JUDGMENT OF THE COURT (Third Chamber)

23 April 2009 *

In Case C-425/07 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 14 September 2007,

AEPI Elliniki Etaireia pros Prostasian tis Pnevmatikis Idioktisias AE, established in Maroussi (Greece), represented by T. Asprogerakas Grivas, dikigoros,

appellant,

the other party to the proceedings being:

Commission of the European Communities, represented by F. Castillo de la Torre and T. Christoforou, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: Greek.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh, J. Klučka, U. Lõhmus and A. Arabadjiev (Rapporteur), Judges,

Advocate General: P. Mengozzi,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 15 October 2008,

after hearing the Opinion of the Advocate General at the sitting on 27 November 2008,

gives the following

Judgment

1 By its appeal, AEPI Elliniki Etaireia pros Prostasian tis Pnevmatikis Idioktisias AE ('AEPI') seeks to have set aside the judgment of the Court of First Instance of the European Communities of 12 July 2007 in Case T-229/05 *AEPI* v *Commission* ('the judgment under appeal') which dismissed as unfounded its action for annulment of Commission Decision SG-Greffe (2005) D/201832 of 18 April 2005 rejecting the complaint submitted by the appellant concerning an alleged infringement of Articles 81 EC and/or 82 EC by the Greek bodies Erato, Apollon and Grammo which collectively manage rights related to copyright in the field of music ('the contested decision').

Background to the dispute

2 It is apparent from paragraphs 1 to 12 of the judgment under appeal that the facts underlying the dispute may be summarised as follows.

3 The appellant is a limited company governed by Greek law which carries out its activities in the sector for the protection of intellectual property rights in the field of music in Greece.

4 On 3 March 1993, the Hellenic Republic adopted Law 2121/1993 on copyright, related rights and cultural issues (FEK A' 25/4.3.1993) ('Law 2121/1993'). Under Article 54 of that law, authors may entrust the management or protection of their intellectual rights to collective management bodies, whose activities are conditional on an authorisation issued by the Greek Ministry of Culture. Article 58 of that law states that the provisions of Article 54 are applicable by analogy to the management and protection of related rights.

5 The applicant requested an authorisation for all the copyright and related rights in the field of music. However, the Greek Ministry of Culture granted it an authorisation which was limited to the collective management of copyright in musical works.

6 Three Greek bodies for the collective management of related rights, namely Erato, Apollon and Grammo ('the three bodies'), obtained authorisation in respect of the collective management of the related rights, respectively, of singers, performance musicians and producers in the recording and/or film industry.

7 On 22 March 2001, the applicant sent to the Commission of the European Communities a complaint relating to the Hellenic Republic and the three bodies. It maintained, first, that the three bodies were infringing Articles 81 EC and 82 EC in so far as they were abusing their dominant position and creating agreements and concerted practices (taken together, 'the practices complained of'), and requested, secondly, that the Hellenic Republic be brought before the Court for infringement of Article 81 EC on the ground that Law 2121/1993 permitted those bodies to engage in the practices complained of.

8 In its complaint, the applicant maintained that the remuneration for the related rights had been set at too high a level, which went up to 5% of the gross income of Greek radio and television broadcasters. That conduct constitutes an infringement of Articles 81 and 82 EC, which causes it serious and irreparable damage inasmuch as the undertakings concerned are not in a position to pay those excessive amounts, thus depriving the applicant of the royalties it seeks in respect of the copyright.

9 By letter of 7 December 2004, the Commission split the complaint into two parts for legal and procedural reasons with one part relating to the Hellenic Republic and the other to the three bodies.

10 On 18 April 2005, after having taken into account the applicant's arguments, the Commission rejected the complaint relating to the three bodies by means of the contested decision on the ground of lack of Community interest.

11 The relevant considerations on which the contested decision is based are worded as follows:

'In the present case, the alleged infringement is unlikely seriously to impede the proper functioning of the common market, given that all the parties involved are established in Greece and pursue their activities in that country alone. It is not foreseeable that that situation will change, that is to say, that the three … bodies will start to pursue their activities in other countries in the near future, in view of the structure of the markets providing services for the protection of related rights and the practical difficulties of such an undertaking. Moreover, the effects of the alleged practices are felt only in the Greek market. Contracts for rights to use music are concluded only with radio and television broadcasters and other users in Greece. The three … bodies are empowered to act only in respect of the protection of related rights in Greece and do not, in practice, have the possibility of exercising such powers outside that country.

Secondly[,] in order to demonstrate that an infringement may have occurred, the Commission is required to undertake a complex investigation into the conditions prevailing in the market in question and the available alternatives. First, given that, on the one hand, Greek law (in accordance with Directive 92/100/EEC [of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61)]) provides that a single remuneration is to be paid for all related rights and, on the other, that the alleged infringement arises from the fact that the three … bodies make a collective demand to the user for payment of that remuneration, the Commission would have to demonstrate that effective methods exist by which it is possible to seek payment of the single remuneration separately. Second, the Commission [would have] to show [not only] that the three … bodies held a collective dominant position [but also], according to the judgments of the Court in [Case 395/87] *Tournier* [[1989] ECR 2521] and [Joined Cases 110/88, 241/88 and 242/88] *Lucazeau* [*and Others* [1989] ECR 2811], investigate the relative levels of fees charged in respect of copyright and related rights in all the countries of the European Union, the respective bases on which the calculations are made, the criteria employed and the conditions which prevail in the Greek market by comparison with [the markets] in other European countries.

Moreover, it must be made clear that your company has the opportunity available to it of making its own complaints to the national authorities. In particular[,] it may bring a case before the Greek competition authority. On account of its in-depth knowledge of the conditions prevailing in the national market[,] the Greek competition authority is perfectly capable of dealing with your complaint. The fact that all the parties involved and all the music users in question are established in Greece and pursue their activities in the Greek market adds greater significance to its detailed knowledge of the conditions in the local market. Furthermore, those authorities have competence to apply Articles [81 EC and 82 EC] in the same way as the … Commission.

It must therefore be concluded that the extent and complexity of the measures of investigation necessary in order to determine whether the conduct of the three … bodies … complies with the Community competition rules are disproportionate in relation to the very minor importance of any infringement [in terms of] the functioning of the common market. The case does not, therefore, present the level of Community interest necessary for the Commission to open an investigation.'

12 Lastly, on 20 April 2005, the Commission decided to take no further action on the part of the complaint relating to the Hellenic Republic's alleged failure to fulfil its obligations. The action brought by AEPI against that decision was dismissed by the order of the Court of First Instance of 5 September 2006 in Case T-242/05 *AEPI* v *Commission*, the appeal against which was itself dismissed by the order of the Court of Justice of 10 July 2007 in Case C-461/06 P *AEPI* v *Commission*.

The proceedings before the Court of First Instance and the judgment under appeal

13 In its action for annulment of the contested decision before the Court of First Instance the appellant relied on two pleas in law alleging a manifest error of assessment of the Community interest of the practices complained of and infringement of the obligation to state reasons.

14 As regards the first plea, the Court held, in paragraph 38 of the judgment under appeal, that, as regards the Commission's powers in handling complaints, the assessment of the Community interest raised by a complaint concerning competition depends on the factual and legal circumstances in each case, which can differ considerably from case to case, and cannot be carried out by reference to predetermined criteria which are of mandatory application. The Court added that the Commission is responsible, in the context of its task of ensuring the application of the principles laid down in Articles 81 EC and 82 EC, for defining the orientation of and implementing Community competition policy and, for that purpose, has a discretion as to the manner in which it handles those complaints.

15 The Court pointed out, in paragraph 40 of the judgment under appeal, that, in order to assess the Community interest, the Commission must strike a balance between the effects of the alleged infringement on the functioning of the common market, the likelihood of its being able to establish the existence of such an infringement and the extent of the investigative measures necessary to fulfil, to the best of its ability, the task of ensuring the observance of Articles 81 EC and 82 EC.

16 In this case, the Court stated, in paragraphs 45 and 46 of the judgment under appeal, that, in the contested decision, the Commission had decided on the basis of three grounds that the practices complained of lacked Community interest, namely that they were incapable of seriously impeding the proper functioning of the common market, that the Commission would be required to undertake a complex investigation into market conditions in order to establish that the alleged infringement had occurred and that the competent national authorities could ensure that the applicant's rights and interests were protected. The Court pointed out that, in its action for annulment of the contested decision, the applicant had challenged only the first of those grounds.

17 The Court then examined the first plea in the following words:

'47 Consequently, the Court's analysis must be restricted to the arguments by which the applicant disputes the contention that there were no adverse effects on trade between Member States, maintaining that the imposition of excessively high fees in respect of related rights is a practice that may affect the common market within the meaning of Articles 81 EC and 82 EC, even though it is confined to Greek territory.

48 In that connection the Commission took the view, first, that all the parties involved in the case were established and pursued their activities in Greece, secondly, that it was unlikely that the activities of the three … bodies could be extended to other countries and, thirdly, that the music users were Greek nationals and that the powers of the three … bodies were confined to Greek territory.

49 It must be stated at the outset that the points of fact and law put forward by the appellant are not capable of establishing that the practices complained of affected the pattern of trade between Member States in a manner which might harm the attainment of the objectives of a single market. The applicant does no more than refer to the financial difficulties suffered by companies managing copyright and music users in Greece and in all the Member States, but fails to substantiate its own claims or even to adduce suitable evidence for that purpose.

50 As regards the applicant's argument that the fact that the royalties of Greek and foreign authors are paid over to companies established in the European Union has the effect of seriously impeding the proper functioning of the common market, it is clear that the powers of the three … bodies are confined to Greek territory and, therefore, it is essentially users of music in that territory and Greek authors who suffer the alleged adverse effects of the practices complained of.

51 As regards the arguments that the Court has already held that infringements confined to the territory of one Member State may constitute infringement of the rules of competition, it must be pointed out that, in the cases which gave rise to those decisions, the effect on trade between Members States stemmed from either concerted action by national copyright-management societies, with the effect that they systematically refused to grant direct access to their repertoires to foreign users (*Lucazeau and Others*, paragraph 17, and *Tournier*, paragraph 23), or the exclusion of all potential competitors on the geographical market consisting of one Member State (Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 70). Consequently, the cases relied on do not have aspects in common with the present case.

52 As regards the alleged requirement of uniformity and proportionality between the Member States as far as concerns royalties, which was set out in the judgment in SENA [Case C-245/00 *Stichting ter Exploitatie van Naburige Rechten (SENA)* [2003] ECR I-1251], it must be pointed out that, in that judgment (paragraph 34) the Court, on the contrary, made a ruling to the effect that there was no Community definition of equitable remuneration and that there were no objective reasons to justify the laying down by the Community judicature of methods for determining what constitutes such remuneration.

53 Lastly, as regards the argument that the Commission acknowledged that there had been infringement of Articles 81 EC and 82 EC, it is clear from the letter of 10 December 2004 and from the contested decision that it is unfounded since the Commission did not acknowledge that such infringement had occurred.

54 In the light of the foregoing, the applicant has not adduced any specific evidence to establish the actual or potential existence of serious impediments to the proper functioning of the common market.

55 Consequently, the applicant has failed to demonstrate that, in the contested decision, the Commission made a manifest error of assessment by considering that the effects of the practices that the applicant complained of were felt for the most

part, or even entirely, in the Greek market and, accordingly, were unlikely to affect trade between Member States within the meaning of Articles 81 EC and 82 EC.

56 Consequently, the first plea must be rejected as unfounded.'

18 As regards the second plea, and in particular the head of claim that the Commission did not express a view on the documents and arguments submitted as a whole, the Court of First Instance held that the Commission was only required to set out the legal considerations which were of fundamental importance for the taking of the decision. According to the Court of First Instance, the Commission had set out the specific grounds for the rejection of the complaint with the clarity required (paragraphs 62 and 63 of the judgment under appeal).

19 Accordingly, the Court of First Instance rejected the action in its entirety.

Forms of order sought

20 AEPI claims that the Court should:

— set aside the judgment under appeal;

— rule on the merits in accordance with the form of order sought by the applicant in the first instance case or refer the case back to the Court of First Instance for a new ruling, and;

— order the Commission to pay the costs in their entirety.

21 The Commission contends that the appeal should be dismissed and that the applicant should be ordered to pay the costs.

The appeal

Admissibility

22 The Commission disputes the admissibility of the appeal and submits that all the grounds of appeal in essence repeat the arguments and evidence that the appellant submitted at first instance without specifically identifying the errors of law which vitiate the judgment under appeal.

23 In that regard, it must be borne in mind that, under the second subparagraph of Article 225(1) EC and the first paragraph of Article 58 of the Statute of the Court of Justice, an appeal is limited to points of law and must lie on the grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant or the infringement of Community law by the Court of First Instance.

24 It is also apparent from the case-law that, provided that the appellant challenges the interpretation or application of Community law by the Court of First Instance, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the Court of First Instance, an appeal would be deprived of part of its purpose (see Case C-240/03 P *Comunità montana della Valnerina* v *Commission* [2006] ECR I-731, paragraph 107, and, inter alia, the orders in Case C-488/01 P *Martinez* v *Parliament* [2003] ECR I-13355, paragraph 39, and Case C-338/05 P *Front National and Others* v *Parliament and Council* [2006], paragraph 23, summary published at ECR I-88).

25 Furthermore, an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (see *Comunità montana della Valnerina* v *Commission*, paragraph 105, and, inter alia, the orders in *Martinez* v *Parliament*, paragraph 40, and *Front National and Others* v *Parliament and Council*, paragraph 24).

26 It must be stated in that regard that the appellant identified certain paragraphs of the judgment under appeal, in particular, paragraphs 38, 41 to 43, 44 and 54 against which it set out legal arguments seeking to show that the Court of First Instance had erred in law.

27 The plea of inadmissibility must therefore be rejected.

Substance

28 In support of its appeal, the appellant relies on five grounds of appeal. By its first ground of appeal, it alleges failure to state the grounds of the judgment under appeal as regards the Commission's discretion when examining complaints lodged with it. By its second

to fourth grounds of appeal, the appellant submits in essence that the judgment of the Court of First Instance is unfounded and contains no statement of grounds as regards the finding that trade between Member States is unaffected. Lastly, by its fifth ground of appeal, the appellant submits that the judgment under appeal contains an error of law inasmuch as even a potential effect on trade between Member States is sufficient for Articles 81 EC and 82 EC to apply.

The first ground of appeal

— Arguments of the parties

29 The appellant claims that there was failure to state the grounds in paragraph 38 of the judgment under appeal in so far as the Court of First Instance did not examine whether the Commission stayed, in the contested decision, within the bounds of its discretion in handling competition complaints lodged with it. The fact that the Commission is accorded such a discretion in that connection does not justify the dismissal of the action because the discretion in question may not be exercised in an arbitrary manner.

30 The Commission contends that the Court of First Instance stated specific and full grounds for its assessment according to which the Commission stayed, in the contested decision, within the bounds of its discretion.

— Findings of the Court

31 The Court of First Instance was right to hold, in paragraph 38 of the judgment under appeal, that the Commission is responsible for defining and implementing Community competition policy and for that purpose has a discretion as to how it deals with complaints lodged with it (see to that effect Case C-119/97 P *Ufex and Others* v *Commission* [1999] ECR I-1341, paragraphs 88 and 89).

32 However, it cannot be deduced from that that the Court of First Instance failed to examine whether the Commission had exercised that discretion within the limits established by the case-law.

33 After pointing out, in paragraph 39 of the judgment under appeal, that, according to settled case-law, when the Commission decides upon certain priorities in examining complaints brought before it, it may decide on the order in which those complaints will be examined and refer to the Community interest residing in a particular case as being the predominant criterion, the Court of First Instance stated, in the next paragraph of that judgment, that, in order to assess the Community interest, the Commission must take into account the circumstances of the particular case and, in particular, the matters of fact and of law which are submitted to it in the complaint brought before it, by weighing up the effects of the alleged infringement on the functioning of the common market, the likelihood of being able to establish the existence of such an infringement and the extent of the investigative measures necessary.

34 In that regard, the Court of First Instance pointed out that it is for it to determine, inter alia, whether it is apparent from the contested decision that the Commission weighed up those factors (paragraph 41 of the judgment under appeal).

35 In the paragraphs of the judgment under appeal that followed, the Court of First Instance carried out precisely such an investigation.

36 In particular, the Court of First Instance examined, in paragraphs 46 et seq. of that judgment, whether the Commission was right to find that the practices complained of were unlikely seriously to impede the proper functioning of the common market in order to conclude that there was a lack of any sufficient Community interest to necessitate the investigation of a complaint by the Commission.

37 In so doing, the Court of First Instance subjected the conditions under which the Commission exercised its discretion to judicial review.

38 In those circumstances, it cannot be alleged that the Court of First Instance did not examine whether the Commission stayed, in the contested decision, within the bounds of its discretion when handling complaints lodged with it. The judgment under appeal is not, therefore, vitiated by failure to state the grounds in that regard.

39 Accordingly, the first ground of appeal must be rejected as unfounded.

The second to fourth grounds of appeal

— Arguments of the parties

40 The appellant's second to fourth grounds of appeal, which it is appropriate to examine together, relate to the Court of First Instance's findings that, where the effects of an infringement are felt only in the territory of one Member State, the Commission is entitled to reject a complaint for lack of Community interest on the ground that that infringement does not affect intra-Community trade.

41 By its second and third grounds of appeal, the appellant claims, in particular, that there were errors of assessment or failure to state the grounds in paragraphs 41 to 43 of the judgment under appeal. Furthermore, the appellant alleges that the Court of First Instance based its finding, in paragraph 44 of that judgment, on case-law which is not concerned with copyright, without taking into consideration a series of relevant judgments which show that intra-Community trade may be affected even where the infringement occurs exclusively in the territory of one Member State.

42 In its fourth ground of appeal, the appellant submits that Articles 81 EC and 82 EC do not automatically preclude intra-Community trade from being affected if the infringement takes place in the territory of one Member State. Furthermore, it disputes the finding in paragraphs 49 and 50 of the judgment under appeal that it failed to adduce evidence capable of establishing, first, that the practices complained of have an effect on the pattern of trade between Member States which might harm the attainment of the objectives of a single market and, secondly, that the damage allegedly caused by those practices is not suffered essentially by music users in Greek territory and Greek authors. It relies, in that regard, inter alia, on the following evidence:

— around 4 500 undertakings which used music and regularly paid royalties ceased to broadcast music on account of the prices imposed by the three bodies in respect of the related rights (5% for the related rights, a percentage which must be compared with the 2.2% requested by the appellant in respect of the copyright). Furthermore, as the Monomeles Protodikeio Athinon (Court of First Instance (single judge), Athens) stated in its judgment No 5144/2005, the appellant received a sum of EUR 5 522 per annum in respect of the royalties payable for the music broadcast in Olympiaki Aeroporia's aeroplanes, whereas the three bodies asked that airline company for a sum of EUR 627 563 per annum in respect of the related rights payable for that music, and

— the conduct described above affects intra-Community trade in the field of copyright and related rights because around 50% of the music broadcast in Greece is foreign music. Furthermore, authors of foreign music which is broadcast in Greece are all represented in that Member State by the appellant which collects their royalties for them there. They are thus deprived of significant revenue on account of the exorbitant prices imposed by the three bodies.

43 According to the Commission, it is apparent from the detailed statement of grounds in the judgment under appeal that, contrary to what the appellant claims, the scope of the activities of the three bodies and their practices did not give rise to the slightest suspicion that those activities have a perceptible effect on intra-Community trade.

— Findings of the Court

44 It must be borne in mind at the outset that, according to settled case-law, the Court of First Instance has exclusive jurisdiction to find the facts, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts. That appraisal thus does not, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice (see Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, paragraph 29, and Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraph 35).

45 Consequently, it is not possible to uphold the arguments put forward by the appellant, in particular in the context of its fourth ground of appeal, which seek to show that trade

between Member States is affected, namely the fact that it collects royalties in Greece relating to the use of music not only of Greek authors, but also of authors established in other Member States of the European Union, and the fact that it pays the royalties collected, on the basis of reciprocal representation agreements, to equivalent bodies established in other Member States, which are responsible, like AEPI, for the collective management of copyright in musical works.

46 First, those arguments are all of a purely factual nature and cannot, therefore, be examined by the Court on appeal.

47 Secondly, the appellant has not claimed that the Court of First Instance distorted the clear sense of some of the evidence.

48 Thirdly, the appellant confines itself to disputing the Court of First Instance's finding that it did not establish that the practices complained of are capable of affecting intra-Community trade. However, the submissions relied on are in any event irrelevant given that such an effect does not in itself give rise to serious impediments to the proper functioning of the common market. It is important to point out in that regard that the Court of First Instance rejected the appellant's first plea in support of its action for annulment and found that it had not adduced any specific evidence to establish the actual or potential existence of serious impediments to the proper functioning of the common market.

49 It must be pointed out in that regard that the concepts of, first, an effect on intra-Community trade and, secondly, of serious impediments to the proper functioning of the common market are two separate concepts.

50 As regards the first concepts, it is apparent from the wording of Article 81 EC and 82 EC that those Articles are applicable to agreements restricting competition and abuse of a dominant position only if those agreements and that abuse may affect intra-Community trade. The effect on trade between Member States thus serves as a criterion to define the scope of Community competition law, in particular Articles 81 EC and 82 EC, as against that of national competition law. If it is established that the alleged infringement is not capable of affecting intra-Community trade or of affecting it only in an insignificant manner (see, to that effect, Case C-238/05 *Asnef-Equifax et Administración del Estado* [2006] ECR I-11125, paragraph 34 and the case-law cited, and Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 90 and the case-law cited), then Community competition law, and more specifically Articles 81 EC and 82 EC, do not apply.

51 Furthermore, it is apparent from settled case-law that, if an agreement between undertakings is to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that it has an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in a manner which might harm the attainment of the objectives of a single market between Member States (see to that effect, inter alia, *Dalmine*, paragraph 90).

52 As for the concept of serious impediments to the proper functioning of the common market, it may constitute one of the criteria for evaluating whether there is sufficient Community interest to necessitate the investigation of a complaint by the Commission.

53 Therefore, when the Commission determines the order of priority for dealing with the complaints brought before it, it may legitimately refer to the Community interest. In this context, it is required to assess in each case how serious the alleged interferences with competition are and how persistent their consequences are. That obligation means

in particular that it must take into account the duration and extent of the infringements complained of and their effect on the competition situation in the European Community (*Ufex and Others*, paragraph 93).

54 Consequently, in a situation where intra-Community trade is found to be affected, a complaint relating to infringement of Articles 81 EC and 82 EC will be investigated by the Commission rather than by the national competition authorities if there is sufficient Community interest. That may inter alia apply where the infringement complained of is capable of giving rise to serious impediments to the proper functioning of the common market.

55 Although it is true, in that regard, that, in the judgment under appeal, the Court of First Instance did not draw a clear and specific distinction between those two concepts but confused them, as the Advocate General pointed out in paragraphs 40 to 45 of his Opinion, that finding cannot give rise to the annulment of that judgment if the operative part of the judgment is shown to be well founded for other legal reasons (see to that effect, inter alia, Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, paragraph 28, and Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraph 58).

56 It is apparent inter alia from a combined reading of paragraphs 49, 50 and 54 of the judgment under appeal that the operative part of that judgment appears to be based on grounds which can be summarised by the finding made by the Court of First Instance in paragraph 54 of the judgment that the applicant had not adduced any specific evidence to establish the actual or potential existence of serious impediments to the proper functioning of the common market.

57 It follows from that that, irrespective of the considerations in the judgment under appeal relating to the issue of the effect on intra-Community trade for the purposes of Articles 81 EC and 82 EC, the Court of First Instance dismissed the action on the basis that there was no specific evidence to establish the actual or potential existence of serious impediments to the proper functioning of the common market as a criterion for evaluating whether there is sufficient Community interest to necessitate the investigation of a complaint by the Commission.

58 Therefore, it cannot be claimed that the confusion characterising the judgment under appeal, which was not, moreover, raised by the appellant in its appeal, is such as to preclude an understanding of the grounds underlying that judgment with a view to challenging its validity or a review by the Court.

59 Likewise, while it is true that the Court of First Instance found, in paragraph 55 of the judgment under appeal, that the applicant had failed to establish that, in the contested decision, the Commission had made a manifest error of assessment by considering that the effects of the practices complained of were unlikely to affect trade between Member States within the meaning of Articles 81 EC and 82 EC, although the Commission did not, in fact, take a view on that issue, the fact none the less remains that that finding does not concern the concept of serious impediments to the proper functioning of the common market.

60 Furthermore, having regard to the fact that the Commission did not handle the issue of the effect on trade between Member States in the contested decision, it is important to point out that that finding of the Court of First Instance does not preclude the competent national authorities from applying Articles 81 EC and 82 EC in the present case.

61 As regards the argument the appellant put forward on the basis of the Court's case-law in the context of its second and third grounds of appeal, which is mentioned in paragraph 41 of the present judgment, it is clear that the case-law thus relied on is not relevant to the present case.

62 The judgments to which the appellant refers, namely those in Case 22/78 *Hugin Kassaregister and Hugin Cash Registers* v *Commission* [1979] ECR 1869; *Tournier*;

Lucazeau and Others; Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889; Case C-18/93 *Corsica Ferries* [1994] ECR I-1783; and *RTE and ITP* v *Commission*, all deal with the concept of the effect on trade between Member States for the purposes of Articles 81 EC and 82 EC.

63 The only judgment cited by the appellant which deals with the concept of serious impediments to the proper functioning of the common market, namely the judgment in Case T-5/93 *Tremblay and Others* v *Commission* [1995] ECR II-185, is likewise not relevant to the present case. It is apparent from paragraph 40 of that judgment that the Court of First Instance annulled a decision of the Commission on the ground of failure to state reasons in so far as that decision rejected complaints about an alleged partitioning of the domestic market as a result of the reciprocal representation contracts concluded between the copyright-management societies in the various Member States. Those are not the circumstances of the present case.

64 Accordingly, the second to fourth grounds of appeal must be rejected.

The fifth ground of appeal

— Arguments of the parties

65 The appellant disputes the finding in paragraph 54 of the judgment under appeal that it did not adduce any specific evidence to establish the actual or potential existence of serious impediments to the proper functioning of the common market. According to the appellant, Articles 81 EC and 82 EC do not require the actual existence of an impediment as a potential impediment is sufficient. In that regard it submits, relying on certain evidence most of which has already been adduced in the context of the fourth

ground of appeal, that the potential effect on intra-Community trade is clear. Consequently, the Court of First Instance erred in its interpretation of Articles 81 EC and 82 EC.

66 The Commission contends that the appellant is misreading paragraphs 42, 48 to 50, 54 and 55 of the judgment under appeal, as the reference which the Court of First Instance made to the 'actual or potential' existence of serious impediments to the proper functioning of the common market must be assessed in the light of the evidence adduced by the appellant.

— Findings of the Court

67 In its fifth ground of appeal, the appellant criticises the Court of First Instance's finding, in paragraph 54 of the judgment under appeal, that it did not adduce any specific evidence to establish the actual or potential existence of serious impediments to the proper functioning of the common market, but confined itself to attempting to show that the practices complained of potentially affect intra-Community trade for the purposes of Articles 81 EC and 82 EC.

68 As is apparent from paragraph 48 of the present judgment, even if the practices complained of potentially affect intra-Community trade for the purposes of Articles 81 EC and 82 EC, as the appellant claims, such an effect does not in itself entail the potential existence of serious impediments to the proper functioning of the common market.

69 Consequently, the fifth ground of appeal must be rejected as irrelevant.

70 Having regard to the foregoing, the appeal must be dismissed in its entirety.

Costs

71 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 of those rules, 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 Commission has applied for costs and the appellant has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. **Dismisses the appeal.**

2. **Orders AEPI Elliniki Etaireia pros Prostasian tis Pnevmatikis Idioktisias AE to pay the costs.**

[Signatures]