On those grounds,

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

Mertens de Wilmars Pescatore O'Keeffe

Everling Mackenzie Stuart Bosco Koopmans

Delivered in open court in Luxembourg on 2 March 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 16 NOVEMBER 1982 [1]

Mr President,
Members of the Court,

The subject of the case on which I am giving my Opinion today is a Commission decision of 29 October 1981 (Official Journal 1981, L 370, p. 49) taken in pursuance of Article 86 of the EEC Treaty and Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-1962, p. 87). It concerns the past conduct of the Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (hereinafter referred to as "GVL"), whose registered office is in Hamburg, in relation to performing artists who were not of German nationality but did have the nationality of one of the Member States of the European Communities or were resident in a Member State. For the purposes of understanding the case I should like simply to recall to mind the main factual and legal points and as regards the details refer the Court to the account given in the Report for the Hearing.

1 — Translated from the German.

GVL engages in the management of so called performers' rights. Such rights derive from the provisions of the German Gesetz über Urheberrecht und verwandte Schutzrechte [Law on Copyright and Related Rights] of 1965 (hereinafter referred to as "the Copyright Law") which introduced them in the form of performers' rights for the protection of performing artists, sound recording manufacturers and broadcasting undertakings. Those performers' rights constitute the reason for the requirement of consent in the case of the *primary exploitation* of the performance, (Paragraphs 74, 75 and 76 (1) of the Copyright Law) whereas in the case of *secondary exploitation* there are only rights to the payment of royalties or fees (Paragraphs 76 (2) and 77 of the Copyright Law). According to Paragraphs 84 and 53 (5) of that Law performing artists may also claim royalties from manufacturers of equipment for the reproduction of works for private use.

According to Paragraph 125 (1) of the Copyright Law performers' rights are vested in German nationals in respect of all performances regardless of where they take place. Non-German nationals are equated with German nationals for the purposes of such rights by virtue of subparagraph (2) of Paragraph 125 subject to the limitations resulting from subparagraphs (3) to (6) thereof and the so called Rome Convention (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 26 October 1961, UNTS 496, p. 44).

GVL, which is the sole German undertaking concerned with the management of claims to royalties and fees arising from *secondary exploitation*, is governed in that capacity by the Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten [Law on the Management of Copyright and Related Rights] of 9 September 1965 (Bundesgesetzblatt I, p. 1294, hereinafter referred to as "the Management Law"). That Law imposes on undertakings which engage in such management and which are subject to official authorization and to official supervision, an obligation to conclude contracts with those having an interest in the exploitation of their work and a *duty of management* towards persons entitled to rights or claims. In relation to the *duty of management* Paragraph 6 (1) of the Law provides that the company set up to exploit and manage rights and claims (Verwertungsgesellschaft) is under an obligation to manage them, within its field of activity, on reasonable terms at the request of their proprietors "where the latter are German nationals within the meaning of the Basic Law or are resident in the area in which the Management Law is in force and where the rights or claims cannot otherwise be effectively exploited."

By letter dated 4 September 1980 the Commission informed GVL that it had, acting on a complaint by Interpar, of London, and on the ground of its finding that GVL had refused to enter into a management contract with an Italian choir, instituted, in pursuance of Article 86 of the EEC Treaty, the procedure provided for in Regulation No 17 of the Council. It alleged that GVL was in breach of the prohibition of abuse of a dominant position on the market by refusing to enter into management contracts with foreign artists not resident in Germany, regardless of whether or not the artists were nationals of Member States of the European Community, or otherwise to manage their performers' rights in Germany. As a result there was evidence to justify the adoption of a decision under Articles 3 (1) and 15 (2) of Regulation No 17. By a letter dated 22 September 1980 the Commission informed GVL of identical complaints made by a number of artists resident in

the United Kingdom and by two artists in France and stated at the same time that these complaints would be joined to the proceedings already begun in the case of Interpar against GVL. In letters dated 5 November 1980 and 9 January 1981 GVL expressed its views on the complaints communicated to it.

On 21 November 1980 GVL had already taken a decision in the following terms:

"Persons entitled who are resident in the Member States of the European Communities shall receive, on application, GVL's general management contract even though they are not resident in the Federal Republic of Germany, including West Berlin. The previous practice, followed by GVL pursuant to Paragraph 6 of the Management Law, is irrevocably terminated."

The hearing prescribed in Article 19 of Regulation No 17 of the Council and in the provisions of Regulation No 99/63/EEC of the Commission of 25 July 1963 (Official Journal, English Special Edition 1963-1964, p. 47) took place on 12 February 1981. Then on 29 October 1981 the Commission adopted the decision now at issue (Official Journal 1981, L 370, p. 49) which was communicated to GVL on 9 November 1981. After the Commission's express finding in the decision that GVL had, by amending its articles of association and its standard management contract, put an end to its discrimination against artists without German nationality, in so far as nationals of the Member States or artists resident in a Member State were concerned, Article 1 of the decision reads as follows:

"GVL's conduct prior to 21 November 1980, characterized by its failure to conclude management agreements with foreign artists where the latter were not resident in Germany, or otherwise to manage performers' rights vested in such artists in Germany, constituted, in so far as such artists possessed the nationality of a Member State of the European Communities or were resident in a Member State, an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty."

GVL brought an action against that decision on 8 January 1982 and requested that it be declared void on the grounds of infringement of essential procedural requirements in the proceedings prior to the decision, of the Commission's lack of competence to take the decision and of infringement of Article 86 of the EEC Treaty.

My opinion on these claims is as follows:

A — The question of the Commission's competence to take the decision

In the context of its formal objections the applicant complains in the first place that the Commission is not "competent" within the meaning of the first paragraph of Article 173 of the EEC Treaty because, in adopting the contested decision, it exceeded its powers under the Treaty or Regulation No 17. It is therefore necessary, in considering this question, first of all to examine more closely the contents of the decision and its effect by reference to the reasons on which it is based.

In the operative part of the decision it is found that GVL's refusal prior to 21 November 1981 to manage the performing rights of foreign artists who

were not resident in Germany but had the nationality of a Member State or were resident in a Member State constituted an infringement of Article 86 of the EEC Treaty.

As can be seen from paragraph 71 of the decision the Commission adopted the decision on the basis that the applicant had put an end to its abusive conduct as from the above-mentioned date and the Commission did not therefore adopt a decision, pursuant to Article 3 of Regulation No 17, requiring the infringement to be terminated but, on the basis of that provision, limited itself to an express finding of unlawful conduct on the part of the applicant prior to that date.

At the same time, in paragraph 74 of the decision, the Commission considered that Article 3 of Regulation No 17 applied with regard to the adoption of a declaratory decision because GVL *"still considers* itself justified, in view of the *uncertain legal position,* in excluding artists not having German nationality or a residence in Germany from availing themselves of its management services" (emphasis added). The paragraph continues: "A decision is therefore needed to clarify the legal position, both for the benefit of the complainants and in order to prevent identical or similar infringements in future."

In other words although the Commission proceeded on the basis that GVL had brought its infringement to an end by the decision of its general meeting it still feared on the other hand — clearly as a result of a subsequent closer reading of the decision of the meeting and because of GVL's practice in regard to the exploitation of rights — a recurrence of the abuse and therefore considered it necessary to adopt a declaratory decision to clarify the existing legal position. In addition it is significant in this connection that the Commission decided, in the exercise of its discretion under Article 15 (2) (a) of Regulation No 17, not to impose a fine, in pursuance of that provision, in respect of GVL's past conduct.

It therefore becomes necessary to examine whether the Commission was empowered by Article 3 of Regulation No 17 or by any other provision to adopt a decision of this kind, with the effects described above, where, on the one hand, the infringement had already been terminated during the administrative proceedings and, on the other hand, no fine had been imposed. Such a decision is not open to objection only if, first, the Community competition rules in principle permit such a declaration even after the termination of the infringement and, secondly, the specific circumstances of the individual case do not exclude the possibility of such a declaration.

I. The question of the admissibility of a declaration after termination of the infringement

Both the applicant and the Commission agree that neither the provisions of the EEC Treaty nor implementing Regulation No 17 deal expressly with the question whether the Commission has power to declare by means of a decision that an undertaking has infringed the competition rules of the Treaty in the past. It is the applicant's view that Regulation No 17, however, contains a catalogue of sanctions which cannot be extended or applied by analogy, with the consequence that the Commission was not competent to adopt a declaratory

decision after the event. On the other hand the Commission's view is that such competence may be inferred by way of interpretation from the EEC Treaty and Regulation No 17. By virtue of Article 3 of Regulation No 17 the Commission is empowered to adopt decisions requiring infringements to be brought to an end, and Article 15 thereof confers on it the additional power to impose fines. Consequently the Commission must also be entitled to adopt a purely declaratory decision of the type with which the Court is concerned here, on the basis, that the "major premise includes the minor", in order to fill a gap in the powers of decision expressly provided for in Regulation No 17. Finally the Court's case-law on that regulation also shows that powers do not only exist when they have been granted *expressis verbis.*

1. In examining these *legal arguments* in detail, it is necessary to bear in mind first of all the *principle of limited individual competence* which governs Community law and finds its expression in Article 4 of the EEC Treaty, according to which each institution may act only within the limits of the powers conferred upon it by the Treaty.

(a) The Commission's powers in this context derive from Article 155 of the EEC Treaty according to which the Commission is, in the manner provided for in the Treaty, *inter alia* to have its own powers of decision and to exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter. By virtue of Article 89 (1) of the EEC Treaty the Commission's *primary competence* includes ensuring the application of the principles laid down in Articles 85 and 86 of that Treaty. If it finds that there has been an infringement then, by virtue of the third sentence of Article 89 (1), it is to propose appropriate measures to bring it to an end. Next, it is clear from paragraph (2) of that article that the Commission can record, in a decision, the existence of such infringement only if it has not been brought to an end. It follows *per contra,* as the applicant rightly states, that according to these rules the Commission is not competent to adopt a decision if the infringement has been brought to an end in good time.

The Commission's *delegated powers* in the field of competition law are to be found in Regulation No 17. Article 3 (1) of that regulation, upon which the Commission bases the adoption of the decision, reads as follows:

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

It follows from paragraph (3) of the same article that the Commission may also, however, without prejudice to the other provisions of the regulation, and before adopting a decision under paragraph (1), address to the undertakings or association of undertakings concerned *recommendations* for the termination of the infringement. It is clear from a synoptic view of Article 3 that if the Commission makes recommendations for the termination of the infringement but the infringement is not brought to an end, it may adopt a decision requiring the infringement to be terminated. Conversely, however, it follows, as the Court indirectly made clear in the *Cement Dealers' Association*

case [1] and in the *EMI Records* case, [2] that as soon as an infringement has been terminated and there is no danger of its repetition there is no longer any room for a decision requiring it to be brought to an end as there would then be nothing to which it could relate.

(b) Furthermore, the same conclusion may also be drawn from the meaning and purpose of the provision which, inasmuch as it requires the undertakings in questions to "bring to an end" the infringement recorded by the Commission, is intended to ensure that the actual market behaviour of the undertakings shall correspond *in the future* to the requirements of a system of undistorted competition. Consequently there is nothing in the provision in question to justify the inference — even on the basis that the major premise includes the minor — that it confers a power to adopt measures which do not relate exclusively to the termination of the infringement but are intended to punish past conduct.

(c) Furthermore, as the applicant, in my opinion rightly, points out, the history of Regulation No 17 is not the least of the factors which show that the Council did not wish to confer a *purely declaratory power* on the Commission. Articles 7 and 8 of the Commission's *draft* regulation in particular make it clear that originally the Commission considered it necessary that the procedures for recording an infringement and for requiring its termination should be separated. Accordingly, Article 17 of the draft contained separate methods of announcing the decision depending on whether it was declaratory or required the termination of an infringement. The Internal Market Committee of the European Parliament also agreed with the Commission's proposals and considered it desirable that there should be a power to adopt a decision declaring "whether one or more undertakings is abusing a dominant position within the meaning of Article 86 of the Treaty". [3] However, as the final text of Regulation No 17 shows, the Council did not espouse this principle of separation but instead, in Article 3 of the regulation, attached importance only to the power to require infringements to be terminated and in that context provided only for the incidental finding of an infringement. In view of this text, which in this respect is clear, it seems to me to be difficult to accept the view advocated by the Commission that the division of the power to declare the existence of and require the termination of an infringement into two separate powers was abandoned only for reasons of draftsmanship.

(d) Nor is it possible to infer from Article 15 (2) of Regulation No 17 that the Commission has a power to make findings, by way of a decision, on the competitive conduct of undertakings in the past. That provision confers on the Commission the power to impose fines and is, together with the decision, under Article 3 of the regulation, requiring an infringement to be brought to an end, the most important instrument for enforcing the prohibitions laid down in Articles 85 and 86. It follows, as the Court made clear in the *Buchler* case, [4] from the object and purpose of that provision, namely to punish unlawful

1 — Judgment of 17 October 1972 in Case 8/72 *Vereeniging van Cementhandelaren* v *Commission of the European Communities* [1972] ECR 977.

2 — Judgment of 15 June 1976 in Case 51/75 *EMI Records Limited* v *CBS (UK) Limited* [1976] ECR 811, at p. 848.

3 — European Parliament, Session Documents 1961-1962, Document 57, pp. 37 and 38.

4 — Judgment of 15 July 1970 in Case 44/69 *Buchler & Co.* v *Commission of the European Communities* [1970] ECR 733, at pp. 760 and 761.

conduct and to prevent its recurrence, that the Commission's power to impose sanctions may still be exercised even when the conduct constituting an infringement and the possibility of detrimental effects no longer exist. However, the factual requirements which lead to a declaratory decision or to a decision imposing a fine are fundamentally different in so far as the imposition of a fine requires proof of intention or negligence, elements which are not necessary for a declaratory decision or for one requiring termination of an infringement under Article 3 of the regulation. Thus this is another situation where the Commission cannot rely on the argument that "the major premise includes the minor" and point to the fact that it would otherwise always be bound to impose a fine.

With regard to these arguments it must also be noted that in applying Article 15 the principles of criminal law which generally apply in the Member States have to be taken into account and one of those principles is that no punishment may be imposed where there are doubts as to the facts or guilt. Thus it is also not permissible, in a situation where such doubts exist, whilst refraining from imposing a fine, none the less to have recourse to the milder remedy of the declaratory decision which, as the Commission admits, also has to a certain degree the *effect of a sanction* by virtue of its being published in the Official Journal.

(e) Whilst the interpretation of the Treaty and of the relevant provisions of Regulation No 17 shows that there is no *express* power to adopt appropriate declaratory decisions, it still remains to be considered whether this gap can be filled by recourse to *analogy*, as suggested by the Commission. Such a procedure, however, would be contrary not only to the institutional principle of "compétence attribuée" [conferred competence] to which I have already referred, but also, on the one hand, to the *presumption of competence in favour of the national authorities* arising from Article 88 of the EEC Treaty until the Council has adopted provisions to implement Articles 85 and 86, and, on the other, to the *principle of the preservation of legal certainty*, consistently recognized by the Court in its decisions, a principle which is closely linked with the principles that the administration shall act within the law and that provisions laying down penalties must make it possible to foresee what conduct is prohibited. It follows, however, from those principles, which are part of the legal systems of all the Member States and are therefore also part of Community law, that the authorities may adopt measures to the disadvantage of the citizen or impose penalties only if they are expressly empowered to do so by the legislature. This is precisely what is missing in the present case. If the *effect of a sanction* produced by the publication of the declaratory decision, to the detriment of the undertaking in question, is considered, it must be concluded that, in conformity with the principle, whose applicability in competition law was indirectly acknowledged by the Court in the *Hoffmann-La Roche* case, [1] of the certainty and foreseeability of penal provisions, such action may be taken only on the basis of an express and precisely delimited enabling provision. In that respect the list of sanctions contained in Regulation No 17 must be regarded as closed and incapable of extension by analogy.

(f) Nor, in particular, does the case-law of the Court provide grounds for any conclusions to the contrary. In

1 — Judgment of 13 December 1979 in Case 85/76 *Hoffmann-La Roche & Co. AG* v *Commission of the European Communities* [1979] ECR 461.

the Commission's view the Court's order in the *Camera Care* case [1] makes it clear that in the Court's view, too, it is not necessary for a particular power to be conferred *expressis verbis* but that the provisions in Regulation No 17 which deal with the question of competence may be the subject of interpretation. But that case solely concerned the question whether the Commission could exercise its supervisory power in competition matters by interim measures pending the decision on the substance of the case. The Court gave an affirmative answer to that question on the ground, *inter alia*, that it was essential, as regards the *right to take decisions conferred* upon the Commission by Article 3 (1) of Regulation No 17, that it should be exercised in the most efficacious manner best suited to the circumstances of each given case. It therefore proceeded on the basis that such a power of decision existed and only considered the question to what extent the Commission could, under the supervisory power conferred upon it, adopt interim protective measures in order to avoid irreparable damage. In order to enable the Commission to fulfil its tasks effectively and to ensure the effectiveness of the decision the Court did, in the result, acknowledge that the Commission had such power, but subject to very strict conditions, and it expressly indicated that such measures could only be taken having regard to the legitimate interests of the undertaking concerned by them.

Nor does the second decision quoted by the Commission in support of its contention, the judgment in the *BP* case, [2] contain anything of relevance to the problem with which we are concerned. That case, like the present one, concerned a purely declaratory decision by the Commission in respect of a past infringement of Article 86 of the EEC Treaty which was challenged under Article 173 of the Treaty. In answer to the applicants' corresponding submission the Court however merely held, as regards the *admissibility of the application*, that the absence of pecuniary sanctions in a decision does not preclude the addressee from having any interest in obtaining a review by the Court of the legality of that decision. As however the question of the Commission's power to make such a decision had not been raised in that case and as the decision had to be declared void on other grounds, the Court saw no reason to define its position on that question. There is therefore no justification here for the conclusion that a declaratory decision is permissible because the Court has reviewed its legality.

2. Thus on the basis that the Commission has no competence to adopt a purely declaratory decision relating to the past, the practical needs which, in further argument, it puts forward as militating in favour of such competence, are basically irrelevant in the context of the *legal review* which the Court has to undertake. I am therefore able to restrict myself to a brief consideration of the

1 — Order of 17 January 1980 in Case 792/79 *Camera Care Limited* v *Commission of the European Communities* [1980] ECR 119.

2 — Judgment of 29 June 1978 in Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV and Others* v *Commission of the European Communities* [1978] ECR 1513.

validity of the arguments adduced by the Commission in that respect.

In the Commission's view such competence is indispensable in order to enable it to implement competition policy efficiently. In this respect it relies primarily on the *informative effect* of publication for the undertaking in question itself, for its trading partners and ultimately for other undertakings acting in a similar or identical manner.

(a) With regard to this argument it must be observed that Article 21 (1) of Regulation No 17, which provides for the publication of decisions adopted pursuant to Articles 2, 3, 6, 7 and 8, in fact presupposes that the Commission is exercising the powers of decision conferred upon it by those provisions. Thus a desired publicity effect *alone* cannot establish a competence to adopt a decision, especially in view of its detrimental effect on the undertaking in question.

Although, as the Commission rightly points out, the Court stated in the *Chemiefarma* case [1] that the publicity given to a Commission decision in competition matters may contribute to ensuring the observance of the rules of the Treaty on competition, that statement did not in fact relate to a situation where there was no power of decision but, to the contrary, was concerned with the situation where a decision adopted pursuant to Article 15 of Regulation No 17 had been published in the Official Journal whereas Article 21 did not prescribe the publication of such a decision. If any conclusion in relation to the present case can be drawn from that judgment it is, on the contrary, as the applicant rightly points out, that precisely because the Court attributed to publication the effect of an additional sanction that effect must comply with the strict and conclusive catalogue of rules on competence and legal protection.

Furthermore, as a final observation on this question, by virtue of the fourth paragraph of Article 189 of the EEC Treaty, a decision basically serves to regulate an individual case and does not primarily seek to make a finding on an abstract question of law. What is more, the informative effect desired by the Commission can also be achieved by a decision not to proceed with the matter, which is released to the press or published in the Official Journal and in which the Commission may state that the proceedings are discontinued following the termination of the practice which in its view was objectionable. With reference to one of the Commission's other arguments, there is no need for legal protection against such a decision.

(b) Finally, as regards any *litigation* between the undertakings affected and other undertakings before national courts, such publication in the press or a communication of the Commission published in the Official Journal in relation to the clarification of an abstract legal question would have the same effect as that of a decision, which, too, in this respect, does not have the value of a precedent but only an *evidential* value.

(c) Finally, I am likewise not convinced by the Commission's argument that such a purely declaratory decision is

1 — Judgment of 15 July 1970 in Case 41/69 *ACF Chemiefarma NV* v *Commission of the European Communities* [1970] ECR 661, at p. 692.

indispensable in order to deal effectively with the *danger of recurrence.* If it is shown that there is such a danger, it is open to the Commission, as I have already said, to adopt a decision pursuant to Article 3 (1) of Regulation No 17 forbidding an infringement. On the other hand as regards the preclusive effect claimed by the Commission for a procedure culminating in an objective declaration, it is precisely that effect for which no provision is made in the Community rules on competition, the aim of which is to put an end to specific infringements. But if, after the proceedings have been discontinued, an undertaking resumes the behaviour to which objection was originally taken, this conduct, too, may ultimately be taken into account in the later proceedings when the subjective aspects of the wrongdoing are considered.

3. On the Commission's argument that the adoption of purely declaratory decisions censuring the past conduct of the undertakings in question accords with its long-standing administrative practice, I need only say that in any event such a practice cannot create any customary right to impose sanctions on the undertakings concerned.

II. The question whether the specific circumstances of this case exclude the possibility of a declaration

Quite apart from the fact that in my opinion the Commission had in principle no power under Article 3 (1) of Regulation No 17 to take a decision merely declaratory of a past infringement, which was terminated long before the taking of the decision, without levying a fine or imposing any other obligations, the following consideration points with even greater force to the conclusion that the Commission had no competence to adopt such a decision precisely in *this* case.

It must be remembered that the Commission, when it adopted the decision, proceeded on the basis that the applicant's abusive conduct which was the subject of complaint had already been terminated prior to the hearing of the parties and that therefore it expressly limited the decision to the situation prior to 21 November 1980. It is, however, clear from the report prepared by the Commission on the essential statements of the persons heard in this case on 12 February 1981 and from the observations made on that report and sent to the Commission by the applicant's Counsel, Dr P. Mailänder, that the applicant explained the decision of its general meeting of 21 November 1980 in the sense that in future its management services were to be extended "also to foreign artists from *Community States* without the additional requirement of residence in Germany" (emphasis added). Whilst this formulation still leaves room for doubt whether only foreign artists who were nationals of a Member State of the European Community were meant or also those who were merely resident in a Member State, it is clear from a further passage from the report that the applicant's future practice in regard to the exploitation of rights was intended to extend only to the former group. Thus at page 16 of that report it is stated: "Dr Mailänder requests that it be put on record that GVL will adhere to its new practice in regard to the exploitation of rights of making no distinction between [German] nationals and *foreigners who are nationals of the Member States of the Community.*" (emphasis added). Thus it had been possible for the Commission to

take cognizance of the change in the applicant's conduct in regard to management at least as from the date of the hearing. If, when it adopted its decision on 29 October 1981, that is to say approximately eight months later, it was still of the opinion, in the light of the notice of objections, that this new practice in regard to the exploitation of rights constituted an infringement of the prohibition of abuse of a market position it should have taken a decision pursuant to Article 3 of Regulation No 17 requiring the infringement to be brought to an end. For that reason there was in any event no longer any purpose in this case in issuing a declaration decision — quite apart from the fact that the applicant's new practice as regards the exploitation of rights was satisfactory to the complainants and that the artists concerned had been given retroactively the possibility of sharing in the royalties. Furthermore the Commission seems to me to admit this indirectly when it now raises the question whether it would have been appropriate to have included in its decision an express obligation to terminate the infringement. It submits *inter alia* that such decisions of general meetings are by their nature not irrevocable, but it must be remarked that it was possible for it to have been already aware of this when it adopted the decision, with the result that, had it feared that there was a danger of repetition, it could also have adopted a decision imposing an obligation.

Instead it chose a different course and expressly acknowledges in the statement of the reasons on which the decision is based that the applicant had, as from 21 November 1980, *terminated* the infringement complained of by amending its articles of association and its standard management contract. With knowledge of the facts forming the basis of the hearing, it thus proceeded on the assumption that the applicant's practice since 21 November 1980 in regard to the exploitation of rights no longer infringed the prohibition contained in Article 86 of the EEC Treaty. Nevertheless it did not discontinue the proceedings but adopted the declaratory decision with which we are now concerned. The reason which it gave for the need for such a decision was that the applicant *still considered* itself justified, in view of the uncertain legal position, in excluding artists not having German nationality or a residence in Germany from availing themselves of its management services. Apart from the fact that this new *general* objection does not correspond to the facts, it does not relate to any past infringement but to *conduct* on the part of the applicant *which may occur in the future.* For, as stated in paragraph 74 of the decision, the purpose of the decision is *inter alia* "to prevent identical and similar infringements in future."

A glance at the list of measures available to the Commission under Regulation No 17 to combat conduct harmful to competition clearly shows, however, that the power to take decisions is conferred upon it only in relation to an *existing* infringement of the competition rules and that the regulation does not provide for any power to take purely *preventive* measures. However, just such a measure is involved in this case which, at least in the Commission's view, is characterized by the fact that the infringement recorded in the notice of objections had been terminated.

As a final comment it may be pointed out that, in addition, the applicant had no opportunity to comment on these

objections in intervening administrative proceedings. In that respect the Commission is also at fault for infringing the *fundamental rule that a person must be given an opportunity to be heard*, as reflected, in particular, in Articles 2 and 4 of Regulation No 99/63 (Official Journal, English Special Edition 1963-1964, p. 47), and the decision must be declared void not least of all on this ground too.

B — On the other submissions

Since I am convinced that the decision must be declared void because of the aforesaid defects I do not consider it appropriate to examine the other complaints as regards form and substance made by the applicant. This is so in particular as regards the applicant's complaint that Article 86 had been incorrectly applied, which would require a thorough discussion of the arguments put forward and is not to be dealt with as a side-issue in a few sentences. Should the Court not declare the decision void for the reasons I have given I would request an extension of time to enable me to present my views in particular with regard to the substantive complaint.

C — In view of the foregoing considerations I propose that the Court should declare void the decision of the Commission of the European Communities of 29 October 1981 relating to a proceeding under Article 86 of the EEC Treaty (IV/29.839 — GVL; Official Journal, L 370 of 28 December 1981, p. 49) and order the defendant to pay the costs pursuant to Article 69 (2) of the Rules of Procedure.

FURTHER OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 11 JANUARY 1983 [1]

Mr President,
Members of the Court,

In my Opinion of 16 November 1982 I concluded that the Commission was not competent to adopt its decision of 29 October 1981 relating to a proceeding under Article 86 of the EEC Treaty (IV/29.839 — GVL, Official Journal, L 370 of 28 December 1981, p. 49), the main features of which I explained at length, and that therefore there were already formal grounds for declaring the decision void. I am still of that opinion but as the Court has requested me to consider the merits of the applicant's other complaints as well I will now give my views.

1 — Translated from the German.