OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 11 JULY 1979 [1]

Mr President,
Members of the Court,

1. In this case the Court has decided that the oral procedure shall be restricted at the present time to the question of the admissibility of the application. I shall therefore deal only with that question, having first summarized the essential facts.

On 23 July 1971 the German association GEMA (Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte) [the (German) Performing Right Society] made an application to the Commission pursuant to Article 3 (2) of Regulation No 17/62 of the Council for a finding that the Compagnie Luxembourgeoise de Télédiffusion (Radio Luxembourg), the undertaking Radio Music International, also of Luxembourg, and the undertaking Radio Tele-Music, Berlin, had infringed the rules on competition of the EEC Treaty. According to GEMA, the Compagnie Luxembourgeoise de Télédiffusion used its subsidiary, Radio Music International, to conclude contracts with music publishers in the Federal Republic whereby Radio Music International obtained half of the royalties in respect of composers' rights in the musical works published jointly in return for broadcasting such works on its own German-language programme. The Commission, proceeding on the basis of the application, sent to the undertakings concerned, by a letter of 23 January 1974, a notification of the complaints, which consisted in an infringement of Article 86 of the EEC Treaty, and then fixed 23 April 1974 as the date for hearing the parties.

GEMA was kept informed of the developments in the proceedings until the end of April 1974; thereafter it received no further information so that, after four years, in view of the prolonged silence of the Commission, GEMA sent a letter on 31 January 1978 calling on the Commission to take a formal decision and to notify it to GEMA within two months. The Commission replied by a letter of 22 March 1978 which set out its reasoned views in detail; in that letter it was stated *inter alia* that on the basis of the result of its most recent investigations there were no grounds for adopting a decision finding that there had been an abuse of a dominant position by the above-mentioned undertakings. Recent developments in the situation in fact rendered it practically impossible to demonstrate the existence of a dominant position in a substantial part of the Common Market, or the abuse of such a position, by the Compagnie Luxembourgeoise. The Commission, in the same letter, reminded GEMA that, pursuant to Article 6 of Regulation No 99/63 of the Commission, it was entitled to submit comment in writing within two months of notification of its views. The Commission finally stated its view that performing right societies, apart from the

1 — Translated from the Italian.

application of Article 86 of the Treaty, had other means of defending themselves against the distortion of competition arising from radio broadcasts giving favourable treatment to works published by the broadcasters. In this connexion it suggested that GEMA should have a meeting with the officers of the Commission. Subsequently the meeting was held but the solution advanced by the Commission, which entailed an alteration of the constitution of GEMA, was in fact considered impossible by the latter.

On 31 May 1978 GEMA brought an action under Article 175 of the EEC Treaty requesting the Court to declare that the Commission's failure to act was unlawful and to order it to adopt a formal decision in the proceedings to find an infringement which were initiated in 1971 at the applicant's request or that it should inform the applicant that the application had been shelved, if that was the case. The applicant maintains that the Commission's failure to act lies on the one hand in its omission to continue with the proceedings initiated pursuant to Regulation No 17 against the Compagnie Luxembourgeoise de Télédiffusion and the other undertakings connected with it and on the other hand in its failure to notify the applicant under Article 6 of Regulation No 99/63 that its application had been shelved.

On 19 March 1979 the applicant submitted a further application as an alternative in which it requested pursuant to the second paragraph of Article 173 of the EEC Treaty, that, if the Court were to consider the application for failure to act inadmissible it should annul the decision contained in the letter of the Commission dated 22 March 1978 not to continue the proceedings against the Compagnie Luxembourgeoise de Télédiffusion.

The Commission raised an objection of inadmissibility to both the first and second applications.

2. Let us consider first of all the application on the grounds of failure to act. The defendant maintains that this application is inadmissible for two reasons: infringement of Article 38 (c) of the Rules of Procedure in that the Commission has failed to state the legal grounds on which the application is based; and infringement of the second paragraph of Article 175 of the EEC Treaty inasmuch as the condition that the institution should have failed to act was not fulfilled.

The objection based on the alleged infringement of Article 38 (c) of the Rules of Procedure does not appear to me to be well founded. That provision requires that the application should state *inter alia* "the subject-matter of the dispute and the grounds upon which the application is based". In the present case it is possible and easy, bearing in mind the context of the dispute, to discern the provisions on which GEMA relies in support of its proceedings: these are, first of all, Article 6 of Regulation No 99/63 of the Commission which, according to the applicant, constitutes the basis for its right that the proceedings for infringement should be continued to the stage of a formal decision, and the right to be notified of the shelving of the complaint and of the reasons therefor; they further include, in matters of procedure, the second paragraph of Article 175 of the EEC Treaty which confers upon natural or legal persons power to bring an action on the ground of the failure of the institutions to act where the conditions provided for in that article are fulfilled. The complaints of GEMA, as I have described them above, show clearly that these provisions are concerned in that they provide a basis for the statement of the legal grounds upon which the applicant relies: that is to say from the statement (contained in Part III of the application) that the Commission has failed to act by refraining from continuing the proceedings for finding an infringement or from notifying the applicant of the shelving of its complaint. In those

circumstances it must be considered that the condition laid down by the said Article 38 (c) of the Rules of Procedure has been fulfilled.

3. The second ground which the Commission has put forward for the inadmissibility of the application is based on the argument that it did not fail to act after being called upon to do so. I have already had occasion to note that the Commission sent a letter to the applicant dated 22 March 1979 after it had been requested to act and I have referred to its contents. The problem which now arises and with regard to which the parties are naturally at odds, is the legal status of that letter. The Commission maintains that it contains a "definition of its position" within the meaning of the second paragraph of Article 175 and accordingly that the complaint of failure to act, which constitutes the precondition of the application, must therefore fail whilst GEMA takes the view that the value of the letter is purely interlocutory and accordingly cannot constitute a termination of the institution's failure to act.

With regard to the letter in question two points are fairly evident. The first is whether it is in accordance with Article 6 of Regulation No 99/63 of the Commission which provides: "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". In this case perusal of the letter in question is sufficient to show that the Commission clearly stated that GEMA's application could not be accepted, set out the reasons for its attitude with regard to the facts which it had found and finally fixed a time-limit of two months for the applicant's written observations. It is therefore impossible to understand the basis for GEMA's statement that it was not informed of the outcome of the proceedings and of the reasons for the so-called "shelving" of its application. The second finding, then, is that the provision for the applicant of a new time-limit for written observations did not constitute an exercise of a discretion by the Commission but the simple compliance with the requirements of the said Article 6 of Regulation No 99/63. It is clear that further debate is possible on the point whether or not the notification prescribed in that provision has interlocutory value or not; however, such consideration must take place within the framework of the rules of Community procedure in competition matters and cannot be restricted purely to the letter of 22 March 1979 in relation to the case complained of by GEMA. In that connexion I have to add that I do not share the view of the applicant, which considers that the letter had interlocutory value on the further ground that it contained a proposal for a meeting with the Commission's representatives to consider appropriate means for avoiding or reducing the disadvantages stemming from practices such as those of the defendant undertakings. In fact the letter in question falls into two distinct parts: a first, fully in accordance with Article 6 of Regulation No 99/63, to which I have already referred, and a second in which there is a suggestion of cooperation in the interests of GEMA, on the basis of the Commission's fund of experience in the sector in question. This latter part, which is clearly distinct from the former, does not in fact concern the continuation of the proceedings for an infringement

of the rules on competition but on the contrary implies that the proceedings have been concluded.

4. There remain two points of a general nature which it appears essential to settle for the purposes of the present action: clarification of the legal position of a private person who makes an application pursuant to Article 3 (2) of Regulation No 17 — establishing whether he is entitled to obtain a decision from the Commission and, if so, the nature of that decision — and the interpretation of Article 175 of the EEC Treaty in order to clarify the scope of the concept of "failure to act" on the part of the Council or of the Commission which is embodied in that article.

With regard to the first problem it should be noted that Regulation No 17 of the Council, supplemented by the later Regulation No 99/63 of the Commission, has established a procedure for ascertaining infringements of Articles 85 and 86 of the Treaty which is distinguished by certain intermediate stages, the most important of which are investigations by the Commission and the hearing of the parties interested and of third parties. During these stages the Commission may adopt measures which, whilst they do not formally constitute decisions for the purposes of Article 189, nevertheless affect the legal position of the persons to whom they are addressed and do not fall into the category of opinions or recommendations (for example if the measures whereby the Commission permits persons having an interest to be heard, as in Article 19 (2) of Regulation No 17 and Article 5 of Regulation No 99/63, or permits persons to supplement orally their written observations, as in Article 7 of Regulation No 99/63, or summons persons to be heard on a certain date, as in Article 8 of the same regulation). In my view the communication of information required in the said Article 6 of Regulation No 99/63, the content of which I have already had occasion to describe, is to be included amongst such measures; I do not think that communication can be classified as a decision even if it implies that the Commission completed its appraisal of the information supplied by the applicant and that obtained through the inquiry. Its essential feature is in fact the information which is communicated to the applicant concerning the reasons which have led the Commission to shelve the proceedings; with regard to the fixing of a time-limit for the submission by the applicant of any comments in writing this is clearly a subsidiary proceeding whereby it is intended to confer upon the third party the widest possible protection of his own interests and to permit the Commission to re-open the matter if that party provides new elements of fact or presents further legal argument. As a counterpart to the obligation regarding notification imposed on the Commission under that provision it is possible to speak of a right on the part of an individual who has made an application under Article 3 (2) (b) of Regulation No 17 to know the reasons why the Commission considers that there are insufficient grounds for complying with his application and furthermore to be allowed a period within which to submit written observations.

In those circumstances I cannot share the view that the applicant is entitled to obtain from the Commission a measure in the nature of a formal decision on the existence or otherwise of the alleged infringement.

There are three principal considerations which prompt me to reject such a view.

(a) First of all I have to observe that, since every case has its own requirements relating to any inquiry, it would be illogical to grant private individuals the

right to require the Commission to take a final decision in the proceedings when it is for the Commission to appraise with a certain margin of discretion the nature and number of the checks which may be necessary before it adopts a definite standpoint. The implied shelving of the measure provided for in Article 6 of Regulation No 99/63 has on the other hand the advantage of flexibility in that there is nothing to prevent the Commission from re-opening the proceedings if a new factor arises.

(b) Secondly, no support for the view in question can be found in the relevant regulations. It is significant that for the purposes of Article 3 (1) of Regulation No 17 even when the Commission has found that there has been an infringement of Article 85 or Article 86, it *may* (and not "must") by decision require the undertakings concerned to bring such infringement to an end: it retains a discretion to adopt a different course, in particular to issue a recommendation (Article 3 (3)).

With regard to Article 6 of Regulation No 99/63 I have already noted that the communication for which it provides presumes the adoption of a substantive decision on the outcome of the proceedings but, as is made clear in the wording of that article, the right it confers on the individual is not to the decision but rather to be informed of it and of the reasons on which it is based.

(c) Thirdly, it is noteworthy that, even though the procedure laid down by Regulation No 17, beginning with a complaint by a third party, is concluded by a decision finding an infringement and requiring the undertaking concerned to bring such infringement to an end that decision *does not constitute a measure addressed to the third party who has made the application:* the person to whom the measure is addressed is the undertaking which has committed the infringement. This is confirmed in the judgment of 25 October 1977 in Case 26/76 *Metro* ([1977] ECR 1875) in which the Court stated that "it is in the interests of a satisfactory administration of justice and of the proper application of Articles 85 and 86 that natural or legal persons who are entitled, pursuant to Article 3 (2) (b) of Regulation No 17, to request the Commission to find an infringement of Articles 85 and 86 should be able, if their request is not complied with either wholly or in part, to institute proceedings in order to protect their legitimate interests" and that such persons must be considered to be directly and individually concerned, within the meaning of Article 173, by the decision of the Commission (paragraph 13 of the judgment). In fact that judgment, which relates to the possibility provided for in the second paragraph of Article 173 to challenge a decision which "although ... addressed to another person, is of direct and individual concern to" the applicant, thereby excludes a decision adopted in connexion with the infringement of Articles 85 and 86 on the application of a third person from the category of decisions "addressed to" the applicant (which in this case is identical with the third person submitting the complaint). In the foregoing circumstances I consider it proper to maintain that the above-mentioned judgment in the *Metro* case has established that the third person making the application in the procedure under Regulation No 17 is not entitled to demand a decision terminating the proceedings which he has begun: he could claim a right of this nature if the

decision were to be addressed to him but such is not the case.

5. Let us now proceed to the other problem of a general nature which must be considered: the interpretation of Article 175 of the EEC Treaty. As the Court is aware, that article provides that "should the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established". The last paragraph of that article extends that right to bring an action to any natural or legal person who wishes "to complain ... that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion". It is a condition for the admissibility of such an action either by the States, the institutions or by private persons, that the institution concerned should first have been called upon to act, and have failed to define its position within two months thereof.

Two points appear to me of particular importance for the outcome of this case: to establish whether the words "any act other than a recommendation or an opinion" refer by implication only to the category of acts binding on the persons to whom they are addressed which are given in the first paragraph of Article 189 (decisions); and to clarify the meaning of "definition of the institution's position" which may preclude the bringing of proceedings for failure to act. With regard to the first point I consider that the most reasonable and justifiable course, on both lexicographical and logical grounds, is to interpret the word "act" widely. From the literal point of view it is significant that the Treaty prefers this word to the technical expression "decision" which has a clear position in the system of sources of law. It is indeed reasonable to suppose that, if the Community legislature had wished to permit individuals to institute proceedings on grounds of failure to act in relation to decisions only it would have used the appropriate technical expression and not a word like "act" bearing a number of meanings. From a logical point of view, then, it appears to me important to note that in the first paragraph of Article 175 the omission of the Council or of the Commission is described in words having a wide meaning ("should the Council or the Commission, in infringement of this Treaty, *fail to act* ..."). In its turn the request which, pursuant to the second paragraph, must be addressed to the institution in question is described as a request "to act", not "to decide". I am therefore of the view that it is possible to bring proceedings in the form of an application for failure to act against an omission to adopt measures which cannot be identified with the formal structure of a decision, in particular the measures which I have previously mentioned with reference to the procedure under Regulation No 17, *inter alia* the information to be given under Article 6 of Regulation No 99/63 of the Commission.

Logically, that view also affects the reply to be given to the second question in view of the even more general nature of the words "definition of position". If the measure envisaged in the third paragraph of Article 175 required in all cases to be a decision the same argument could be put forward concerning the nature of the "definition of position" mentioned in the second paragraph; however, a wide interpretation of the word "act" indicates *a fortiori* that a wide interpretation must also be given to the words "definition of position". In fact I

consider that the institution in question can also define its position (and thereby rebut the charge of failure to act) by an act which is not in the nature of a decision and therefore by an act which does not terminate the procedure. With regard to this case the conclusion which must be drawn is that the classification of the letter of the Commission of 22 March 1979 is ultimately irrelevant. Whether that letter is considered as information pure and simple or even if it is viewed as an implied decision to shelve the matter (as I have already indicated is my view) the Commission has nevertheless "defined its position" for the purposes of Article 175 and accordingly cannot be charged with having failed to act.

The decisions of the Court of Justice confirm the interpretation which I have placed upon the words "definition of position". The judgment of 13 July 1971 in Case 8/71, *Komponistenverband* v *Commission,* [1971] ECR 705 in fact established that a letter whereby the Commission wrote to an undertaking against which proceedings under Regulation No 17 had been initiated giving it the opportunity of submitting its observations within a certain period pursuant to Article 5 of Regulation No 99/63 constituted "defining its position" for the purposes of the second paragraph of Article 175; accordingly the Commission had not "refrained from acting when called upon by the applicant to do so" and consequently since "the conditions laid down by Article 175" were "lacking" the application must "be dismissed as inadmissible".

There is a further aspect of Article 175 which appears to me to call for comment. We have seen that the purpose of empowering private persons to institute proceedings for failure to act is to make it possible to complain that one of the institutions has *failed to address to the applicant* an act other than a recommendation or an opinion. In my view this means that the failure must arise in relation to an act which should have been addressed to the applicant. On this view there is a clear difference between the third paragraph of Article 175 and the second paragraph of Article 173 concerning applications for annulment. The latter provision in fact provides that "any natural or legal person may ... institute proceedings against a decision addressed to that person" but immediately afterwards provision is also made for that person to institute proceedings "against a decision which, although in the form of a regulation or *a decision addressed to another person,* is of direct and individual concern to the former". The fact that this latter phrase from the second paragraph of Article 173 was not repeated in Article 175 makes it possible to state that the right to institute proceedings for failure to act was conferred on natural or legal persons in a narrower range of cases than for proceedings for annulment; in particular power was withheld from such persons to institute proceedings for failure to act against acts which, whilst of direct and individual concern to them, are not addressed to them.

The difference in scope between the rights to bring actions under the second paragraph of Article 173 and under Article 175 has a comprehensible logic and does not display contradictory aspects. The purpose of the application for failure to act is to obtain a finding from the Court of Justice that the Council or the Commission has failed to act and to oblige the latter, through the authoritative intervention of the Court, to define its position. The application for annulment on the other hand is intended to obtain a judgment affecting an existing act and annulling it. It is accordingly reasonable that the only persons who can bring proceedings for failure to act are the persons to whom the act should have been addressed: these persons have an interest that the Commission should not remain inactive and that interest is sufficiently strong and worthy of protection only in so far as the

interested party is also the person to whom the contested act should have been addressed. It is not reasonable to extend that instrument — which in substance is intended to avoid the clogging of the machinery of justice — to persons who are affected by an act which is nevertheless not addressed to them. If a decision is adopted such persons may institute proceedings against it under the last part of the second paragraph of Article 173: it is in fact appropriate that, in this latter case, where the institution takes positive steps, the applicant should be permitted to challenge them and thereby obtain a review by the Court of the choices made by the Commission.

It is impossible to arrive at different conclusions by referring to the application for failure to act envisaged by Article 35 of the ECSC Treaty. That procedure is in fact different from the application referred to in Article 175 since it is conceived of as a subsidiary aspect of the application for annulment. There are solid grounds for the view that a number of the doubts which arise in the interpretation of Article 175 stem from carrying over into this sphere concepts developed with regard to Article 35 of the ECSC Treaty.

6. Let us take stock of the foregoing considerations. GEMA, having exercised the power conferred by Article 3 (2) (b) of Regulation No 17 of the Council upon natural or legal persons having a legitimate interest, was certainly entitled under Article 6 of Regulation No 99/63 of the Commission to receive the information therein provided for and to be given a time-limit for any further comments in writing. If it had not received that information it would moreover have been entitled to call upon the Commission to act (within the meaning of Article 175 of the EEC Treaty) and if the latter nevertheless failed to reply or to take action the conditions would have been fulfilled for bringing proceedings for failure to act. However, the information was in fact supplied by the Commission through the said letter of 22 March 1978 which, as I have already stated, met in full the requirements prescribed in Article 6 of Regulation No 99/63. In my view the provision of that information constitutes a specific example of the *act* mentioned in the last paragraph of Article 175; accordingly the Commission's failure came to an end at the date of that letter. The act in question could have been challenged within the proper time by an application for annulment since the acts whose legality may be reviewed by the Court of Justice are described in the first paragraph of Article 173 in identical terms with those employed in the last paragraph of Article 175. This view is substantiated by the fact that, in my view, the letter of 22 March 1978 constituted an implied decision to shelve the proceedings initiated against the Compagnie Luxembourgeoise de Télédiffusion and its associated undertakings. GEMA could therefore have requested the annulment of that decision on the basis of the lines laid down in the judgment of 25 October 1977 in the *Metro* case. In any event, that is to say, even though there remained doubts as to the exact status of the letter in question, it nevertheless constituted a definition by the Commission of its position for the purposes of the second paragraph of Article 175; that was enough to defeat the application for failure to act.

GEMA on the other hand had no right to have the Commission adopt a formal decision on the substance of the matter in the proceedings to find an infringement of the rules on competition which was initiated following its application; I have explained above the reasons why this is so. Accordingly,

GEMA had no reason to expect such a decision after receiving the letter of 22 March 1978 even if the nature of that letter did not appear to it to be final. Nevertheless, even if a formal decision on the substance of the matter had been adopted in those proceedings it would not have been *addressed to GEMA;* accordingly GEMA, without such a decision, was not entitled to initiate the procedure for failure to act which is restricted by the last paragraph of Article 175 to the failure to adopt an act addressed to the applicant.

7. We have seen that GEMA also lodged an application in the alternative on 19 March 1979 for the annulment of the decision contained in the Commission's letter of 12 March 1978.

In my view that second application is also inadmissible because it is out of time; at the date when it was in fact lodged it was already well outside the final limit of two months from the receipt of the contested act.

In its pleadings the applicant maintains that the claim for annulment constitutes the raising of a fresh issue based on matters of law which came to light during the written procedure and accordingly must be considered admissible under Article 42 (2) of the Rules of Procedure. The matter of law which has come to light consists, it is claimed, in the judgment of the Bundesgerichtshof [Federal Court of Justice] of 12 December 1978 concerning the same matters as those at issue in the proceedings initiated by the Commission against the Compagnie Luxembourgeoise; in that judgment it is stated *inter alia* that the Commission has refrained from pursuing the said procedure. According to the applicant, this means that the Bundesgerichtshof considered the Commission's letter of 22 March 1978 as a decision concluding the proceedings and that that justifies the late submission of the alternative claim.

That argument does not appear to me well founded. First of all it may be doubted whether the appraisal contained in the judgment of the Bundesgerichtshof as to the legal status of the Commission's letter of 22 March 1978 can constitute a (new) "matter of law" within the meaning of Article 42 (2) of the Rules of Procedure; ultimately it is merely an interpretation of a document given in passing by a national court in explaining the reasons for its own judgment and it has no legal relevance at Community level. I should add that when Article 42 (2) of the Rules of Procedure provides as an exception that a fresh issue may be raised in the course of proceedings, it refers, in my view, to new grounds of fact or of law which serve to support the claim put forward in the act initiating the proceedings whilst in the present case the applicant has submitted what is actually a *new claim.* In fact the applicant in its first application of 30 May 1978 claimed under Article 175 that the Commission should be required to adopt a formal decision or to notify it that the proceedings had been shelved, that is, to define its position with regard to the original application; on the other hand in the second application it claimed under the second paragraph of Article 173 the annulment of the decision not to continue the proceedings against the Compagnie Luxembourgeoise de Télédiffusion: the *object* of the claim is accordingly different in the two cases; the *cause of action* is also different: in the first instance it is based on the Commission's failure to act and in the second on the unlawfulness of the decision adopted by it. There can be no doubt, then, that the second claim is new. I further observe that the alternative claim was in any case submitted after the closure of the written procedure

and accordingly on that ground also falls outside the scope of Article 42 (2).

Finally, I think that it should be noted that the essential conditions for an application for annulment cannot be discerned in the application for failure to act of May 1978; that is, it cannot be maintained that GEMA, in its first application, whilst apparently relying on the failure of the institution to act, had in substance been claiming that a decision should be annulled. The difference between the *objects of the claims* and *causes of action* in the two applications, to which I have already drawn attention, prevents the adoption of such a course.

8. I accordingly conclude by suggesting that the Court of Justice should declare inadmissible both applications, for failure to act and for annulment, lodged by GEMA against the Commission on 30 May 1978 and 19 March 1979 respectively.

With regard to the costs, having regard to the complexity and partial novelty of the points at issue I suggest that under the first subparagraph of Article 69 (3) of the Rules of Procedure the Commission should bear one-third of its own costs and that the applicant undertaking should be ordered to pay the Commission the remaining two-thirds.