Moreover, even assuming that such a communication may be in the nature of a decision capable of being contested by way of Article 173 of the Treaty, that in no way implies that the applicant within the meaning of Article 3 (2) of Regulation No 17 is entitled to require from the Commission a final decision as regards the existence or non-existence of the alleged infringement. In fact the Commission cannot be obliged to continue the proceedings whatever the circumstances up to the stage of a final decision. A contrary interpretation would remove all meaning from Article 3 of Regulation No 17 which in certain circumstances allows the Commission the opportunity of not adopting a decision to compel the undertakings concerned to put an end to the infringement established.

2. A letter, by which the Commission, in accordance with Article 6 of Regulation No 99/63, replies to a person who has made an application under Article 3 (2) (b) of Regulation No 17, stating reasons, fixing a time-limit for the applicant to submit any comments, and explaining that the information obtained does not permit a finding of the existence of an infringement of Article 85 or 86 of the EEC Treaty, constitutes a defining of its position under the second paragraph of Article 175 of the Treaty.

3. The first subparagraph of Article 42 (2) of the Rules of Procedure allows an applicant, in exceptional circumstances, to raise fresh issues in order to support conclusions set out in the document instituting the proceedings. However, that provision does not in any way provide for the possibility of an applicant's introducing fresh conclusions or, *a fortiori*, of transforming an application on grounds of failure to act into an application for annulment.

In Case 125/78

GEMA, GESELLSCHAFT FÜR MUSIKALISCHE AUFFÜHRUNGS- UND MECHANISCHE VERVIELFÄLTIGUNGSRECHTE, 29 Herzog-Wilhelm-Straße, Munich, represented by Ernest Arendt, of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of Mr Arendt,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Erich Zimmermann, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Plateau du Kirchberg,

defendant,

supported by

COMPAGNIE LUXEMBOURGEOISE DE TÉLÉDIFFUSION S.A., represented by its Managing Director, Dr Gustave Graas, Villa Louvigny, Parc Municipal, Luxembourg, assisted by Professor Arved Deringer, with an address for service in Luxembourg at the Chambers of Jacques Loesch, Advocate, 2 Rue Goethe,

and

RADIO MUSIC INTERNATIONAL S.À.R.L., represented by its Managing Director, Dr Gustave Graas, assisted by Professor Arved Deringer, with an address for service in Luxembourg at the Chambers of the said Jacques Loesch,

interveners,

APPLICATION concerning the failure of the defendant to give effect to the application made by the applicant in pursuance of Article 3 (2) (b) of Regulation No 17 of the Council of 6 February 1962 (First Regulation implementing Articles 85 and 86 of the Treaty), Official Journal, English Special Edition 1959-1962, p. 87),

THE COURT

composed of: H. Kutscher, President, A. O'Keeffe and A. Touffait, (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart and G. Bosco, Judges;

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

## JUDGMENT

## Facts and Issues

I — Facts and procedure

Article 3 of Regulation No 17 of the Council of 6 February 1962 (First Regulation implementing Articles 85 and 86 of the EEC Treaty) provides in particular as follows:

"(1) Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

(2) Those entitled to make application are:

(a) Member States;

(b) natural or legal persons who claim a legitimate interest.

(3) ..."

According to Article 6 of Regulation No 99/63 of the Commission of 25 July on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-1964, p. 47):

"Where the Commission, having received an application pursuant to Article 3 (2) of Regulation No 17, considers that on the basis of the information in its possession there are insufficient grounds for granting the application, it shall inform the applicants of its reasons and fix a time-limit for them to submit any further comments in writing."

By letter of 23 July 1971 the applicant, a German performing right association, submitted a complaint to the Commission in pursuance of Article 3 (2) (b) of Regulation No 17 against:

1. Compagnie Luxembourgeoise de Télédiffusion S.A. (hereinafter referred to as "Radio Luxembourg"), whose registered office is in Luxembourg;

2. Radio Music International S.à r.l. (hereinafter referred to as "RMI"), whose registered office is in Luxembourg;

3. Radio Tele-Music GmbH (hereinafter referred to as "RTM"), whose registered office is at Berlin-Wilmersdorf,

for infringements of Articles 85 and 86 of the EEC Treaty. That complaint, which was registered by Directorate General IV of the Commission under No IV/26.932, concerned principally Radio Luxembourg's practices of:

— Using its subsidiary, RMI, in order to conclude with music publishers established in Germany and carrying on their business there joint publishing contracts by which the publishers grant to RMI one half of the royalties payable in respect of their performing rights over the musical work published jointly in return for broadcasts in German at favourable listening times;

and

— Through the medium of the Secretary General of Radio Luxembourg in association with Edition Intro Gebrüder Meisel KG, managing a music-publishing company, Radio Tele-Music GmbH, in which each of the two partners holds one half of the capital, and whose purpose is to conclude, with other publishers, composers and authors, publishing contracts relating to musical works frequently broadcast by Radio Luxembourg in its German-language programmes at favourable listening times.

The applicant maintained that the effect of the practice followed by Radio Luxembourg and its subsidiaries of jointly publishing pieces of light music which are broadcast frequently by Radio Luxembourg is to obtain for Radio Luxembourg, as a member of the applicant association, increased royalties in respect of performing rights. Since the applicant — which is the only performing right association in Germany — has to apportion all the royalties it

receives on the basis of a fixed scale of distribution, the result of the said practice is to put the other publishers of light music in an unfavourable position.

By letter of 23 January 1974 the Commission sent to the aforementioned three companies in accordance with Article 19 (1) of Regulation No 17 a statement of the objections raised against them which concluded that there was an infringement of Article 86 of the Treaty. A copy of that letter was sent to the applicant. Radio Luxembourg and RMI replied to the statement of objections in a memorandum dated 9 April 1974. On 23 April 1974 the Commission conducted hearings of the parties.

By letter of 31 January 1978 the applicant called upon the Commission "to adopt a formal decision in the inquiry into Proceedings IV/26/932 — Radio Luxembourg ... within two months of the receipt of this letter" failing which the applicant would institute against the Commission the proceedings for failure to act for which provision is made in the second and third paragraphs of Article 175 of the Treaty.

In a letter dated 22 March 1978 the Commission informed the applicant in particular that:

"The Commission considers that the most recent information in its possession does not entitle it to grant your application in pursuance of Article 3 (2) of Regulation No 17 for a decision recording an abuse of a dominant position by Radio Luxembourg and the other aforementioned undertakings. In the light of recent developments the Commission considers it doubtful whether it is possible to demonstrate convincingly to the Commission and the Court of Justice of the European Communities that Radio Luxembourg:

— Occupies a dominant position in a substantial part of the Common Market; and

— Abuses such a position."

After setting out in detail the reasons on which its opinion was based the Commission concluded as follows:

"For those reasons the Commission considers that a decision under Article 86 would not be justified in the present circumstances. In accordance with Article 6 of Regulation No 99/63/EEC the Commission allows you the opportunity of submitting in writing any comments which you may have on the foregoing within two months of receipt of this notification."

In that letter the Commission also expressed its opinion that performing right associations are able in other ways to take precautions against the practice of certain broadcasting companies of giving preference in broadcasting to their own pieces of light music. The Commission suggested that the applicant should have discussions on that subject with two of its officials. Those discussions took place in Brussels on 14 April 1978. The applicant was represented by Professor Mestmäcker and Mr Arendt. According to the applicant the discussion covered all the points raised by the Commission in its letter of 22 March 1978.

By a telex message of 28 April 1978 the applicant informed the Commission that it considered its proposals, which involved in particular amending the articles of association of GEMA in order to frustrate Radio Luxembourg's practice of concluding joint publishing contracts, to be impracticable.

On 30 May 1978 the applicant lodged this application for failure to act against

the Commission, relating to its failure to comply with the application made by the applicant on 23 July 1971 in pursuance of Article 3 (2) of Regulation No 17.

The application was received at the Court Registry on 31 May 1978.

It should be noted that the applicant lodged an application before the Landgericht Köln [Cologne Regional Court] based on Article 1 of the Law against unfair competition in conjunction with Articles 85 and 86 of the Treaty with the aim of prohibiting Radio Luxembourg from concluding joint publishing contracts. Following the dismissal of the application by the Landgericht (1972) and dismissal of the applicant's appeal by the Kartellsenat [division dealing with competition matters] of the Oberlandesgericht [Higher Regional Court] Düsseldorf (1973) the applicant brought an appeal on a point of law against the latter judgment before the Bundesgerichtshof [Federal Court of Justice].

On 7 December 1978 Radio Luxembourg and RMI applied to the Court for permission to intervene in the present proceedings in support of the submissions of the Commission whilst waiving the right to submit observations during the written procedure.

By order of 17 January 1979 the Court allowed Radio Luxembourg and RMI to intervene to the extent desired.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided in accordance with Article 92 of the Rules of Procedure to open the oral procedure as regards the sole question of the admissibility of the application without holding any preparatory inquiry.

## II — Conclusions of the parties

In its application the *applicant* claims that the Court should:

1. Declare that the Commission's failure to act is wrongful;
2. Call upon the Commission to adopt a formal decision in Proceedings IV/26.932 or, if appropriate, to inform the applicant of their discontinuance in accordance with the provisions of Article 6 of Regulation No 99/63 within two months of the date of the judgment to be given by the Court of Justice;
3. State that if the Commission fails to observe the terms of the operative part of the judgment to be given its conduct is contrary to the EEC Treaty;
4. Order the Commission to pay the costs.

In its defence the *Commission* contends that the Court should dismiss the application as inadmissible or, in the alternative, as unfounded and order the applicant to pay the costs.

In its reply the *applicant* adheres to the conclusions in its application.

In its rejoinder the *Commission* contends that the Court should dismiss the application as inadmissible or, in the alternative, as unfounded and order the applicant to pay the costs.

## III — Submissions and arguments of the parties

According to the *applicant* the Commission was duly called upon to act by letter dated 31 January 1978 in accordance with the provisions of the second paragraph of Article 175 of the Treaty. The Commission did not define its position within two months of being so called upon. This application was lodged within two months of the expiry of that time-limit.

Proceedings for failure to act are open to any natural or legal person when an institution of the Community has "failed to address to that person any act other than a recommendation or an opinion".

In this instance the Commission had a duty to act and the measure sought is capable of producing definitive legal effects and is neither an opinion nor a recommendation.

The application is therefore admissible.

The inaction on the part of the Commission may be considered from two aspects. First, the Commission failed to continue the proceedings which it had instituted on the basis of Regulation No 17. Secondly, it failed to inform the applicant of the shelving of its complaint as required by Article 6 of Regulation No 99/63.

It is consistently accepted in academic writing on Community law that Article 6 of Regulation No 99/63 implies that the complainant may bring proceedings for failure to act against the failure of the Commission to pursue its complaint (Mégret, Louis, Vignes, Waelbroeck: Le Droit de la Communauté Économique Européenne, Vol. 4, No 78, p. 118, Goldman: Droit Commercial Européen, No 360, Braun, Gleiss, Hirsch: Droit des Ententes de la Communauté Economique Européenne, No 130, Steindorff, A.W.D. 1963, 353; Deringer, Das Wettbewerbsrecht der Europäischen Gemeinschaft, Article 3, Regulation No 17, Note 3).

In its defence the *Commission* observes chiefly, as regards the facts, that although invited by the Commission to comment on its letter of 22 March 1978 the applicant failed to do so.

After observing that it is difficult to reconcile the two aspects of the alleged inaction referred to by the applicant the Commission puts forward two arguments intended to show that the application is inadmissible.

First, it maintains that as, in its application to the Court, the applicant did not set out the grounds on which it believes that the Commission's alleged failure to take a decision is an "infringement of the Treaty" (first paragraph of Article 175) the application does not state "the grounds on which the application is based" as required by Article 38 (1) (c) of the Rules of Procedure. Secondly, the application is inadmissible because there is no failure to act on the part of the Commission. To support that argument the Commission observes that in its judgment in Case 8/71 *(Deutscher Komponistenverband e.V.* v *Commission of the European Communities,* [1971] ECR 705) the Court declared (in paragraph 2, p. 710) that Article 175 "refers to failure to act in the sense of failure to take a decision or to define a position". If the Commission has defined its position within the period fixed by Article 175 "the conditions for application of that article are not satisfied" (judgment in Case 42/71, *Nordgetreide GmbH & Co. KG* v *Commission of the European Communities,* [1972] I ECR 105 at p. 110, paragraph 4).

The Commission recollects that it was called upon to act on 31 January 1978. It defined its position on the complaint in its letter of 22 March 1978, that is, within the period of two months fixed in the second paragraph of Article 175. In that letter the Commission explained to the applicant in accordance with Article 6 of Regulation No 99/63 the reasons for its opinion that on the basis of the information which it had obtained there were insufficient grounds for granting its application in pursuance of Article 3 (2) of Regulation No 17.

The decision of which the applicant was entitled to receive notification if the Commission considered that it was unable to grant its application is clearly that referred to in Article 6 of Regulation No 99/63. Since it defined its position within the period of two months the Commission considers that the application is inadmissible.

In the reply the *applicant* maintains that by refusing to establish the existence of an infringement of Article 86 of the Treaty and to adopt the measures necessary to put an end to it the Commission contradicts its own findings and assessments of the legal position made in its statement of the objections raised by the applicant. To support that argument the applicant cites various passages in the statement of objections and concludes therefrom that for reasons of substantive law it has a legitimate interest in the cessation of an infringement of the rules on competition.

In reliance upon academic legal writings on Article 3 (2) of Regulation No 17 (in particular *Thiesing,* Kommentar zum EWG-Vertrag, 2nd edition 1974, Article 3 of Regulation No 17, Note 27) the applicant maintains that its right consists in obtaining, first, a finding that such an infringement exists and, secondly, its cessation. In the context of the right to make an application in pursuance of Article 3 of Regulation No 17, defining a position within the meaning of the second paragraph of Article 175 of the Treaty does not mean simply adopting any attitude whatever but rather involves taking action imposed by the rules on competition and consistent administrative practice. The Commission's letter of 22 March 1978 does not satisfy those requirements for the reasons of substantive law referred to by the applicant.

The applicant refers to the discussions which took place on 14 April 1978 and maintains that having regard to their very context they were intended to allow consideration of all the points raised by the Commission in its letter of 22 March 1978. The applicant was informed of the subject-matter of the discussions in a report by Professor Mestmäcker, who represented the applicant with Mr Arendt. That report, a copy of which is annexed to the reply, was necessary because possible means of solving the problem other than those suggested by the Commission in the aforementioned letter were considered in detail during the discussions.

By a telex message of 28 April 1978 the applicant informed the Commission that it considered the proposals relating to the amendment of its articles of association to be impracticable.

It is therefore incorrect that the applicant failed to comply with the invitation to submit its comments on the Commission's letter of 22 March 1978. The applicant expressed its views on that subject during the discussions and in the telex message referred to above.

The applicant also observes that it stated in the telex message that it was appropriate to leave the application on the grounds of failure to act and the action for termination of the infringement brought against Radio Luxembourg before the Bundesgerichtshof to proceed simultaneously.

Finally, the applicant emphasizes the fundamental importance for the application of the rules on competition in the Common Market of the questions of law which arise in this instance. The administrative practice followed by the Commission in the present case is such as to make impossible in practice cooperation of citizens and national courts in observing the rules on competition. In particular no national court which wishes to afford legal protection to those subject to its jurisdiction is able any longer to suspend the proceedings pending adoption of a decision by the Commission if that body allows the matter to rest for more than three years before avoiding an action for failure to act by relying on grounds which are contrary to the rules of law on

the basis of which the proceedings have taken place until then. The Court of Justice is alone in a position to avert such consequences by affording effective legal protection by way of Article 3 (2) of Regulation No 17.

In its *rejoinder* the Commission claims that the contradictions referred to by the applicant do not exist. After carrying out a searching inquiry and implementing the administrative procedure the Commission became convinced that it would be impossible as things stand to prove the existence of a dominant position held by Radio Luxembourg and its subsidiaries RMI and RTM within the meaning of Article 86. In order to make the true situation more readily comprehensible it gives a detailed description of the course of the administrative procedure.

After becoming convinced, following the implementation of the administrative procedure, that it was unable to grant the applicant's application because it considered it impossible to demonstrate that Radio Luxembourg had infringed Article 86 of the Treaty the Commission was unable to do anything other than communicate that information to the applicant within the period allowed as required in Article 6 of Regulation No 99/63 which prescribes in imperative terms the action to be taken by the Commission when it considers that the information which it has obtained does not entitle it to comply with the application made in pursuance of Article 3 (2) of Regulation No 17. The Commission was therefore unable to react to the applicant's letter of 31 January 1978 in any different way.

At the stage of the procedure in question Article 6 of Regulation No 99/63 in fact fixes the legal position of the applicant with regard to Article 3 (2) of Regulation No 17. Having called upon the Commission to act by letter of 31 January 1978 the applicant was entitled to have that information communicated to it. In the Commission's opinion that communication was an "act" within the meaning of the second paragraph of Article 175 which, if it had not been adopted within the prescribed period, might have justified the bringing of an action for failure to act by the applicant (cf. *Roemer*, Die Untätigkeitsklage im Recht der Europäischen Gemeinschaft, S.E.W., 1966, p. 13).

If, in accordance with what is accepted by academic legal writers, Article 3 (2) of Regulation No 17 entitles an applicant to *action* on the part of the Commission, it must nevertheless be observed that the existence of such a right does not entitle the applicant in the present case to conclude that it includes that of having the infringement established and terminated (cf. *Steindorff*, Das Antragsrecht im EWG-Kartellverfahren and seine prozessuale Durchsetzung, Außenwirtschaftsdienst des Betriebsberaters 1963, p. 357).

Finally, the Commission gives its views, even though it considers them to be irrelevant for the purpose of the judgment to be given by the Court — on the applicant's contention that it is deprived of all effective legal protection if the action for failure to act in the present instance is not successful.

In that connexion the question of fundamental importance which arises and which has not yet received any reply is whether, if his application is dismissed by the Commission, an applicant within the meaning of Article 3 (2) of Regulation No 17 is entitled to require a decision to be adopted which he will be able to contest by proceedings brought by way of the second paragraph of Article 173 of the Treaty when the Commission does not adopt any positive decision directed against a third party.

The Commission envisages three possible solutions but immediately rejects the third on the ground of the considerable additional burden of work which it would involve for the department of the Commission responsible for observance of the rules governing competition:

1. The proceedings based upon Article 3 (2) of Regulation No 17 are exhausted by the communication provided for in Article 6 of Regulation No 99/63. There is no right of recourse to the Court against that communication.

2. The communication referred to in Article 6 of Regulation No 99/63 constitutes a decision capable of being contested by the applicant by proceedings based upon Article 173.

3. The communication is not final. The Commission is bound to dismiss the application by means of a formal decision adopted after communication of the reasons on which it is based in accordance with Article 6 of Regulation No 99/63. That decision may be contested by proceedings instituted on the basis of the second paragraph of Article 173.

According to the Commission the solution envisaged under point 1 may be contemplated without the slightest difficulty. The Community legislature would not leave applicants without protection if recourse to the Court of Justice was impossible following dismissal of their application by the Commission. The prohibitions contained in Articles 85 and 86 are directly applicable rules of Community law. Applicants may institute proceedings before the national courts for the cessation of the infringement and, if appropriate, for compensation. If they consider that a wrongful act or omission exists on the part of the defendant they may seek reparation for any damage caused in accordance with Article 215 of the Treaty.

If it is accepted that the principle aim of the right to make application to the Commission conferred by Article 3 (2) of Regulation No 17 is to grant to persons and associations of persons a right whose existence may be subject to review by the court, the solution indicated under point 2 must be seriously considered (cf. in particular *Mertens de Wilmars*, Administratieve Procedure en Rechtswaarborgen in EEC Kartelzaken, Europese Kartelrecht, pp. 240 and 241, *Waelbroeck, op. cit.* Vol. 4, p. 118). The communication referred to under Article 6 of Regulation No 99/63 may be regarded as a decision, since it has legal consequences as regards the applicant. When the Commission indicates the reasons which prevent it from granting the application that is ordinarily to be regarded as a final definition of its position. The fact that Article 6 of Regulation No 99/63 provides for the applicant to be allowed a period in which to submit any further comments in writing does not prevent the communication from constituting a decision. That provision allows the applicant to decide whether he wishes to submit further comments on the communication. If he fails to do so, he accepts the definitive nature of the communication. If he makes use of his right to submit further comments and if the Commission informs him that it adheres to its opinion the communication referred to in Article 6 of Regulation No 99/63 in that case also constitutes a rejection of the application.

If the solution referred to under point 1 is adopted the applicant no longer has any right on which he may rely in order to obtain the adoption of the decision which results from Article 6 of Regulation No 99/63. That decision has already been adopted.

If it appears necessary to adopt the solution suggested under point 2, then the applicant was able to contest the communication of 22 March 1978 referred to in Article 6 of Regulation No 99/63 by means of an application for

annulment based on the second paragraph of Article 173 of the Treaty.

If the solution adopted is that referred to under point 3, the applicant is entitled to have the defendant adopt a formal decision rejecting his application.

In none of the aforementioned cases have the proceedings for failure to act brought by the applicant any chance of succeeding, since the Commission "defined its position" within the period prescribed. In the first case the applicant is not entitled to have a fresh decision adopted. In the second and third cases the prevailing principle is that by which, within the system of legal protection provided for by the Treaty, proceedings for annulment and for failure to act are alternatives to one another. That means that if proceedings for annulment are brought it is no longer possible to bring proceedings for failure to act. In the third case the applicant may — after the dismissal of the application which forms the subject of the present action — bring fresh proceedings against the Commission in order to obtain a formal decision. If the Commission adopts the decision requested the applicant may contest it under the second paragraph of Article 173. If the Commission does not adopt the said decision within two months of the date on which proceedings are brought the applicant may bring fresh proceedings under Article 175.

The Commission therefore adheres to its conclusions in favour of the dismissal of the application as inadmissible.

## IV — Additional conclusions submitted by the applicant

On 19 March 1979 the applicant submitted in the alternative, the following additional conclusions to the effect that the Court should:

"If the application is declared inadmissible inasmuch as it refers to the failure of the Commission to act, declare null and void the decision not to pursue the proceedings instituted against Radio Luxembourg contained in the Commission's letter to the applicant of 22 March 1978 (second paragraph of Article 173 of the EEC Treaty)."

The applicant states that that application for annulment is based upon Article 86 of the Treaty and Article 3 (2) of Regulation No 17 of the Council. It is therefore based upon the same facts as those already set out by the applicant for the purpose of the proceedings directed against the Commission's failure to act.

In support of its alternative claim the applicant refers to the judgment of the Bundesgerichtshof of 12 December 1978, which, together with the grounds of judgment, had been communicated to it on 20 February 1979, in the action brought by the applicant against Radio Luxembourg, RMI and RTM. That judgment rejected the applicant's conclusions inasmuch as it sought an order that Radio Luxembourg should refrain "from concluding and/or causing to be concluded joint publishing contracts with music publishers whose registered place of business is in the Federal Republic of Germany including West Berlin and/or from establishing with such publishers joint publishing houses the purpose or result of which is to ensure that in the German-language programmes broadcast by Radio Luxembourg preference is given to the musical works published jointly".

*The admissibility of the alternative application*

The *applicant* observes that no appeal lies from the judgment of the Bundesgerichtshof. By virtue of the third paragraph of Article 177 of the Treaty that court was required to ask the Court of Justice to rule on questions of Community law. Without expressing any opinion on the material content of Articles 85 and 86 the Bundesgerichtshof decided not to refer the matter to the Court. In the statement of the facts in the judgment the Bundesgerichtshof

indicated that it had regarded the Commission's letter of 22 March 1978 as a decision putting an end to the proceedings. As a result of that assessment of the facts the applicant is deprived of any remedy before the Court of Justice if that body accepts that the Commission has not remained inactive and has put an end to the proceedings by means of the decision addressed to the applicant. That is why the applicant is lodging the alternative claim.

The applicant states that it bases its application on the first subparagraph of Article 42 (2) of the Rules of Procedure of the Court. It considers that the matters of law on which the application is based came to light only on the expiry of the written procedure. It claims that it has observed the period prescribed in the third paragraph of Article 173 of the Treaty.

The *Commission* claims that the application is inadmissible.

The applicant bases its application on Article 42 (2) of the Rules of Procedure according to which "No fresh issue may be raised in the course of proceedings". An exception is provided for as regards cases in which such issue "is based on matters of law or of fact which come to light in the course of the written procedure". According to the second subparagraph of that provision, such fresh issues may be raised "in the course of the written procedure".

In fact the applicant is not raising any fresh issues in support of its submissions based upon Article 175 of the Treaty but is rather seeking to put forward fresh submissions based upon the second paragraph of Article 173, which is not contemplated by the provisions of Article 42 (2) of the Rule of Procedure. The applicant is in fact seeking to create for itself a right to lodge an application for annulment outside the period prescribed by the second paragraph of Article 173.

The legal arguments put forward by the applicant to support its submissions did not come to light for the first time in the course of the written procedure. The applicant was in possession of the Commission's letter of 22 March 1978 before the present proceedings were instituted. The possible classification of that letter as a decision open to contest ought to have led a prudent applicant to lodge an application for annulment as either a main action or in the alternative.

The conduct of the Bundesgerichtshof does not constitute a fresh issue which came to light in the course of the written procedure before the Court. Even assuming that the Bundesgerichtshof did regard the letter of 22 March 1978 as a decision by the Commission putting an end to the proceedings which it had instituted the legal reasons for such a point of view were already in existence before the present application was lodged.

The refusal of the Bundesgerichtshof to refer to the Court of Justice preliminary questions on the interpretation of Articles 85 and 86 by virtue of Article 177 of the Treaty is not the cause of the lack of access to the Court of which the applicant complains. In fact, the Court could only have "interpreted" the questions of law referred to it. The applicant is attempting to obtain a decision *on the substance* from the Court by means of additional conclusions.

In any event, the applicant submitted its application only after the closure of the written procedure by the lodging of the Commission's rejoinder of 3 November 1978, that is, outside the period prescribed by Article 42 of the Rules of Procedure.

V — Oral procedure

The applicant, represented by Ernest Arendt, of the Luxembourg Bar, and the defendant, represented by its Agent, Erich Zimmermann, presented oral argument at the hearing on 20 June 1979.

The Advocate General delivered his opinion at the hearing on 11 July 1979.

## Decision

1 The dispute in these proceedings arises out of a letter dated 23 July 1971 by which the applicant, GEMA, a German performing right association, submitted a complaint to the Commission in pursuance of Article 3 (2) (b) of Regulation No 17 of 6 February 1962 (Official Journal, English Special Edition 1959-1962, p. 87) the aim of which was to establish the existence of infringements of the rules on competition laid down in Articles 85 and 86 of the EEC Treaty by the Compagnie Luxembourgeoise de Télédiffusion (hereinafter referred to as "Radio Luxembourg"), its subsidiary, Radio Music International (hereinafter referred to as "RMI"), both of which have registered offices in Luxembourg, and Radio Tele-Music (hereinafter referred to as "RTM"), whose registered office is in Berlin-Wilmersdorf.

2 According to the terms of that complaint Radio Luxembourg concluded contracts through RMI with publishers of light music established in the Federal Republic of Germany and carrying on their business there, by which RMI receives one half of the royalties due in respect of the performing rights over the musical works published jointly by RMI and the said publishers in return for the frequent broadcasting of those compositions in German on Radio Luxembourg at favourable listening times. The effect of that practice is to obtain for Radio Luxembourg, as a member of GEMA, excessive royalties in respect of performing rights. Since the applicant — which is the only performing right association in the Federal Republic — has to apportion all the royalties which it receives on the basis of a fixed scale of distribution, the result of the said practice is to put the other publishers of light music, who are also members of the applicant association, in an unfavourable position.

3 The Commission complied with the terms of the applicant's complaint on 23 January 1974 by sending to the aforementioned three companies a letter

containing a statement of the objections raised against them in accordance with Article 19 (1) of Regulation No 17. On 23 April 1974 the Commission conducted hearings of the parties but did not inform the applicant of the subsequent course of the proceedings.

4 By letter of 31 January 1978 the applicant called upon the Commission to adopt "a formal decision in the inquiry into the proceedings" within two months failing which the applicant would lodge against the Commission an application for failure to act, in accordance with Article 175 of the Treaty.

5 The Commission replied by letter of 22 March 1978 in which it expressed the view that "the most recent information" in its possession did not entitle it to grant the applicant's application for a decision recording an abuse of a dominant position by Radio Luxembourg and the other aforementioned undertakings. In the light of recent developments in the situation the Commission considered it doubtful whether it was possible to demonstrate convincingly that Radio Luxembourg occupied a dominant position in a substantial part of the Common Market and abused such a position. After setting out in detail the reasons for that opinion the Commission concluded that a decision by way of Article 86 of the Treaty would not be justified. In accordance with Article 6 of Regulation No 99/63 of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-1964, p. 47) the Commission allowed the applicant the opportunity of submitting any further comments within two months of receipt of "this notification".

6 In the aforementioned letter the Commission also expressed its opinion that associations for the protection of performing rights were able in other ways to take precautions against distortions of competition resulting from the practice of certain broadcasting companies of giving preference in broadcasting to pieces of light music over which they had certain rights of ownership. The Commission suggested that the applicant should have discussions on that subject with certain of its officials. During those discussions which took place on 14 April 1978 and which, according to the applicant, covered all the points raised by the Commission in its letter of 22 March 1978, the Commission submitted proposals involving in particular amendment of the articles of association of GEMA in order to frustrate Radio Luxembourg's practice of arranging for joint publication. However, by

a telex message of 28 April 1978 the applicant informed the Commission that it considered its proposals to be impracticable.

7 On 31 May 1978 the applicant lodged an application under Article 175 of the Treaty, seeking to establish the illegality of the Commission's failure to act and to call upon it either to adopt a formal decision within the context of the proceedings instituted in 1971 following the applicant's complaint or, if appropriate, to inform the applicant of the discontinuance of the proceedings, in pursuance of Article 6 of Regulation No 99/63. The applicant claims that the letter of 22 March 1978 did not constitute performance by the Commission of its obligations under Article 3 (2) of Regulation No 17 since the applicant is "entitled ... to have ... the Commission continue the proceedings instituted against Radio Luxembourg, establish the existence of the infringement and prescribe the measures necessary in order to put an end to it".

8 By order of 17 January 1979 the Court allowed Radio Luxembourg and RMI to intervene in support of the submissions of the Commission.

9 On 19 March 1979 the applicant submitted in the alternative certain additional conclusions which, in case the Court should consider the application for failure to act to be inadmissible, sought, by way of the second paragraph of Article 173 of the Treaty, the annulment of the decision not to continue with the proceedings instituted against Radio Luxembourg contained in the Commission's letter of 22 March 1978.

## Admissibility

10 The Commission contests the admissibility of the application for failure to act on the ground that the conditions for the application of Article 175 are not satisfied.

11 The Commission observes that the second paragraph of Article 175 requires it not to have "defined its position" within two months of being called upon to act and claims that there is no failure to act in this instance since its letter of 22 March 1978 constitutes a definition of its position within the meaning of Article 175. That statement is in turn challenged by the applicant who claims, first, that the letter of 22 March is purely interlocutory in nature and, secondly, that as a private applicant making an application by way of

Article 3 (2) of Regulation No 17 it is entitled to a "decision" within the meaning of Article 189 of the Treaty. The Commission claims, furthermore, that as the decision demanded by the applicant could not have been addressed to it but only to the undertakings whose conduct was called in question by the complaint the applicant does not fall within the category of natural or legal persons who, under the terms of the third paragraph of Article 175, may complain to the Court.

12 The Commission also contests the admissibility of the applicant's alternative application. The applicant bases that alternative application upon Article 42 (2) of the Rules of Procedure according to which no "fresh issue" may be raised "in the course of proceedings" unless it "is based on matters of law or of fact which come to light in the course of the written procedure". The Commission claims, however, that that application does not raise any fresh issue but rather puts forward fresh conclusions. In any event, the application is inadmissible since it was submitted after the expiry of the period prescribed by the final paragraph of Article 173.

13 It is therefore necessary to consider the admissibility of both the application for failure to act and the alternative application.

*A — The application for failure to act*

14 It is necessary to decide, first, whether the letter of 22 March 1978 constitutes defining a position within the meaning of the second paragraph of Article 175. To that end it is first necessary to consider the Commission's obligations within the context of the procedure laid down by Regulation No 17 and supplemented by Regulation No 99/63 for the purpose of establishing possible infringements of Articles 85 and 86 of the Treaty.

15 Article 3 of Regulation No 17 provides in particular as follows:

"(1) Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

(2) Those entitled to make application are:

(a) Member States;

(b) natural or legal persons who claim a legitimate interest."

16 Article 6 of Regulation No 99/63 provides that:

"Where the Commission, having received an application pursuant to Article 3 (2) of Regulation No 17, considers that on the basis of the information in its possession there are insufficient grounds for granting the application, it shall inform the applicants of its reasons and fix a time-limit for them to submit any further comments in writing."

17 As is shown by the phrase " . . . shall inform the applicants of its reasons", it follows that the communication referred to in Article 6 of Regulation No 99/63 only seeks to ensure that an applicant within the meaning of Article 3 (2) (b) of Regulation No 17 be informed of the reasons which have led the Commission to conclude that on the basis of the information obtained in the course of the inquiry there are insufficient grounds for granting the application. Such a communication implies the discontinuance of the proceedings without, however, preventing the Commission from re-opening the file if it considers it advisable, in particular where, within the period allowed by the Commission for that purpose in accordance with the provisions of Article 6, the applicant puts forward fresh elements of law or of fact. The applicant's argument that an applicant under Article 3 (2) of Regulation No 17 is entitled to obtain from the Commission a decision within the meaning of Article 189 of the Treaty on the existence of the alleged infringement cannot, therefore, be accepted.

18 Moreover, even assuming that such a communication is in the nature of a decision within the meaning of Article 189 of the Treaty and that it is therefore capable of being contested by way of Article 173 of the Treaty, that in no way implies that the applicant within the meaning of Article 3 (2) of Regulation No 17 is entitled to require from the Commission a final decision as regards the existence or non-existence of the alleged infringement. In fact the Commission cannot be obliged to continue the proceedings whatever the circumstances up to the stage of a final decision. The interpretation put forward by the applicant would remove all meaning

from Article 3 of Regulation No 17 which in certain circumstances allows the Commission the opportunity of not adopting a decision to compel the undertakings concerned to put an end to the infringement established. It therefore follows from the nature of the procedure to establish an infringement laid down by Article 3 of the regulation that it cannot be accepted that a natural or legal person who, in pursuance of Article 3 (2) (b) of the regulation, has requested the Commission to establish the said infringement, is entitled to demand a final decision on the proceedings instituted by the Commission following his complaint.

19 As regards the letter of 22 March 1978 it must be noted that the Commission informed the applicant of its view that a decision by way of Article 86 of the Treaty would not be justified and set out the facts and reasons on which that opinion was based. In addition, in accordance with the provisions of Article 6 of the aforementioned Regulation No 99/63 it fixed a time-limit of two months for the submission by the applicant of any further comments in writing.

20 It follows that the Commission acted in accordance with the aforementioned provisions of Article 6 of Regulation No 99/63 by informing the applicant of the outcome of the proceedings and of the reasons for the discontinuance of the inquiry into its complaint. It must be added that it emerges from the terms of the letter, which is in two separate sections, that the Commission's suggestion for discussions with the applicant in order to examine other suitable methods of dealing with the consequences of the practices called in question by it falls outside the scope of the procedure to establish an infringement of the rules on competition instituted by the Commission following the submission of the original complaint. Contrary to the argument put forward by the applicant that suggestion cannot therefore confer on the letter an interlocutory character.

21 It results from the foregoing considerations that by replying by means of the letter of 22 March 1978, which was in accordance with the requirements of Article 6 of Regulation No 99/63, to the applicant's letter of 31 January 1978 calling upon it to act, the Commission addressed to the applicant an act which constitutes a definition of its position within the meaning of the second paragraph of Article 175 of the Treaty.

22 It follows that in this instance the Commission has not failed to act on the applicant's application to it and that the circumstances contemplated by Article 175 are not present.

23 The application on the grounds of failure to act must therefore be dismissed as inadmissible.

*B — The application for annulment*

24 As has already been stated the applicant lodged supplementary conclusions on 19 March 1979 seeking the annulment of "the decision not to pursue the proceedings instituted against Radio Luxembourg contained in the Commission's letter to the applicant of 22 March 1978 (second paragraph of Article 173 of the EEC Treaty)". In support of its application the applicant states that it is based upon the same facts as those already referred to for the purposes of the application for failure to act. It also claims that its application constitutes the raising of a fresh issue based on matters of law which came to light only at the end of the written procedure and that it is therefore admissible by virtue of the first subparagraph of Article 42 (2) of the Rules of Procedure.

25 The matter of law referred to by the applicant is the communication to it on 20 February 1979 of the grounds for the judgment given by the Bundesgerichtshof on 12 December 1978 in an action between the applicant and Radio Luxembourg, RMI and RTM which concerned the same facts as those which form the basis of the proceedings instituted by the Commission against those companies. It may be seen from that judgment that the Bundesgerichtshof states, in particular, that the Commission has ceased to pursue those proceedings. According to the applicant the Bundesgerichtshof had regarded the Commission's letter of 22 March 1978 as a decision putting an end to the proceedings. The applicant has lodged the alternative application for annulment in case the Court shares that opinion.

26 The first subparagraph of Article 42 (2) of the Rules of Procedure states that: "No fresh issue may be raised in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the written procedure". That provision therefore allows an applicant, in exceptional circumstances, to raise fresh issues in order to support conclusions set out in the document instituting the proceedings. It does not in any way provide for the possibility of an applicant's introducing fresh conclusions or, *a fortiori*, of transforming an application on grounds of failure to act into an application for annulment. In this instance the conclusions in the originating application were based on Article 175 of the Treaty whilst those in the additional application relate to the existence of an act which may be contested by virtue of Article 173. The applicant cannot therefore rely on the provisions referred to above in order to show the admissibility of its application for the annulment of any decision contained in the Commission's letter of 22 March 1978.

27 The alternative application for annulment must therefore be dismissed as inadmissible.

## Costs

28 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

29 As the applicant has failed in its submissions it must be ordered to pay the costs with the exception of those which may have been incurred as a result of the intervention of Radio Luxembourg and RMI in respect of which, in accordance with Article 69 (3) of the Rules of Procedure the applicant and the interveners, who have not submitted any written or oral observations, must each bear their own costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders the applicant to pay the costs with the exception of those which may have been incurred as a result of the intervention, in respect of which the applicant and the interveners must each bear their own costs.**

Kutscher O'Keeffe Touffait

Mertens de Wilmars Pescatore Mackenzie Stuart Bosco

Delivered in open court in Luxembourg on 18 October 1979.

A. Van Houtte — Registrar

H. Kutscher — President