in that the risk that the Commission will receive a large number of individual complaints criticizing the same conduct is reduced.

29 In the present case, this Court finds, first, that the applicant's objects, as set out in its statutes, include 'promoting the creation of musical works by ensuring that they reach the public' (Article II). Its statutes expressly provide that it 'shall represent the interests of its members both in relations with the public authorities and the government and in legal proceedings' (Article III(7)). The Court also notes from the documents before it that the conduct criticized in the applicant's complaint is all of such a kind as to harm the interests of the discothèques making up its membership.

30 In those circumstances, the Court considers that the applicant had a legitimate interest in submitting to the Commission an application under Article 3(2)(b) of Regulation No 17. Accordingly, by virtue of the case-law cited above, the applicant has an interest in bringing proceedings against the Commission's decision rejecting its application.

The admissibility of the various claims made in the application

31 The applicant seeks, first, the annulment of the Commission's decision contained in its letter of 20 October 1992. The applicant then asks the Court to make

various findings of a general nature and to direct the Commission to draw up a new report.

32 As regards the claim that the decision contained in the letter of 20 October 1992 should be annulled, it should be noted that in that letter the Commission rejected the applicant's complaint after taking cognizance of the observations submitted by the applicant following a communication under Article 6 of Regulation No 99/63. It is a final decision, forming part of the third stage of the procedure for the investigation of complaints, as analysed by this Court in its judgment in Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 47, (hereinafter '*Automec I*'), and can be the subject of proceedings.

33 As regards the other heads of claim, it must be remembered that, in an action for annulment under Article 173 of the Treaty, the jurisdiction of the Community judicature is limited to reviewing the legality of the contested act. If the action is well founded, the Court, acting in pursuance of Article 174 of the EC Treaty, declares the act to be void. Under Article 176 of the EC Treaty, it is incumbent on the institution whose act has been declared void — and not the Community judicature — to take the necessary measures to comply with the judgment.

34 It follows that the claims that the Court should make certain findings of a general nature and issue a direction to the Commission are inadmissible since they fall outside the jurisdiction conferred on the Court of First Instance in an action for annulment.

35 It follows from the foregoing considerations that the action is admissible only in so far as it seeks the annulment of the Commission decision of 20 October 1992 rejecting the applicant's complaint. For the rest, the application must be dismissed as inadmissible.

Substance

36 The applicant puts forward, essentially, three pleas in law in support of its 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. The second plea alleges infringement of Article 3 of Regulation No 17, in that the Commission failed to characterize the tariff practices of SACEM described in its report of 7 November 1991. In its third plea, the applicant claims that the contested decision is vitiated by an error of law and a manifest error of appraisal such as to render it void.

The plea as to infringement of Article 190 of the Treaty

Summary of the parties' arguments

37 First, the applicant claims that the Commission did not give a decision on the allegation concerning the reciprocal representation contracts concluded between the copyright-management societies in the various Member States, whose effect, it submits, is to deny French discothèques direct access to the repertoire of the copyright-management societies of the other Member States. Thus, by merely concerning itself with the problems relating to Article 86 of the Treaty, the Commission, in the applicant's view, did not sufficiently state its reasons for rejecting that part of its application which related to Article 85 of the Treaty. It also claims that a restrictive agreement exists at present amongst the various national copyright-management societies within the Groupement Européen des Sociétés d'Auteurs et de Compositeurs (hereinafter 'GESAC') to increase the tariffs in the various Member States, with a view to eliminating any significant difference between copyright tariffs at European level.

38 Secondly, the applicant maintains that the Commission also failed to examine the allegation of discriminatory treatment of discothèques by SACEM. Although

SACEM changed the structure of its tariffs following the *Tournier* and *Lucazeau* judgments, the discrimination still exists. The applicant claims that SACEM at present invoices discothèques that are members of the applicant on the basis of a tariff requiring payment of 6.05% of their receipts whereas the tariff applicable to discothèques that are members of privileged syndicates requires payment of 4.63% of their receipts.

39 The Commission replies that it undertook an appropriate and careful examination of the complaints in accordance with the principles laid down by the Court of First Instance in *Automec II*. It considers that its statement of the reasons on which its decision is based is sufficient 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).

40 As regards the application of Article 85(1) of the Treaty and, in particular, the fact that discothèques are not able to have direct access to the repertoires of copyright-management societies in other Member States, the Commission considers that, in the absence of any solid evidence of an infringement, it cannot be criticized for not undertaking investigative measures. As regards the alleged differences of treatment by SACEM in granting a preferential tariff and certain discounts, that matter was discussed in the report of 7 November 1991, which must be read in conjunction with the contested decision.

The findings of the Court

41 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, *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).

42 It must be borne in mind that the complaint lodged by the applicant 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.

43 The Court notes, first, that the letter of 20 October 1992 rejected the applicant's complaint in its 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'.

44 It should be observed that the decision of 20 October 1992 essentially rejects the complaint on the grounds given in the communication which it sent to the applicant on 20 January 1992 under Article 6 of Regulation No 99/63 (hereinafter '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 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.'

45 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 20 October 1992 and those mentioned in the Article 6 letter must be considered.

46 In the first limb of its plea, the applicant claims that the contested decision does not sufficiently state its reasons for rejecting the first allegation in the complaint, concerning the partitioning of the market resulting from a restrictive agreement between the various national copyright-management societies in breach of Article 85(1) of the Treaty.

47 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 applicant's 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.

48 In its letter of 20 October 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 applicant's 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).

49 The Court considers that paragraph 6 of the letter of 20 October 1992, which contains the essential reasons for the final rejection of the complaint, cannot reasonably be said to deal with the applicant's 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 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.

50 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 applicant) 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 (from counsel for the applicant) of 20 March 1992, 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.'

51 The Court considers that paragraphs 12 and 13 of the contested decision contain the reasons for the rejection of two allegations made by the applicant, not in its complaint but in its 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, on the other hand, contain any statement of the reasons for which the part of the applicant's complaint alleging partitioning of the market was rejected.

52 In those circumstances, the statement of the reasons for the contested decision does not apprise the applicant of the grounds for rejecting its complaint 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 the obligation imposed on it by 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.

53 In the second limb of the same plea in law, the applicant claims that the Commission also failed to examine the allegation that SACEM treated discothèques in a discriminatory manner.

54 The Court finds that the report of 7 November 1991 annexed to the Article 6 letter as an integral part of it analyses not only the level of the tariffs applied by SACEM by comparison with those applied by the other copyright-management societies but also, extensively, the differences of treatment applied by SACEM to discothèques in granting preferential rates and contractual discounts. In those

circumstances, the applicant cannot claim that the Commission failed to examine its allegation of discriminatory treatment of discothèques by SACEM.

55 The Court also finds that the contested decision expressly rejects the allegations in the complaint relating to Article 86 — one of which is the allegation of discriminatory treatment of discothèques by SACEM — on the basis that no sufficient Community interest is involved.

56 It follows that the contested decision adequately states the reasons on which it is based in so far as it rejects the allegation that the royalties charged by SACEM are discriminatory. Accordingly, the second limb of the present plea in law must be rejected.

57 It follows from the foregoing that the contested decision must be annulled to the extent to which it rejects the applicant's 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 as to infringement of Article 3 of Regulation No 17

The parties' arguments

58 The applicant claims that the Commission failed to make a determination on SACEM's tariff practices, as described in the report of 7 November 1991, and that that omission is unlawful since it is clear from the *Tournier* and *Lucazeau*

judgments that such tariff practices are within the direct purview of Article 86 of the Treaty.

59 The applicant also claims that the Commission's statement in its 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' misled the national courts. By failing to make a determination on the tariff practices at issue the Commission, in the applicant's view, knowingly helped to maintain confusion in the French courts, which have often regarded the rejection of the applicant's complaint by the Commission as constituting approval by the Commission of SACEM's tariffs. In support of its contention, the applicant has produced to the Court several decisions of French courts which have adopted that interpretation of the statement made in the Commission's Article 6 letter. The applicant considers that the Commission, as guardian of the Community legal order, was not entitled to remain passive in the face of the national courts' misinterpretations of its letter.

60 The Commission states that it preferred, on conclusion of its investigation, to leave the French authorities to draw for themselves, on the basis of the observations contained in its report, the conclusions relevant to the disputes pending before them. It points out that it has no exclusive power to apply Articles 85(1) and 86 of the Treaty, provisions which create direct rights for individuals which the national courts are required to safeguard. According to the Commission, the risk of discrepancies in the application of those articles of the Treaty between the decisions of the courts is inherent in that 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 in the case-law on the provisions concerned, if necessary by seeking preliminary rulings from the Court of Justice under Article 177 of the Treaty. As regards the failure to characterize the tariff practices at issue, the Commission contends that the application of Article 86 by the national courts cannot, as the applicant appears to think, be limited to drawing inferences from legal determinations previously made by the Commission in order to decide cases before them. On the contrary, in the Commission's view, it is incumbent on the national courts, as ordinary courts applying Community law, to decide for

themselves whether the conduct of an undertaking holding a dominant position constitutes an abuse within the meaning of Article 86 of the Treaty (judgment in Case T-51/89 *Tetra Pak* v *Commission* [1990] ECR II-309, paragraph 42).

61 Finally, the Commission observes that the French Conseil de la Concurrence (Competition Council) took the view, in an opinion of May 1993, that the tariffs applied by SACEM, both before and after their reduction on 1 January 1990, were appreciably higher, in the sense contemplated in the judgments in *Tournier* and *Lucazeau*, than those applied by other national copyright-management societies, and that their level was not justified by objective and relevant differences between copyright management in France and the other Member States.

The findings of the Court

62 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).

63 The Court considers that the applicant seeks, by the present plea in law, to show that the contested decision is unlawful in that the Commission, in the circumstances of this case, should have taken a decision finding that SACEM's tariff practices constituted an infringement of Article 86 of the Treaty. However, it is clear from the case-law cited above that the applicant was not entitled to obtain such a decision from the Commission, even if the latter had become persuaded that the practices at issue constituted an infringement of Article 86 of the Treaty.

64 The fact that a number of national courts may have been misled by a finding contained in the Commission's Article 6 letter — which, according to consistent case-law (see in particular the judgment in *Automec I*, cited above, paragraph 46), is merely a preparatory measure and contains only a provisional assessment of the matters complained of — is not such as to have any effect on the Commission's discretion in that regard.

65 Moreover, even if it were assumed that the Commission's appraisal in an Article 6 letter contained an error of law, the Court considers that such a circumstance could not affect the position of individuals in proceedings before national courts. In the first place, in view of the division of powers between the Commission and the national courts for the purposes of the application of Articles 85(1) and 86 of the Treaty (judgments in *Delimits*, cited above, paragraphs 44 and 45, and *Automec II*, cited above, paragraph 90), the national courts are not bound by an appraisal by the Commission of the applicability or otherwise of those provisions to an agreement or concerted practice. In the second place, where an appraisal made by the Commission causes a national court to entertain doubts as to the applicability of Article 85(1) or Article 86, or both, that court has the right to refer a question to the Court of Justice for a preliminary ruling under Article 177 of the Treaty.

66 It follows that the present plea in law must be rejected.

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

Summary of the parties' arguments

67 The applicant considers that the contested decision contains an error of law and a manifest error of appraisal such as to render it void.

68 First, the applicant claims that the Commission's statement in its Article 6 letter, according to which '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', contains an error of law. The applicant asserts that the Commission maintained that position in its decision of 20 October 1992. First, it is clear from the report of 7 November 1991 that the tariffs applied before and after 1990 by SACEM are appreciably higher than those applied in the other Member States. The applicant considers that, in the light of the *Tournier* and *Lucazeau* judgments, the Commission should have found that the conditions for the application of Article 86 of the Treaty were satisfied vis-à-vis SACEM. Secondly, the applicant considers that it is clear from the Commission's investigation report that SACEM applies discriminatory tariffs, which are also prohibited by Article 86 of the Treaty.

69 Secondly, the applicant considers that the Commission's appraisal of the Community interest must be regarded as manifestly incorrect. The present case, by contrast with *Automec II*, is one investigated by the Commission. The applicant therefore considers that the Commission could no longer invoke a lack of Community interest in order to reject its complaint. It adds that a mere reading of the *Tournier* and *Lucazeau* judgments is sufficient to establish that the Community interest is affected either by the independent conduct of a national copyright-management society or by the parallel conduct of the other management societies established in Europe. Furthermore, the applicant considers that there was no justification in this case for referring the matter to the national courts since the French judiciary, unlike

the Commission officials, do not have the necessary powers to undertake an investigation having implications in all the Member States of the Community.

70 With regard to the first limb of the present plea, the Commission replies that it did not base its rejection of the complaint on the lack of any infringement by SACEM but on the lack of any Community interest and the fact that similar cases had already been brought before several French courts. It adds that the contested sentence in its Article 6 letter cannot be taken as defining its position with respect to SACEM's conduct and observes that the 'Conclusions' part of its letter refers only to the lack of a Community interest and to the fact that similar cases had been brought before French courts in order to justify rejection of the complaint and referral of the matter to the national courts. The Commission points out that it would have been pointless to refer the matter to those courts if it had definitively concluded that there was no abuse.

71 As regards the second limb of the present plea, the Commission observes that its power, within the limits of *Automec II*, to reject a complaint through lack of any Community interest can be exercised, by definition, only in cases where the competition rules of the Treaty are applicable since it would not otherwise be competent to act. It considers that, even where it has reason to presume that there has been an infringement, this does not preclude it from rejecting a complaint for lack of any Community interest and referring the matter to the national courts. Furthermore, if the conduct of SACEM which has been complained of is of a Community nature, in that it is liable to fall within the scope of the Treaty competition rules, that does not affect the Commission's right to reject the complaint for lack of any Community interest. The Commission contends that the centre of gravity of the alleged infringement is, essentially, in France, and the Community interest is thereby reduced. The Commission also observes that to concede that it may reject a complaint without undertaking a prior investigation and yet, in this case, criticize it for not adopting a decision finding an infringement, on the ground that it undertook a long investigation, constitutes a paradoxical interpretation of the *Automec II* judgment. The Commission then rejects the argument that the national courts are not in a position to assess the facts of the case in the light of Articles 85(1) and 86 of the Treaty. It considers, on the contrary, that the report drawn up by it places the national courts in a better position to fulfil the role which falls to them as a result of the direct applicability of those provisions.

The findings of the Court

72 Where the Commission rejects, on the ground of lack of a Community interest, an application for a finding of an infringement under Article 3 of Regulation No 17, the review of legality which the Court of First Instance must undertake focuses on whether or not the contested decision is based on a materially incorrect appreciation of the facts or is vitiated by an error of law, a manifest error of appraisal or misuse of powers (judgment in *Automec II*, paragraph 80).

73 The Court's examination of the first plea, alleging an inadequate statement of reasons, showed that the contested decision should be annulled in so far as it rejects the applicant's allegation as to partitioning of the market. It is therefore necessary to consider the present plea only in relation to the other two allegations contained in the complaint, namely that the rates of royalties charged by SACEM are excessive and discriminatory and that SACEM refuses to allow French discothèques to use only its foreign repertoire.

74 As regards the first limb of the present plea, alleging an error of law by which the Commission decision is vitiated, it must be borne in mind that in its Article 6 letter the Commission found 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' and that, in the contested decision, the Commission adhered to 'the judgment made and the conclusions set out' in its Article 6 letter (paragraph 5 of the contested decision).

75 In reviewing the legality of the contested decision, it is therefore necessary to consider whether the finding made in the Article 6 letter and repeated by implication in paragraph 5 of the contested decision necessarily supports the conclusion that the applicant's complaint should be rejected and the matter referred to the national

courts (see in particular the judgment of the Court of First Instance in Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, paragraph 31).

76 It is apparent from the conclusions stated in the Article 6 letter (see paragraph 9 above) that the Commission intended rejecting the applicant's complaint on the ground that the case before it did not display a sufficient Community interest and that that insufficiency of interest derived from 'the essentially national effect of the practices criticized' and that 'the matter is at present before a number of French courts'. In those circumstances, the Court considers that the Article 6 letter did not rely on the lack of any infringement of Article 86 as a basis for rejecting the complaint.

77 Similarly, in the letter of 20 October 1992, the Commission did not reject the applicant's complaint after finding that there had been no infringement of the Treaty competition rules but explained its definitive rejection of the complaint in paragraph 6 of the contested decision by saying 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'. Thus, in paragraph 8 of the contested decision, the Commission states that 'since the centre of gravity of this matter is obviously in France ... and since there is a competent national authority which, thanks to the Commission's work, now has in its possession the information needed for the comparison required by the CJEC, everything indicates that that authority should indeed take such official action as ought to be taken. Moreover, in the present case, numerous French courts now have before them complaints lodged by BEMIM and the discothèques which have endorsed that complaint. Certain of those courts have already given judgment in those cases. Accordingly, it appears that the Commission itself is not required to investigate those complaints in depth or, *a fortiori*, to deal with them as a matter of priority since, as the Commission has just pointed out, there is in France an administrative authority empowered to adjudicate on them. This is therefore a classic case of the application of the principle of subsidiarity, which involves no failure to act on the part of the Community authorities but simply a transfer of competence to the national authorities.'

78 It follows from the foregoing that the Commission's conclusion that the case did not display a sufficient Community interest — that being the sole ground on which the complaint was rejected — was not based on the lack of any infringement of Article 86 of the Treaty. Accordingly, even if the Commission had committed an error of law, as claimed by the applicant, by considering 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 legality of the contested decision would not thereby be affected.

79 It follows that the first limb of the present plea is irrelevant and must therefore be rejected.

80 As regards the second limb of the plea, namely that the contested decision is based on a manifest error of appraisal, it is clear from the principles developed by this Court in its judgment in *Automec II* that the Commission is entitled to reject a complaint when it considers that the case does not display a sufficient Community interest to justify further investigation of the case (paragraph 85). In that case, the Court of First Instance made it clear 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.

81 It is true, as the applicant points out, that in *Automec II* the Commission rejected the complaint for lack of a Community interest without undertaking investigative

measures. The Court considers, however, that the Commission may take a decision to shelve a complaint for lack of a sufficient Community interest not only before commencing an investigation of the case but also after taking investigative measures, if that course seems appropriate to it at that stage of the procedure. To conclude otherwise would be tantamount to placing the Commission under an obligation, once it had taken investigative measures following the submission of an application under Article 3(2) of Regulation No 17, to adopt a decision as to whether or not either Article 85 or Article 86 of the Treaty, or both, had been infringed. Such an interpretation would not only be contrary to the very wording of Article 3(1) of Regulation No 17, according to which the Commission 'may' adopt a decision concerning the existence of the alleged infringement, but would also conflict with the settled case-law of the Court of Justice and Court of First Instance cited in paragraph 62 above according to which a complainant has no right to obtain from the Commission a decision within the meaning of Article 189 of the Treaty.

82 It is apparent, in the present case, from paragraphs 6 and 8 of the contested decision that the Commission concluded, after its examination, that there was no sufficient Community interest in further investigation of the case, since the centre of gravity of the infringement was in France and similar cases were pending before several French courts and the French Conseil de la Concurrence.

83 As regards the essentially national effect of the practices criticized, namely the allegedly excessive and discriminatory rate of royalties charged by SACEM and SACEM's alleged refusal to allow French discothèques to use only the foreign repertoire, the Court considers that the fact that a course of conduct or a practice is liable to affect trade between Member States, within the meaning of Article 86 of the Treaty, does not in itself prevent the effects of that conduct from being confined essentially to the territory of a single Member State. In the present case, it is apparent from the documents before the Court that only French discothèques have been the victims of SACEM's allegedly abusive conduct and that the effects of the practices criticized, in so far as they were such as to affect trade between Member States, made themselves felt only in frontier areas. In any event, the Court finds

that the applicant, which expressly stated in its complaint that SACEM's practices have created 'discrimination, in particular involving discothèques on each side of the border between France and another Member State (Belgium, Luxembourg, Germany and Italy)', has produced no evidence to show that the Commission made any factual error in taking the view that 'the centre of gravity of the alleged infringement is in France'.

84 Furthermore, the Court observes that it is common ground that several French courts, in proceedings between SACEM and certain of the applicant's members, and the French Conseil de la Concurrence, have been asked to decide whether the practices criticized in the complaint are compatible with Articles 85 and 86 of the Treaty.

85 It is therefore 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.

86 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 — or members of it, in cases such as the present one where the complainant is an association of undertakings — 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).

87 The applicant considers that, because the French courts do not have the necessary powers to undertake an investigation of such great scope, the referral of the matter to the national courts was not justifiable in this case.

88 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. 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 the said Treaty provisions.

89 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.

90 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.

91 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.

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

93 The Court considers, in view of the foregoing, that the applicant has adduced no specific evidence from which it might be inferred that its rights and those of its members cannot be satisfactorily safeguarded by the French courts. In the circumstances of this case, the Commission could therefore properly reject the applicant'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 second limb of the plea must be rejected.

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

Costs

95 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 applicant's costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1) Annuls the Commission decision of 20 October 1992 in so far as it rejects the applicant's 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 applicant to bear the other half of its 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