ORDER OF THE COURT (First Chamber)
16 September 1997 *

In Case C-59/96 P,

Casper Koelman, resident in Brussels, represented by R. V. H. Jonker, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of R. Pels, 12 Rue Léon Thyes,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber, Extended Composition) in Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1, seeking to have that judgment set aside

the other party to the proceedings being:

Commission of the European Communities, represented by B. J. Drijber, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the Office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

supported by

Buma, an association governed by Dutch law, established in Amstelveen (the Netherlands) represented by C. van Rij and E. A. P. Engels, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of G. Harles, 8-10 Rue Mathias Hardt,

* Language of the case: Dutch.

and

French Republic, represented by C. de Salins, Assistant Director of the Legal Affairs Department of the Ministry of Foreign Affairs and P. Martinet, Secretary for Foreign Affairs in that department, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Prince Henri,

interveners,

THE COURT (First Chamber),

composed of: L. Sevón, President of the Chamber, D. A. O. Edward and M. Wathelet (rapporteur), Judges,

Advocate General: G. Tesauro,
Registrar: R. Grass,

after hearing the views of the Advocate General,

makes the following

Order

1 By application lodged at the Registry of the Court of Justice on 4 March 1996, Casper Koelman (hereinafter 'the appellant') brought an appeal under Article 49 of the Statute of the Court of Justice of the EC against the judgment of 9 January 1996 in Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1 (hereinafter the

'contested judgment'), in which the Court of First Instance dismissed his application concerning the Commission's decision of 14 October 1993 rejecting his complaint submitted under Article 3(2) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

2 It is clear from the contested judgment that on 26 October 1990 the appellant lodged a complaint, alleging infringement of the competition rules, concerning two standard agreements governing retransmission by cable, one for television programmes and the other for radio programmes, concluded in the Netherlands since 1985, between the holders of rights in those programmes, all represented by the association Buma, and each cable operator. Those agreements were intended to ensure that the Auteurswet (Copyright Law) was applied to the retransmission of those programmes as regards consent to retransmission and payment of royalties to copyright holders (paragraphs 2 and 9 of the contested judgement).

3 On 6 March 1992 the appellant supplemented that complaint by a number of objections concerning the standard exploitation agreement of 23 December 1986 concluded between the authors of musical works and Buma, which is the only organization to have been authorized by Dutch law to act as intermediary in the field of musical copyright (paragraphs 5 and 9).

4 On 6 August 1992, the appellant brought an action for a declaration that the Commission had failed to act (Case T-56/92), after previously having requested it to act by letter of 8 April 1992 (paragraph 11).

5 On 8 October 1992 the Commission sent a letter, pursuant to Article 6 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided

for in Article 19(1) and (2) of Council Regulation No 17 (OJ English Special Edition 1963-1964, p. 47), informing him that it did not intend to pursue the appellant's complaint and inviting him to submit his observations in that regard (paragraph 11).

6 The applicant submitted his observations in a letter of 8 November 1992 (paragraph 12).

7 By letter of 14 October 1993 the Commission definitively rejected the appellant's complaint (paragraph 13).

8 By order of 29 November 1993 in Case T-56/92 *Koelman* v *Commission* [1993] ECR II-1267, the Court of First Instance held that it was therefore no longer necessary to rule on the action for a declaration of a failure to act (paragraph 14).

9 On 14 December 1993 the appellant brought an action before the Court of First Instance under Article 173 of the EC Treaty for annulment of the Commission's decision rejecting his complaint and, under Articles 178 and the second paragraph of Article 215 of that Treaty, for compensation for the damage which he considered he had suffered (paragraph 15).

10 In his application, the appellant claimed that the Court of First Instance should:

'1. Declare void, on the basis of Articles 173 and 174 of the Treaty, the Commission's decision not to initiate the procedure provided for in Article 3 of Regulation No 17 following the complaint which he had lodged on 26 October 1990 concerning the two cable distribution agreements of 29 May 1985 and all agreements

deriving therefrom, the participation in those and other agreements by organizations managing copyrights in musical works which hold a dominant position, the standard exploitation agreements used by Buma and the role played by the Netherlands State in the establishment of the abovementioned cable distribution agreements;

ensure that authors are free to choose the organization which they wish to appoint to manage their works;

ensure that undertakings which act as intermediaries for such rights enjoy fair access to the market, and protect them against abuses of dominant positions by monopolies in the field of copyright in musical works;

2. Declare:

(a) the two cable radio and television agreements of 29 May 1985 and all the agreements deriving therefrom to be incompatible with Article 85(1) of the Treaty;

(b) the standard cable television agreement of 29 May 1985 and all agreements deriving therefrom to be incompatible with Article 7 of the Treaty;

(c) the participation of Buma in the cable distribution agreements, in the form adopted, to be incompatible with Article 86 of the Treaty;

(d) the role played by the Netherlands State in the establishment of the standard cable distribution agreements and their practical implementation by means of increases in invoices issued by public utility companies to be incompatible with its obligations under Article 90;

(e) Articles 2, 3, 5, 6, 8 and 9 of Buma's standard exploitation agreements to be in breach of the Commission's Decision 71/224/EEC of 2 June 1971 relating to a proceeding under Article 86 of the EEC Treaty (IV/26.760 — *GEMA*; OJ 1971 L 134, p. 15) and to be incompatible with Article 86 of the Treaty since they constitute an abuse of Buma's dominant position in relation to copyright owners;

3. Rule on other matters which the Court considers to be relevant;

4. Order the Commission to pay compensation for the damage suffered by him, which he estimates to be no less than HFL 1 500 000, or for at least the part of the injury which the Court imputes to the Commission's conduct;

5. Order the Commission to pay the costs' (paragraph 19).

11 It is also apparent from the contested judgment that:

'At the hearing the applicant's lawyer stated that he did not wish to present oral argument or reply to the questions which the Court wished to put to him in the language of the case, because he had an insufficient command of that language. In those circumstances, the Commission also waived its right to present oral argument. In agreement with the Commission, the Court suggested that the applicant's lawyer should reply in French to certain questions which it wished to put to him. Even though arrangements had been made for the translation of the questions into French during the hearing, the applicant's lawyer stated that he would prefer that

the Court did not put any further questions to him in view of the comprehensive nature of the arguments submitted in support of the applicant's claim during the written procedure. The Court then merely put questions to the Commission which replied in the language of the case. The intervener was not represented at the hearing' (paragraph 18).

The contested judgment

12 The Court of First Instance declared the appellant's claims inadmissible in so far as they did not relate to the annulment of the Commission's decision of 14 October 1993 (hereinafter the 'decision at issue').

13 In that respect, the Court recalled, with regard to the second part of point 1 of the form of order sought by the appellant, 'that it is settled case-law that it has no jurisdiction to issue directions to the Community institutions, to the Member States or to natural or legal persons' (paragraph 29) and, with regard to the claims set out under point 2 of the form of order sought by the appellant, that 'the Community courts have no jurisdiction to give a ruling, at the initiative of a natural or legal person, on the compatibility of a Member State's or a natural or legal person's conduct with the provisions of the Treaty or to annul, in whole or in part, agreements concluded by natural or legal persons' (paragraph 30). Finally, the Court of First Instance considered that point 3 of the appellant's claims did not satisfy 'the degree of precision required by Article 19 of the EC Statue of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance for it to be admissible' (paragraph 31).

14 The remainder of the claims for annulment and for compensation were rejected as unfounded.

The claim for annulment

15 In support of his claim for annulment the appellant relied on four pleas in law before the Court of First Instance.

The first plea

16 The first plea alleged infringement of Article 85(3) of the Treaty.

17 The Court of First Instance rejected that plea on the following grounds:

'38. By this plea the Court is asked to decide whether or not the Commission may reject a complaint under Article 3 of Regulation No 17 on the ground that the agreements complained of satisfy in any event the requirements laid down in Article 85(3) of the Treaty for grant of an exemption from the prohibition in Article 85(1) of the Treaty, even though it has not issued a decision on the matter to the parties to those agreements, who in fact also notified them to it, and even though it has not given a definitive decision on the issue whether or not those agreements infringe Article 85(1) of the Treaty.

39. Where a complaint has been submitted to the Commission under Article 3 of Regulation No 17, it is required to examine carefully the facts and points of law brought to its notice by the complainant in order to decide whether they disclose conduct liable to distort competition in the common market and affect trade between Member States (judgment of the Court of First Instance in Case T-24/90

Automec II v *Commission* [1992] ECR II-2223, paragraph 79). Nevertheless, it also follows from the settled case-law of the Court of Justice and of 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 Treaty regarding the existence or otherwise of an infringement of Article 85 of the Treaty (judgment of the Court of Justice in Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, paragraph 17; judgment of the Court of First Instance in Case T-114/92 *BEMIM* v *Commission* [1995] ECR II-147, paragraph 62).

40. It follows from that case-law that, when rejecting a complaint, the Commission must indicate the reasons for which careful examination of the facts and points of law brought to its notice by the complainant do not prompt it to initiate a procedure to establish whether Article 85 of the Treaty has been infringed. In so doing, the Commission may investigate the agreements and practices called into question in the light of Article 85 as a whole and set out the reasons for which it considers that — assuming that those agreements and practices constitute an infringement of Article 85(1) — this provision could in any event be declared "inapplicable" to those agreements and practices under Article 85(3), so that it does not appear to the Commission that careful examination of the complaint must lead it to take the action requested by the complainant. It follows that, in the present case, the Commission was entitled to explain the reasons for its decision to reject the complaint by giving the reasons for which it considered, on the basis of the facts and points of law brought to its notice by the complainant, that the standard agreements satisfied the conditions of Article 85(3) without previously adopting a decision exempting those agreements which had been addressed to the contracting parties, or having definitely ruled on the compatibility of those agreements with Article 85(1).

41. Nevertheless, such a decision to reject a complaint, which does not definitively rule on the question whether or not there is an infringement of Article 85(1) and does not grant an exemption under Article 85(3), is merely an assessment by the Commission of the agreements and practices in question. Accordingly, as the

Commission accepted at the hearing, it has the same legal status as a "comfort letter" (judgments of the Court of Justice in Joined Cases 253/78 and 1/79 to 3/79 *Giry and Guerlain and Others* [1980] ECR 2327, paragraph 13, Case 37/79 *Marty* v *Lauder* [1980] ECR 2481, paragraph 10, and Case 99/79 *Lancôme and Cosparfrance* v *ETOS* [1980] ECR 2511, paragraph 11).

42. It follows that the assessments made by the Commission in a decision rejecting a complaint of the kind involved in the present case do not prevent a national court which has to rule upon the compatibility with Article 85(1) of the agreements and practices criticized by the complainant from declaring those agreements and practices to be automatically void under Article 85(2) of the Treaty, having regard to the evidence before it. The fact that, unlike in the case of comfort letters, the Commission's assessments are contained in a challengeable measure does not affect that conclusion, since such assessments entail no definitive decision on the issue whether or not Article 85(1) has been infringed or an exemption is to be granted under Article 85(3) on the conditions laid down in Regulation No 17.

43. Moreover, the assessments made by the Commission constitute facts which national courts may take into account in examining whether the agreements or conduct in question are in accord with the abovementioned provisions (see the judgment in *Giry and Guerlain and Others*, cited above, paragraph 13) and in this regard they can, if necessary, contact the Commission (judgment of the Court of Justice in Case C-234/89 *Delimitis* v *Henninger Bräu* [1991] ECR I-935, paragraphs 43 to 55). In the present case, such facts include, precisely, the Commission's assessment to the effect that "it cannot be excluded in advance that the purpose or effect of the cable distribution agreements is to restrict competition within the meaning of Article 85(1)" (see the contested decision, paragraphs 10 to 12), although the Commission has not yet used its exclusive powers under Regulation No 17 to grant an exemption under Article 85(3), so that the national court's power to annul such an agreement is unaffected.'

The second plea

18 It is apparent from the contested judgment that the second plea was in two parts.

19 The first part alleged a manifest error of appraisal in that the Commission wrongly based its rejection of the applicant's complaint on the finding that the standard agreements satisfied all the conditions of Article 85(3) of the Treaty.

20 The second part of the plea alleged that the Commission failed to find that Buma infringed Article 86 of the Treaty by concluding the standard agreements and that it did not consider it necessary to investigate the compatibility of the action of the Kingdom of the Netherlands with Article 90(1) of the Treaty in the light of Article 86 (paragraph 35 of the contested judgment).

21 The Court of First Instance rejected the second plea on the following grounds:

'56. It is settled case-law that when the Commission has decided to reject a complaint submitted under Article 3(2) of Regulation No 17 without holding an investigation, the purpose of judicial review by the Court of First Instance is to ensure that the challenged decision is based on a correct assessment of the facts and that it is not vitiated by any error of law, manifest error of assessment or abuse of power (Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraph 45).

57. As regards the first part of this plea, the Court observes, first, that the Commission stated at point 14 of the contested decision that "a collective and uniform agreement authorizing the transmission of radio and television programmes constitutes the most effective and efficient method of ensuring the lawful transmission of those programmes by cable in a situation in which a large number of copyright holders and cable operators are concerned by the grant of a licence and by the ensuing transmission. Since both many national and foreign broadcasters are concerned by that collective agreement, it must be found that it improves the distribution of radio and television programmes in the common market." The applicant challenges that argument. He says that the retransmission by cable of television and radio programmes is no less significant in countries which do not have a "collective and uniform agreement authorizing the transmission of radio and television programmes" yet he does not adduce the slightest evidence to establish the facts upon which he relies, even though the Commission invited him to do so in the letter of 8 October 1992 sent to him in accordance with Article 6 of Regulation No 99/63.

58. The Court therefore considers that the applicant has not shown that the Commission's view that such a collective and uniform agreement is the most effective and efficient means of ensuring the lawful retransmission by cable of television and radio programmes was vitiated by a manifest error of appraisal. It follows that the applicant's argument cannot be accepted by the Court.

59. Secondly, the Court finds that neither in his observations of 8 November 1992 in reply to the Commission's letter of 8 October 1992, nor in his application or reply, has the applicant submitted any evidence in support of his claim that users do not receive a fair share of the benefit resulting from an improvement in the retransmission of radio and television programmes which would undermine the plausibility of the Commission's view, set out in the contested decision, that the cable transmission agreements at issue provide consumers with a wider range of radio and television programmes and reduce to a minimum the risks of disturbance or interruption of retransmissions as a result of disputes over copyright. It follows that this argument of the applicant cannot be accepted by the Court either.

60. Thirdly, as regards the condition laid down in Article 85(3) of the Treaty whereby standard agreements may not impose on the undertakings concerned restrictions which are not indispensable to the attainment of the objectives referred to in that provision, it must be held that the applicant has not suggested any reasonable alternative to the Commission's view that the conclusion between copyright holders and each cable operator of a collective agreement for the diffusion by cable of television and radio programmes is indispensable in order to improve the effective and lawful retransmission of such programmes. In the first place, as regards the applicant's first suggested alternative, whereby royalties on retransmissions by cable of radio and television programmes would be settled at source, that is to say between the first broadcaster and the copyright owner, the Court observes that, even assuming that such a settlement system were conceivable, as the applicant claims, its implementation could not prevent obstacles from arising when negotiations take place concerning the conclusion, between the first broadcaster and a cable operator, of an agreement on the retransmission of a broadcast programme. Furthermore, under such a system individual agreements must be concluded between each cable operator and the first broadcaster of each work protected by copyright. Since there may be several first broadcasters for parts of the same radio or television programme, it is clear that the conclusion of such individual agreements does not enable the programmes in question to be retransmitted by cable effectively and efficiently in the way in which the conclusion of a collective agreement does.

61. Secondly, in support of the second method, whereby retransmitted programmes are automatically "tracked", the applicant submitted as an annex to his letter to the Commission of 6 March 1992 an advertisement by the company Broadcast Data Systems offering a "Record Track, AD Track, Radiotrack and Royalty Track" system, which states as follows:

"A method for instantaneously gathering and reporting data about songs and commercials being broadcast. Broadcast Data Systems offers four airplay monitor-

ing information services for different segments of the music, advertising and radio industries";

"RECORD TRACK lets record companies and associated businesses quickly, easily track songs being played on radio, music TV and cable stations nationwide";

"ROYALTY TRACK allows performing rights societies to expand substantially their ability to monitor the on-air use of copyrighted music".

62. It would appear from that advertisement on its own that the system proposed by the applicant is only of use in tracking the transmission of audio signals. However, such a system does not appear to be capable of tracking the transmission of visual signals, such as images or, what is of particular interest to the applicant, photographic works. Consequently, that system cannot be presented as a feasible alternative to the conclusion of a collective agreement.

63. It follows that the applicant has not shown that the Commission's reasoning in that regard is vitiated by a manifest error of appraisal.

64. Fourthly, as regards the last condition laid down by Article 85(3), namely that the agreements in question must not eliminate competition in respect of a substantial part of the market, the Court observes that in the contested decision the Commission states that the standard agreements "give cable operators the opportunity to obtain, on the basis of a single contract, a licence covering all copyrights of the owners and third parties represented by them". The Commission goes on to state that "those standard agreements do not preclude cable operators from concluding individual agreements with the owners if they wish, for example, to transmit a more selective range of stations" (point 17 of the contested decision).

65. In that regard, it must be observed first of all that the Commission did not state that the consent of the right holders who are parties to the standard agreements also included that of the owners or holders of rights who were not parties to, or not represented in, the standard agreement to retransmit their works by cable.

66. The Court therefore considers that the Commission's assessment does not imply that copyright intermediaries other than those who are parties to, or represented in, the standard agreements have no right to conclude with the cable operators individual agreements governing the settlement of royalties payable on retransmission of the works for which they act as intermediaries. It follows that the applicant's argument is misdirected on this point because it is based on an incorrect analysis of the Commission's appraisal in the contested decision.

67. The provision in the preamble to the standard agreement for television programmes, which the applicant calls an "exclusivity clause", is in fact referring to the exclusive right possessed by the copyright holders to consent to the retransmission by cable of protected works. The applicant is mistaken about the meaning and nature of that provision and attributes to it a right-creating character which it does not possess. In that provision, the holders of rights who are parties to the standard agreement simply give a warranty to the other parties to the standard agreement that they have an exclusive right under the law applicable so that those other parties to the agreement will then enter into obligations towards them.

Indeed, the obligation entered into by the right holders in Article 6 of the standard agreement, by which they assume all financial responsibility which may arise from claims by copyright owners or holders who are not represented in the standard agreement in the event of retransmission of their protected works, is entered into precisely and solely because of what the right holders who are parties to the standard agreement warrant in the recital in question. Consequently, the exclusivity referred to in that recital does not, at least in principle, prohibit those right holders from concluding agreements other than the standard agreements which still deal with the retransmission by cable of their programmes, sometimes with the involvement of other intermediaries on the market and, possibly, at the same time — because of its legal monopoly — with the involvement of Buma where musical works are to be retransmitted. Neither the existence of that recital in the standard agreement nor that legal monopoly can therefore affect the Commission's assessment that the standard agreement in question complied with the last condition laid down by Article 85(3) of the Treaty. In that regard too, the applicant has not therefore shown that the Commission committed a manifest error of appraisal in the contested decision.

68. It follows from the foregoing that, since the applicant has not shown that the Commission's assessments relating to the conditions laid down in Article 85(3) of the Treaty were manifestly wrong, the first part of the second plea must be rejected.

69. As regards the second part of that plea, to the effect that Buma abused its dominant position on the market for copyrights in musical works in order to gain a similar position on related markets, it is clear from the contested decision that the Commission refused to investigate on its own initiative whether Article 86 of the Treaty had been infringed by Buma without precise and specific evidence from the applicant (points 20 and 21 of the contested decision). The Court considers that, having regard to the content of the applicant's complaint (point 46 of the complaint), the supplement to it of 6 March 1992 and the observations which he made on 8 November 1992 (point 11 of those observations) in reply to the Commission's letter of 8 October 1992 (point 19 of that letter), that assessment by the Commission is not the result of a manifest error of appraisal. The only evidence

submitted by the applicant is his rather vague argument that a cable operator which concluded a standard agreement for the retransmission of radio programmes is not obliged to pay royalties to Buma in respect of the retransmission of those programmes if it concludes a parallel standard contract for the retransmission of television programmes. Such an argument cannot, however, be accepted. On reading Article 8(3) of the standard agreement for the retransmission of radio programmes (which provides that where a cable operator concludes both an agreement on the retransmission of radio programmes and an agreement on the retransmission of television programmes, the royalty which it is to pay under the latter agreement is to include the royalty which is due under the former agreement) and Article 9 of the standard agreement for the retransmission of television programmes (which defines the method of calculating the royalty payable by the cable operator as consideration for the licence granted to it to retransmit television programmes), the Court finds, first, that, as the intervener observes in its statement in intervention (point 39), where a cable operator has concluded both an agreement on the retransmission of radio programmes and one on the retransmission of television programmes, the royalty which is paid under Article 9 of the latter agreement includes not only the royalty payable on the retransmission of television programmes but also the royalty payable on the retransmission of radio programmes. Secondly, under Article 10(7) of the standard agreement for the retransmission of television programmes, right holders have the "exclusive right" to allocate the royalties thus received by their agent, which in this case is Buma. It follows that the part of those royalties which relate to the retransmission of radio programmes may, when allocated, be accorded to the persons holding the rights in those radio programmes. Consequently, the applicant's assertion that radio programmes are offered for free where an agreement on the retransmission of television programmes has also been concluded does not appear to be well founded. The unreliable calculations made by the applicant in his observations on the statement in intervention cannot weaken that conclusion. Furthermore, the Court could not obtain any further details on this point at the hearing from the applicant's lawyer (see paragraph 18 above).

70. Finally, in so far as this part of the complaint refers to acts of the Netherlands State, namely the grant to Buma of the legal monopoly to represent authors of musical works, it is not necessary to determine whether the complaint submitted

to the Commission was based exclusively on Article 3 of Regulation No 17, or whether it also contained complaints about the Netherlands State, thus requesting the Commission to initiate proceedings under Article 169 of the Treaty or to use the powers conferred on it by Article 90(3) of the Treaty.

71. It is settled case-law that the Commission is not bound to commence proceedings under Article 169 of the Treaty but enjoys a discretion which precludes any right of individuals to require it to take a specific position. Accordingly, as far as proceedings under Article 169 of the Treaty are concerned, persons who have lodged a complaint do not have the possibility of bringing an action before the Community judicature against a decision of the Commission not to take action on their complaint (see the judgment of the Court of Justice in Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraphs 10 to 14; and the order of the Court of First Instance in Case T-84/94 *Bilanzbuchhalter* v *Commission* [1995] ECR II-101, paragraph 23). Secondly, it is settled that the exercise of the power conferred by Article 90(3) of the Treaty to assess the compatibility of State measures with the Treaty rules is not coupled to an obligation on the part of the Commission to take action (judgment of the Court of First Instance in Case T-32/93 *Ladbroke Racing* v *Commission* [1994] ECR II-1015, paragraphs 36 to 38, and also the order of the Court of First Instance in Case T-84/94 *Bilanzbuchhalter* v *Commission*, cited above, paragraph 31). Consequently, legal and natural persons who request the Commission to take action under Article 90(3) do not have the right to bring an action against a Commission decision not to use the powers which it has in this regard.

72. The Court therefore finds that the applicant is not in any event entitled to contest the Commission's refusal to initiate proceedings under Article 169 or to issue a directive or a decision under Article 90(3) of the Treaty. It follows that the question whether the complaint fell outside the scope of Regulation No 17 and, if so, whether the Commission correctly refused to investigate the role of the Netherlands State in this case is not relevant.

73. Consequently, the second part of the second plea must also be rejected.'

The third plea

22 The third plea alleged infringement of Article 155 of the Treaty and Article 3 of Regulation No 17 in that the Commission failed to investigate the compatibility with Community law of the exploitation agreement concluded by Buma with the authors of musical works because the Commission considered that the applicant's complaint did not possess sufficient Community interest (paragraph 35 of the contested judgment).

23 The Court of First Instance rejected that plea on the following grounds:

'78. By this plea the applicant merely contests the Commission's right to decide the priority to be given to a complaint. He does not call into question the grounds on which the Commission rejected the complaint on this point, save in so far as the Commission justified its decision by pointing out the possibility of bringing proceedings before a national court in order to enforce his rights in this regard.

79. It is settled case-law that the Commission is entitled to give different degrees of priority to the investigation of complaints submitted to it (judgment in *Automec II*, cited above, paragraph 83). Moreover, the applicant has not shown that it would actually be impossible for him to bring an action before the national court in order to challenge the alleged abuse of a dominant position by Buma. Furthermore, the Court has no more detailed information on this point which it wished to obtain from the applicant's lawyer at the hearing (...).'

The fourth plea

24 The fourth plea alleged infringement of the obligation to state the reasons upon which a decision is based, since the Commission rejected the complaint without stating the reasons for which Buma's conduct in relation to its members did not justify an investigation of a possible infringement of Article 86 of the Treaty (paragraph 35 of the contested judgment).

25 The Court of First Instance rejected that plea on the following ground:

'83. In accordance with settled case-law, according to which the duty of the Community authority which adopted the measure in question is to disclose in a clear and unequivocal fashion the reasoning it followed so as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and the Community judicature to exercise its review (judgment of the Court of Justice in Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 15), the Court of First Instance considers that the reasoning set out in that regard by the Commission is appropriate, since, as is shown by the Court's reasoning concerning the second part of the second plea (see paragraphs 69 to 73 above) and the third plea (see paragraphs 78 to 80 above), the Court has been able to review the legality of the Commission's reply to the applicant's complaint in so far as it related to the alleged abuse of a dominant position by Buma.'

The claim for compensation

26 The claim for compensation was based on the Commission's alleged infringement of the principle of sound administration, which is said to have caused the applicant's photographic agency in which he acted as intermediary for copyrights in photographic work to go out of business (paragraph 35 of the contested judgment).

27 On the basis of the reasoning set out below, the Court of First Instance dismissed the action for compensation since it considered that neither fault nor damage had been established:

'89. It is settled case-law that the Community cannot be liable under the second paragraph of Article 215 of the Treaty unless a set of conditions, relating to the existence of actual damage, a causal link between the damage claimed and the conduct alleged against the institutions, and the illegality of such conduct (see the judgment of the Court of Justice in Case 4/69 *Lütticke* v *Commission* [1971] ECR 325, paragraph 10), is satisfied.

90. In the present case, it must be examined first of all whether the applicant's claims that the Commission breached the principle of sound administration have been proved.

91. In that regard, the Court observes that the applicant alleges, first, that the Commission omitted clearly to notify the interested undertakings of its wish to see undertakings operating as copyright intermediaries disappear so as to benefit rights societies formed around monopolies in copyrights in musical works and, secondly, that the Commission concealed its intention not to prosecute the cable distribution cartels, while inducing the applicant not to submit a complaint in order to avoid having to carry out an administrative investigation and, eventually, a positive decision, all of which was contrary to the applicant's interests.

92. The Court finds, first, that the applicant has not adduced the slightest evidence or matter to demonstrate that the Commission intended, as alleged, to put undertakings acting as copyright intermediaries out of business.

93. Secondly, the applicant's second complaint against the Commission is unfounded. It follows, first of all, from the correspondence between the applicant and the Commission, as set out in part D of the supplementary appendices lodged by the applicant at the request of the Court, that prior to lodging his complaint on 26 October 1990 the applicant had been aware that the Commission had issued a comfort letter to the parties which had notified the standard agreements.

94. Thus, the applicant put the matter before the Commission for the first time in a letter of 8 August 1985, in which he complained of the "*de facto* monopoly" of "the copyright societies". It was only in his second letter to the Commission, dated 25 August 1985, that the applicant referred to the standard agreements, but without indicating the reason for which he was referring to them. Finally, on 2 June 1989, that is to say after a period of approximately four years, the applicant referred once again to the standard agreements and informed the Commission that he had brought an action in the Netherlands courts in order to have those agreements annulled. On 21 November 1989 the Commission replied that on 16 June 1986 a comfort letter had been sent to the parties to the notified standard agreements and it also informed him that Mr Bloemendaal, a Commission official, would contact him in order to obtain additional information in order to check the current compatibility of the standard agreements with Community competition law. It follows from the foregoing that the Commission informed the applicant of the notification of the standard agreements and the dispatch of a comfort letter six months after receipt of the letter from the applicant which for the first time specifically related to the standard agreements. It should be noted that, at that stage, the applicant had not yet stated that he wished to submit a complaint to the Commission under Article 3 of Regulation No 17 and that the Commission expressly had in mind a supplementary investigation of the agreements in question and had notified the applicant of its intention. The Court therefore considers that the evidence submitted to it by the parties does not establish that the Commission deliberately concealed from the applicant that it had sent a comfort letter to the parties to the standard agreements which had notified them to it.

95. Secondly, a letter from the Commission of 22 May 1992, which refers to a letter from the applicant's lawyer of 19 September 1990 which has not been produced by the parties, shows that the applicant had not yet submitted a complaint at that time because he "eerst door middel van informele contacten de materie

dusdanig wenste te bewerken en rangschikken, dat in een klacht geen onnodige ballast zou behoeven te worden meegevoerd" ("first of all wished to prepare and arrange the matter by means of informal contacts so as not to clutter up a complaint with unnecessary details"). It follows that the period which elapsed between the first letter sent by the applicant to the Commission on 8 August 1985 and the letter addressed by the applicant's lawyer to the Commission on 19 September 1990 must be attributed, according to the documents at the Court's disposal, to the applicant's own decision and that it is, therefore, not the result of the Commission's attitude during that period. Furthermore, the Court observes that, as regards the period after 19 September 1990, even if it were proved to be correct that the Commission attempted in some way to convince the applicant that he should not submit a complaint under Article 3 of Regulation No 17, which the applicant has not proved, the Commission's efforts clearly did not put off the applicant, since he submitted such a complaint on 26 October 1990, that is to say, hardly more than one month later.

96. The applicant has not therefore proved the existence of the facts which he alleges. Consequently, the Court considers that it is not possible to find any fault of such a nature as to render the Community liable under the second paragraph of Article 215.

97. Moreover, as regards the alleged damage, it is for the applicant to produce to the Court the evidence to establish the fact and the extent of the loss which he claims to have suffered (see, to that effect, the judgment of the Court of Justice in Case 26/74 *Roquette Frères* v *Commission* [1976] ECR 677, paragraphs 22 to 24). In that regard, the Court observes that the applicant has merely estimated the alleged damage at HFL 1 500 000, a sum corresponding to five times his annual estimated income, but has not adduced any evidence in support of that claim. It cannot be disputed that such an assessment proves neither the fact nor the extent of the loss for which he is claiming compensation. Consequently, the Court considers that the applicant has not proved the existence of the loss nor, therefore, its extent.'

The appeal

28 In his appeal, the appellant is asking the Court of Justice to set aside the contested judgment and to give a definitive ruling in the case by annulling the decision at issue and ordering the Commission to pay compensation in respect of the harm which he claims to have suffered, together with costs.

29 In support of his appeal, the appellant relied on 22 pleas in law.

Findings of the Court

30 Under Article 119 of the Rules of Procedure, where the appeal is clearly inadmissible or clearly unfounded, the Court may at any time by reasoned order dismiss the appeal in whole or in part.

31 Before considering the pleas raised by the appellant, it should be recalled that, according to settled case-law of the Court, under Article 168a of the EC Treaty and the first subparagraph of Article 51 of the Statute of the Court of Justice of the EC, an appeal may rely only on grounds relating to infringement of rules of law, to the exclusion of any appraisal of facts (see, in particular, Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 12, and order in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraphs 39 and 40).

The first, seventh, eighth, ninth and nineteenth pleas

32 In his first plea, the appellant alleges that the Court of First Instance did not correctly state the facts. In his seventh plea, he alleges that, at paragraph 59 of the contested judgment, it did not reject the Commission's view that 'the cable

transmission agreements at issue provide consumers with a wider range of radio and television programmes and reduce to a minimum the risk of disturbance or interruption of retransmissions as a result of disputes over copyright'. In his eighth and ninth pleas, the appellant alleges that, at paragraphs 60 and 61 of the contested judgment, the Court of First Instance did not reject the Commission's view that 'the conclusion between copyright holders and each cable operator of a collective agreement for the diffusion by cable of television and radio programmes is indispensable in order to improve the effective and lawful retransmission of such programmes'. In his 19th plea, the appellant considers that the Court of First Instance wrongly found, at paragraph 92, that 'the applicant has not adduced the slightest evidence or matter to demonstrate that the Commission intended, as alleged, to put undertakings acting as copyright intermediaries out of business'.

33 All those pleas are based on pure findings of fact by the Court of First Instance, and do not establish that they are vitiated by any factual error. They must therefore be rejected as manifestly inadmissible.

Second, third and twentieth pleas

34 In his second plea, the appellant challenges the finding of the Court of First Instance, at paragraph 7 of the contested judgment, that the 'standard agreements were notified to the Commission on 18 December 1985 for the purpose of obtaining negative clearance or an exemption'. In his third plea, he challenges the account of the hearing set out at paragraph 18 of the contested judgment. In his 20th plea, the appellant challenges the finding of the Court of First Instance, at paragraph 93 of the contested judgment, 'that prior to lodging his complaint on 26 October 1990 the applicant had been aware that the Commission had issued a comfort letter to the parties which had notified the standard agreements'.

35 Here, the appellant simply challenges the accuracy of the facts found by the Court of First Instance without proving or seeking to prove their inaccuracy, particularly as far as the second and twentieth pleas are concerned, in the light of the documents submitted to this Court.

36 Those pleas must therefore be rejected as manifestly inadmissible.

The fourth plea

37 In his fourth plea, the appellant challenges paragraphs 29 and 30 of the contested judgment in which the Court of First Instance considered that it had no jurisdiction to issue directions to the Community institutions, to the Member States or to natural or legal persons or to give a ruling, at the initiative of a natural or legal person, on the compatibility with Community law of a Member State's or an individual's conduct, or to annul, in whole or in part, agreements concluded by individuals.

38 It is sufficient to note here that, at paragraphs 29 and 30 of the contested judgment, the Court of First Instance simply applied the settled case-law of the Court of Justice, to which it expressly referred. The fourth plea must therefore be rejected as manifestly unfounded.

The fifth and sixth pleas

39 In his fifth plea, the appellant challenges the view of the Court of First Instance, set out at paragraphs 39 to 44 of the contested judgment, that the Commission was entitled to reject the complaint on the ground that the agreements to which the complaint related satisfied the conditions of Article 85(3) of the Treaty for the grant of an exemption, even though it had not previously addressed a decision to that effect to the parties to the agreements.

40 According to the appellant, that view is vitiated by an error of law in view of the Commission's task, conferred on it by the first indent of Article 155 of the Treaty, of ensuring that Community law is observed. The appellant takes issue, in particular, with the practice of 'comfort letters', in which the Commission indicates that, in view of the information available to it, it is not necessary for it to take action in respect of an agreement, decision, or practice under Article 85(1) or Article 86 of the Treaty and the file may, therefore, be closed.

41 In his sixth plea, the appellant challenges the view of the Court of First Instance, expressed at paragraph 79, that the Commission was entitled to give different degrees of priority to the investigation of complaints submitted to it.

42 At paragraph 39 of the contested judgment, the Court of First Instance rightly referred to the settled case-law according to which 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 Treaty regarding the existence or otherwise of the alleged infringement (*Gema* v *Commission*, cited above, paragraphs 17 and 18). As the Court of First Instance stated, when a complaint has been submitted to it, the Commission must, on the contrary, examine carefully the facts brought to its notice in order to decide whether they disclose conduct liable to distort competition in the common market and affect trade between Member States and inform the complainant of the reasons for its decision to close the file. The fact that the Commission could have granted an exemption under Article 85(3) of the Treaty in respect of an agreement or concerted practice, even if it breaches Article 85(1), is sufficient reasoning for the rejection of a complaint against that agreement which does not definitively rule on the question whether or not there is an infringement of Article 85(1).

43 Furthermore, it is always possible for an undertaking which considers itself to have been injured by anti-competitive behaviour, particularly when the Commission decides not to pursue its complaint, to take action before the national courts

in order to enforce its rights under Articles 85(1) and 86 of the Treaty, which produce direct effects in relations between individuals (Case 127/73 *BRT and SABAM* [1974] ECR 51, paragraph 16, and, most recently, Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503, paragraph 39).

44 As regards 'comfort letters' — the legal status of which, as the Court observed at paragraph 41 of the contested judgment, was defined by the Court of Justice in particular in the judgment in *Giry and Guerlain and Others*, cited above, paragraph 13 — they are based only on the facts in the Commission's possession, reflect the Commission's assessment of those facts and bring to an end the procedure of examination by the Commission's departments; they do not therefore have the effect of preventing national courts, before which the agreements in question are alleged to be incompatible with Article 85, from reaching a different finding as regards the agreements concerned, on the basis of information available to them. Whilst it does not bind a national court, the opinion expressed in such letters nevertheless constitutes a factor which national courts may take into account in examining whether the agreements or conduct in question are in accordance with the provisions of Article 85.

45 It follows that the fifth and sixth pleas must be rejected as manifestly unfounded.

The sixth plea

46 The sixth plea, which relates to the reasoning set out in paragraphs 56 to 61 of the contested judgment, is in two parts. First, the appellant challenges the Court of First Instance's failure to accept that the application of the standard agreements undermines copyright to the benefit of audiovisual companies. Second, he challenges the ruling that he must bear the burden of proof as regards the manifest error of appraisal allegedly vitiating the decision at issue.

47 As regards the first part, it is sufficient to note that the appellant has not put forward arguments to establish that the reasoning set out in paragraphs 56 to 61 of the contested judgment was vitiated by an error of law.

48 On that point, the plea must therefore be rejected as manifestly inadmissible.

49 As regards the second part, it should be recalled that, in a direct action before the Community court, it is for the applicant to state and to develop the arguments put forward in support of his application (see, in particular, Case 44/76 *Milch-, Fett- and Eier-Kontor* v *Council and Commission* [1977] ECR 393, paragraph 16, and Case 346/82 *Favre* v *Commission* [1984] ECR 2269, paragraphs 31 and 32). In this case, by finding, at paragraph 58 of the contested judgment, that the appellant had not shown that the decision at issue was vitiated by a manifest error of appraisal, in particular in so far as it acknowledged the efficiency of the standard collective agreement as a means of ensuring the lawful retransmission by cable of television and radio programmes, the Court of First Instance correctly applied the rules concerning the burden of proof.

50 It follows that, on this point, the sixth plea must be rejected as manifestly unfounded.

The 10th, 11th, 12th and 13th pleas

51 In his 10th plea, the appellant challenges the Court of First Instance's view, apparent in paragraphs 64 to 67 of the contested judgment, that the Commission did not commit any manifest error of appraisal in considering that the agreements at issue did not eliminate competition. In his 11th, 12th and 13th pleas, the appellant claims that paragraph 69 of the contested judgment, in which the Court of First Instance held that the Commission's determination that no infringement of Article 86 of the Treaty had been established was not the result of a manifest error of appraisal, is not only vitiated by insufficient reasoning but is also factually incorrect in so far as it does not take into account either the distribution of royalties

relating to cable transmissions or the conflict of interests resulting from the fact that whilst Buma enjoys a monopoly in acting as intermediary in the field of musical copyright it has entered into an agreement intended to protect the interests of television broadcasters.

52 It should be recalled that, according to settled case-law, an appeal merely repeating or reproducing verbatim the pleas in law or arguments previously submitted to the Court of First Instance, including those based on facts expressly rejected by that Court, fails to satisfy the requirements under Article 51 of the EC Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court. In reality, such an appeal amounts to no more than a request for re-examination of the application submitted to the Court of First Instance, which, by virtue of Article 49 of the EC Statute of the Court of Justice (see, in particular, the order of 12 December 1996 in Case C-49/96 P *Progoulis* v *Commission* [1996] ECR I-6803, paragraph 25), lies outside the jurisdiction of the Court of Justice.

53 In this case, the appellant is merely repeating the arguments which he raised before the Court of First Instance (see paragraphs 49 and 50 of the contested judgment), without attempting to establish that the Court of First Instance committed errors of law in its assessment. The 10th, 11th, 12th and 13th pleas must therefore be rejected as manifestly inadmissible.

The 14th plea

54 In his 14th plea, the appellant alleges that, in the reasoning of the contested judgment, the Court of First Instance did not refer to the decisions in GEMA [Commission Decisions 71/224/EEC, cited above, and 72/268/EEC of 6 July 1972 concerning a procedure under Article 86 of the EEC Treaty (IV/26.760 — Gema) (English version not available) (JO 1972 L 166 p. 22)].

55 In that respect it is sufficient to note that, since the Court of First Instance's rejection of the plea alleging a manifest error of appraisal is sufficiently reasoned and is not vitiated by any error of law, it was not also required to consider the possible implications of certain Commission decisions in competition matters, even if they were mentioned during the argument before it.

56 The 14th plea must therefore be rejected as manifestly unfounded.

The 15th and 22nd pleas

57 In his 15th plea, the appellant challenges the view of the Court of First Instance, at paragraph 71 of the contested judgment, that individuals 'who request the Commission to take action under Article 90(3) do not have the right to bring an action against a Commission decision not to use the powers which it has in this regard'. In his 22nd plea, the appellant alleges that the Court of First Instance did not address the claim that the cable transmission agreements infringed Article 6 of the Treaty.

58 It is sufficient to note here that the appellant's complaint, on which the Commission decided to take no further action, was based on Article 3(2) of Regulation No 17. Even on the assumption that it contained allegations of infringement by the Kingdom of the Netherlands of Articles 6 and 90(3) of the Treaty, thus taking it outside the scope of that regulation, the Court of First Instance correctly recalled, at paragraph 71 of the contested judgment, that, according to the settled case-law of the Court of Justice, the Commission is not bound to commence proceedings under Article 169 of the Treaty, but enjoys a discretion which precludes any right of individuals to require it to take a specific position.

59 The 15th and 22nd pleas are therefore manifestly unfounded.

The 17th and 21st pleas

60 In his 17th plea, the appellant alleges that the Court of First Instance did not take into account the interests of authors in its reasoning. In his 21st plea, he explains why he did not consider it appropriate to weigh down his application with arguments intended to establish the existence of harm.

61 It is sufficient to observe that the appellant has not substantiated those pleas with any details concerning the alleged breach of rules of law by the Court of First Instance which would enable this Court to assess whether those pleas are founded. In those circumstances, they can only be rejected as manifestly inadmissible.

The 18th plea

62 In his 18th plea, the appellant contends that the Court of First Instance did not examine sufficiently well the complaints he put forward before it concluded, at paragraph 83 of the contested judgment, that the reasoning on which the decision at issue was based was appropriate.

63 It should be noted that, as regards the reasons which led the Commission to find that Buma had not abused its dominant position with respect to its members, the Court of First Instance, at paragraphs 83 and 84 of the contested judgment, rejected the plea based on infringement of Article 190 of the Treaty on the ground that the Commission's reasoning was sufficient to enable it to review the legality of the decision rejecting the appellant's complaint.

64 In so doing, the Court of First Instance undertook a proper review of the Commission's compliance with its duty to state the reasons for acts adversely affecting the persons concerned, the purpose of statements of reasons being, as the Court has consistently held, to enable the Community judicature to review the legality of such acts (*Delacre and Others*, cited above, paragraph 15).

65 It follows that the 18th plea must be rejected as manifestly unfounded.

66 It follows from all the foregoing that the appeal must be dismissed in its entirety.

Costs

67 Under Article 69(2) of the Rules of Procedure, which applies to appeals by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appellant has been unsuccessful, he must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby orders:

1. The appeal is dismissed.

2. The appellant is ordered to pay the costs.

Luxembourg, 16 September 1997.

R. Grass — Registrar

L. Sevón — President of the First Chamber