cases, relates only to the performance in non-member countries of contracts entered into in the territory of a Member State by parties within the jurisdiction of that State does not preclude the application of Article 86 of the Treaty.

Kutscher O'Keeffe Touffait

Mertens de Wilmars Pescatore Mackenzie Stuart Koopmans

Delivered in open court in Luxembourg on 25 October 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 4 OCTOBER 1979

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Cour de Cassation of France.

The appellant before that Court is a company called Greenwich Film Production, which, despite its name, is a French company, having its head office in Paris. Its business is, as its name indicates, that of producing films. I shall call it "Greenwich".

There are two respondents.

The first is the Société des Auteurs, Compositeurs et Éditeurs de Musique, or "SACEM", which is the French equivalent of the Belgian "SABAM", of the German "GEMA" and of the British Performing Right Society. It too has its head office in Paris.

The second respondent is the Société des Éditions Labrador, which is a music publisher, also carrying on business in Paris. I shall call it "Labrador". Labrador is closely associated with a firm called "Les Éditions Francis Dreyfus", which is

also a music publisher in Paris, and which I shall call "Dreyfus".

The question referred to the Court by the Cour de Cassation, though expressed in general terms, is narrow in scope. The Cour de Cassation asks this Court to rule "on the application of Article 86 of the Treaty of Rome in relation to the performance in third countries of contracts entered into in the territory of a Member State by parties within the jurisdiction of that State".

In order to understand how that question arises, and also why both the SACEM and the Commission evinced anxiety, during the course of the argument before us, that Your Lordships should answer it warily, one must look, in some detail, at the facts of the case and at the history of the litigation that has led to the reference.

The case is essentially about royalties payable in respect of the use of the copyright in the music written for two films produced by Greenwich, namely "Adieu l'Ami" and "Le Passager de la Pluie". The composer of the music for "Adieu l'Ami" was Mr François de Roubaix. The composer of the music for "Le Passager de la Pluie" was Mr Francis Lai. We were told that both are distinguished French composers, and that indeed Mr Lai composed the very famous music of "Un Homme et une Femme".

Mr Lai joined the SACEM in 1954. Mr de Roubaix joined it in 1961. After joining, each of them executed an assignment in favour of the SACEM of which the essential terms were these:

"... je fais apport à la SACEM, pour le monde entier, du droit exclusif, qui m'est accordé par les lois françaises et étrangères sur la propriété littéraire et artistique, d'autoriser ou d'interdire, dans le cadre et les limites de son objet social, tel qu'il est défini par l'article 4 des Statuts de la Société, l'exécution ou la représentation publique de toutes mes oeuvres présentes et futures, quelle que soit la nature ou la source d'audition ou de vision publique (notamment interprétation directe, enregistrements, radiodiffusion, télévision, films cinématographiques, etc. ...).

La SACEM bénéficiera, également, de toutes les prorogations, quelle qu'en soit la nature ou la source, dont le droit en cause pourrait être l'objet."

The assignment executed by Mr Lai was dated 28 September 1958; that executed by Mr de Roubaix 9 January 1962. Thus both were executed after the entry into force of the EEC Treaty.

(See Annexes 1 and 2 to the Observations of Greenwich and Annexes 6 and 7 to the Observations of the SACEM).

It appears that, as the "Statuts" and "Règlements" of the SACEM then stood, members were bound to make such wide assignments of their rights, except that, so the Commission told us, the "Statuts", even then, contained the proviso, which they still contain, that:

"... les Membres de la Société ont la faculté de conserver le droit d'autoriser ou d'interdire la reproduction de leurs oeuvres dans les films destinés à la projection dans les théâtres cinématographiques et pour lesquels ces œuvres ont été spécialement écrites."

By a contract datet 25 June 1968 Mr de Roubaix assigned to Dreyfus his copyright in all countries in the music of "Adieu l'Ami". That assignment was however expressed to be made subject to the prior rights of the SACEM, of

which, it appears, Dreyfus was also a member, as a music publisher. The contract provided for royalties to be paid by Dreyfus to Mr de Roubaix, but not for every kind of use of the copyright. In particular the contract seems to have excluded any liability on the part of Dreyfus to pay royalties to Mr de Roubaix for the use of his music as part of the sound track of a film where that use would entitle him to a royalty from another source. Possibly that was intended to exclude liability for royalties on the part of Dreyfus in circumstances in which Mr de Roubaix would be remunerated through the SACEM. (Annex 12 to the Observations of the SACEM is a copy of the contract).

On 2 July 1968, i.e. about a week later, a contract was entered into between Greenwich (called therein "Le Producteur") and Labrador (called "L'Éditeur"). It was in many ways a strange contract. Among other things it nowhere mentioned the SACEM. Its essential terms seem to have been these:

"3) Le Producteur bénéficiera à titre exclusif du droit de reproduction et du droit de représentation de l'œuvre musicale composée par Monsieur François de Roubaix pour le film 'Adieu l'Ami', en vue de son exploitation cinématographique, télévisuelle ou par tous procédés audiovisuels connus ou inconnus à ce jour, et ce pour le monde entier et pour le temps que durera la protection légale y rattachée tant en vertu des législations en vigueur en France et à l'Étranger (sic).

4) L'Éditeur se chargera de l'Édition de l'œuvre musicale par tout autre procédé que ceux précédemment énumérés dans l'article 3). S'il a recours, pour les éditions, à des tierces personnes, il devra tenir informé le Producteur sur les conditions auxquelles il traitera.

5) L'Éditeur garantit que les droits d'auteur de Monsieur François de Roubaix sont libres de toute autre cession. Il garantit également au Producteur l'exercice paisible du droit cédé et s'engage à faire respecter ce droit et à le défendre dans toutes atteintes qui lui seraient portées."

(Annex 3 to the Observations of Greenwich and Annex 4 to the Observations of the SACEM are copies of the contract).

On 4 November 1969 and 5 February 1970 respectively similar contracts were entered into between, on the one hand, Mr Lai and Dreyfus and, on the other hand, Greenwich and Labrador, relating to the music for "Le Passager de la Pluie". (See Annex 4 to the Observations of Greenwich and Annexes 5 and 13 to the Observations of the SACEM).

The SACEM has two methods of recovering royalties in respect of the copyright in the music of films. In many countries, referred to as "statutory countries" ("pays statutaires"), it recovers them directly from exhibitors. All the Member States of the Community are "statutory countries". As regards other countries, referred to as "non-statutory countries" ("pays non statutaires"), the SACEM charges the producer of each film 3% of the moneys obtained by him on the sale or hire of the film for showing there. Some French producers are parties to an agreement between their trade association, the "Chambre Syndicale des Producteurs et Exportateurs de Films Français", and the SACEM under which the charge is

reduced to 2.5 %, but Greenwich is not among them (Annex 1 to the Observations of the SACEM contains a copy of that agreement).

On 25 October 1971, the SACEM, having failed to obtain any payment from Greenwich in respect of sales of "Adieu l'Ami" and of "Le Passager de la Pluie" for showing in a number of "non-statutory countries", brought an action against Greenwich in the Tribunal de Grande Instance of Paris for 3% of the proceeds of those sales. Greenwich caused Labrador to be joined as a third party in that action. On 26 April 1974 the Tribunal gave judgment in favour of the SACEM against Greenwich, and allowed in part Greenwich's third-party claim against Labrador (Annex 2 to the Observations of the SACEM).

No point of Community law was raised before the Tribunal.

Greenwich appealed against the judgment of the Tribunal to the Cour d'Appel of Paris.

In 1970 the Commission had instituted proceedings under Article 86 of the Treaty and Article 3 of Regulation No 17 against the GEMA, the SABAM and the SACEM. In the case of the GEMA the proceedings culminated in a Decision of the Commission dated 2 June 1971 amended by a further Decision dated 6 July 1972 requiring the GEMA to modify its rules in a number of respects (Official Journal L 134 of 20 June 1971 and Official Journal L 166 of 24 July 1972). The SABAM and the SACEM modified their rules voluntarily to comply with the Commission's requirements. The SACEM did so, it appears, in stages, the last set of modifications being made on 11 June 1974.

The main purposes of the modifications that the Commission required the SACEM to make were these:

(a) to eliminate from its rules discrimination against nationals of other Member States;

(b) to enable a member to assign to the SACEM part only of his rights: the Commission considered that an author or composer should be free to entrust the care of different categories of his rights in different countries to different performing right societies;

(c) to reduce the length of time for which a member was bound to the SACEM.

The correctness of the Commission's approach was to a substantial extent confirmed by the Judgment of this Court in Case 127/73 *BRT* v *SABAM* [1974] 1 ECR 313.

Prompted, in appears, by the decisions of the Commission in the GEMA case and of this Court in *BRT* v *SABAM*, Greenwich, in the Cour d'Appel, took a new point. This was to the effect that the assignments executed in favour of the SACEM by M. Lai and M. de Roubaix, on which the SACEM's claim was based, were invalidated by Article 86. Greenwich contended that the SACEM, at the time when those assignments were executed, was an undertaking having a dominant position in a substantial part of the common market, namely France; that the SACEM, in requiring from its members the assignment of all their rights for the whole world and for a long

period, had abused that dominant position; and that such abuse affected trade between Member States, because it made it more difficult for members of the SACEM to resort to the services of performing right societies in other Member States.

Greenwich also submitted that, for the same reasons, the activities of the SACEM should be held contrary to French legislation for the safeguard of competition, namely Article 59 bis of an Ordonnance, No 45-1483, of 30 June 1945 (which was inserted by a Decree, No 53-704, of 9 August 1953) as subsequently amended.

(See Annex 5 to the Observations of Greenwich).

The Cour d'Appel delivered judgment on 7 May 1976 affirming the judgment of the Tribunal. In dealing with Greenwich's point on Article 86, the Cour d'Appel said first that, if it had to adjudicate on the merits of that point, it would hold it bad for the same reasons as it held bad Greenwich's point on Article 59 bis of the Ordonnance of 30 June 1945. Those reasons were that Greenwich's contentions amounted merely to a broad assertion that the SACEM, by requiring an assignment, for the whole world and for a long period, of all categories of rights, had abused its dominant position, but that there was nothing to show or to suggest that the activities of the SACEM had, or had had, as their object, or could have, or had had, as their effect, to hinder the normal functioning of the market, and therefore that they could be, or have been, of an abusive nature. The Cour d'Appel went on, however, to reject the Article 86 point as inadmissible on the grounds that the action was between French corporations and was about the financial consequences of contracts to be performed outside the territory of the European Community; that it was neither proved nor alleged that that contractual situation might affect trade between Member States; and that any invalidity of the assignments in question under Community law was irrelevant in litigation which in no way concerned the Community. (Annex 3 to the Observations of SACEM is a copy of the Judgment).

It is against that Judgment that Greenwich now appeals to the Cour de Cassation.

The question referred by the Cour de Cassation to this Court is confined, Your Lordships remember, to the application of Article 86 "in relation to the performance in third countries of contracts entered into in the territory of a Member State by parties within the jurisdiction of that State". Its narrow scope may be a consequence of the narrowness of the reasons on which the Cour d'Appel rested its Judgment and of the limited nature of the Cour de Cassation's own powers. At all events the narrowness of the scope of the question caused concern, as I mentioned at the outset, both to the SACEM and to the Commission.

The SACEM was at pains to emphasize before us that no French Court had found that any of the conditions for the application of Article 86 was satisfied. There was no finding that the SACEM was an "undertaking" within the meaning of that Article; no finding that it had at any relevant time a dominant position in any part of the common

market; no finding that it had abused any such position; and of course no finding that any such abuse might have affected trade between Member States. The fear expressed on behalf of the SACEM was that a ruling by this Cour substantially to the effect that the Cour d'Appel had wrongly interpreted the reference in Article 86 to trade between Member States might be taken by the French Courts to which the case went back as an implicit ruling that all the other conditions for the application of Article 86 were satisfied. To meet that fear a clear statement in Your Lordships' Judgment that it carried no such implication would, in my opinion, be enough.

The Commission for its part submitted that the Court should, as it were, remedy the narrowness of the Cour de Cassation's question by ruling on matters that that question did not raise.

The Commission pointed out (as indeed was also pointed out to us on behalf of the SACEM) that one could not determine whether a particular abuse of a dominant position might affect trade between Member States until one had first determined what that abuse consisted in. This Court must therefore, so the Commission submitted, give to the French Court to which the case would go back, if the Cour de Cassation quashed the Judgment of the Cour d'Appel of Paris, guidance on how to determine that prior question. The Commission added that, in its view, there had been in this case no relevant abuse of its dominant position by the SACEM, because of the existence in its "Statuts" of the proviso enabling a member to retain his rights in respect of the reproduction of his works by way of the showing in cinemas of films for which those works had been specially written. The existence of that privoso meant, said the Commission, that Mr Lai and Mr de Roubaix had assigned to the SACEM those of their rights that were here material, not because they were compelled to do so as a condition of joining the SACEM, but because they had freely chosen to do so.

In my opinion, however, Your Lordship's ruling should be confined to the question referred to this Court by the Cour de Cassation. I agree of course with the Commission that this Court has never regarded itself as rigidly bound by the terms in which questions referred to it by national courts are formulated. But where the Court has departed from that formulation, it has always been, I think, because it considered the formulation in some way inapt, for instance because it raised questions of fact or of national law, or because it raised a question of interpretation of a provision of Community law which, on the facts found by the national court, was manifestly inapplicable, or because, conversely, it failed to advert to a provision of Community law which, on those facts, was manifestly applicable. What this Court cannot do is to go altogether outside the scope of the question or questions referred to it by the national court. Article 177 of the Treaty does not confer on the Court jurisdiction to rule on questions that have not been referred to it. If, as the Commission envisages, the Cour de

Cassation quashes the decision of the Cour d'Appel and sends the case back to another French Court for determination, it will be open to the latter Court itself to refer to this Court any question of Community law that it considers to be relevant. There may be very good reasons, to do with the rules of the French appellate system, why the Cour de Cassation limited the scope of the present reference in the way that it did.

A point was raised both by the Commission and by the Italian Government, which both seemed inclined to think was outside the scope of the Cour de Cassation's question, but which both, rightly in my opinion, regarded as important. It was to the effect that, even if there had been an infringement by the SACEM of Article 86 of the Treaty, the assignments executed in its favour by Mr Lai and Mr de Roubaix were not necessarily void either in whole or in part. The Commission and the Italian Government both pointed out that Article 86 contains no provision like paragraph 2 of Article 85. I would add that, even under Article 85, not every transaction or legal ralationship having a connexion with an agreement, decision or concerted practice prohibited by that Article is necessarily void. For instance, in the case of a price-fixing cartel, sales by members of the cartel to customers are not void even if made at the prices illegaly fixed. Nor, in the case of a patent licence, does the incompatibility of some of its terms with Article 85 necessarily result in the invalidity of the whole licence — see *Chemidus Wavin Ltd.* v *Société pour la Transformation et l'Exploitation des Résines Industrielles* [1977] F.S.R. 181, a case in which the Court of Appeal of England and Wales gave effect to the ruling of this Court in Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235. Similarly, in the case of an abuse of a dominant position, it would be unthinkable that Article 86 should be held indiscriminately to avoid contracts in a manner detrimental to the victims of the abuse or to third parties. The Commission was, I think, right when it said that, for the purposes of the present case, the solution was indicated in the ruling of this Court in *BRT* v *SABAM* that:

"If abusive practices are exposed, it is for the national court to decide whether and to what extent they affect the interests of authors or third parties concerned, with a view to deciding the consequences with regard to the validity and effect of the contracts in dispute or certain of their provisions."

Since the Cour de Cassation's question refers to the performance of contracts, I do not think that Your Lordships would be going beyond its scope by giving a similar indication in this case.

As to the main aspect of the Cour de Cassation's question, it is clear, I think, that it is related to the reasons given by the Cour d'Appel for its decision. Essentially the thought underlying the Cour d'Appel's reasoning seems to have been that, because the present litigation was between parties who were all French and was only about the financial consequences of the sale of films in third countries, no other Member State was

concerned and therefore Community law was irrelevant; it seems, however, that the Cour d'Appel might have reached a different conclusion had it been shown that the situation resulting from the contracts in question might affect trade between Member States.

With great respect to the Cour d'Appel, it seems to me that it misapprehended the real issues in the case.

Article 86 applies wherever there has been an abuse by an undertaking of a dominant position within the common market or in a substantial part of it in so far as that abuse may affect trade between Member States.

The abuse here alleged consisted in the use by the SACEM of its (alleged) dominant position in France to impose on its members a requirement that they should assign to the SACEM the whole of their copyright for the whole world and for a long period. The way in which it is alleged that such an abuse might affect trade between Member States is that it would hinder the freedom of authors and composers who joined the SACEM to "shop around" for the services of performing right societies in other Member States in respect of some categories of their rights or in respect of the exploitation of their rights in some countries. As was forcefully pointed out to us, not only on behalf of Greenwich, but also on behalf of the Commission, it is perfectly obvious that such an abuse (if committed) might affect trade between Member States in that way. If so, it would be nil ad rem that, in particular litigation involving the rights of a member of the SACEM, the parties before the Court were all French and the subject-matter of the dispute was the financial reward derived from the exploitation of those rights in third countries. The exploitation of an author or composer's rights in third countries is just as much something that he might, if free to do so, choose to entrust to a performing right society in another Member State as the exploitation of his rights in that Member State itself or in another Member State. The Commission gave it as an example that a French author or composer might think the British Performing Right Society better placed than the SACEM to look after the exploitation of his copyright in English-speaking countries.

In the result I am of the opinion that, in answer to the question referred to the Court by the Cour de Cassation, Your Lordships should rule as follows:

1. Where there has been an abuse by an undertaking of a dominant position within the common market or in a substantial part of it, Article 86 of the Treaty may apply in relation to the performance in third countries of contracts entered into in the territory of a Member State by parties within the jurisdiction of that State if that abuse is of such a kind that it may affect trade between Member States.

2. Where the question is raised before a court or tribunal of a Member State, it is for that court or tribunal to determine whether and to what extent the illegality of the abuse entails the invalidity or modifies the effect of contracts connected with it.