JUDGMENT OF THE COURT
13 JULY 1971[1]

Deutscher Kompanistenverband e.V. v Commission of the European Communities[2]

Case 8/71

Summary

Procedure — Failure to act on the part of the executive — Concept (EEC Treaty, Article 175)

Article 175 of the EEC Treaty refers to failure to act in the sense of failure to take a decision or to define a position, and not the adoption of a measure different from that desired or considered necessary by the persons concerned.

In Case 8/71

DEUTSCHER KOMPONISTENVERBAND E.V., represented by its Presidents, Professor Werner Egk and Raimund Rosenberger, assisted by Reinhold Kreile, Advocate, of the Munich Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34b rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Jochen Thiesing, acting as Agent, with an address for service in Luxembourg at the office of Émile Reuter, Legal Adviser to the Commission, 4 boulevard Royal,

defendant,

Application to the Court under Article 175 of the EEC Treaty on the ground of failure to act, with a view to obtaining a ruling that the Commission has failed in its duty to hear the Deutscher Komponistenverband e.V. in its capacity as a legal person having a sufficient interest in the proceedings initiated under Articles 85 and 86 of the EEC Treaty against the Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA),

1 — Language of the Case: German.
2 — CMLR.

THE COURT

composed of: R. Lecourt, President, A. M. Donner (Rapporteur) and A. Trabucchi, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore and H. Kutscher, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts which form the basis of the dispute and the course of the procedure may be summarized as follows:

By a letter of 5 June 1970 addressed to the Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungs- rechte (hereinafter referred to as 'GEMA') whose office is at 37, Bayreuther Straße, Berlin 30, the Commission of the European Communities, the defendant, initiated proceedings under Articles 85 and 86 of the EEC Treaty (Proceedings IV/26.760–GEMA) against that undertaking. These proceedings ended in the decision of the Commission of 2 June 1971.

By a telex message of 13 November 1970 the Deutscher Komponistenverband e.V. (the German Composers' Association, hereinafter referred to as 'the Association'), the applicant, through its President and authorized representative, Werner Egk, requested that its governing body should be heard in the various proceedings initiated by the Commission against GEMA, as a 'legal person' showing a 'sufficient interest' within the meaning of Article 19(2) of Regulation No 17/62 and Article 5 of Regulation No 99/63.

In a letter of 17 November 1970 the Commission left open the question whether the applicant was an interested party within the meaning of Article 19(2) of Regulation No 17/62, in view of the fact that Professor Werner Egk was both Chairman of the supervisory board of GEMA and President of the Association and that therefore the applicant already had the opportunity of obtaining information and of influencing the observations of GEMA on the complaints raised by the Commission. Nevertheless, in the same letter the Commission permitted the applicant to submit its written observations within the period of one month.

By a letter of 2 December 1970 the applicant insisted on being heard orally. The Commission replied that the applicant had no legal interest in obtaining a decision on its admission to the oral procedure because it had already been granted on opportunity of making known its attitude in writing.

By an application lodged at the Court Registry on 12 March 1971 the Association commenced the present proceedings.

By a statement of 23 April 1971 the defendant raised an objection of inadmissibility under Article 175 of the

EEC Treaty and requested the application of Article 91 of the Rules of Procedure of the Court of Justice of the European Communities.
On 1 June 1971 the applicant lodged its observations on this objection.
Having heard the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure with regard to the objection of inadmissibility.
The parties presented oral argument at the hearing on 17 June 1971.
The Advocate-General delivered his opinion at the hearing on 1 July 1971.

II — Conclusions of the parties

The *applicant* claims that the Court should:

'(1) Rule that the defendant is bound to hear the applicant Association within the framework of proceedings IV/26.760 (GEMA) in accordance with the second sentence of Article 19(2) of Regulation No 17/62 (First Regulation implementing Articles 85 and 86 of the Treaty—Official Journal, English Special Edition, 1959-1962, p. 87);

(2) Order the defendant to bear the costs.'

The *defendant* contends that the Court should:

'(1) Give a prior ruling on the admissibility of the application;

(2) Dismiss the application as inadmissible;

(3) Order the applicant to bear the costs'.

The *applicant*, the defendant with regard to the objection, contends that the Court should:

'Dismiss the objection of inadmissibility raised by the defendant, the applicant with regard to the objection.'

III — Submissions and arguments of the parties

The submissions and arguments of the parties on admissibility may be summarized as follows:

(a) The *applicant* asserts in its application:

(1) That the telex message from the President of the Association of 13 November 1970 constitutes a request to act in the manner indicated, as laid down in the second paragraph of Article 175 of the EEC Treaty. Since it may be supposed that this telex message reached the defendant on the same day the period referred to in the second sentence of the second paragraph of Article 175 began to run on that day. The application for failure to act could thus have been introduced at any time until 13 March 1971 (this period could also be supplemented by the extension laid down by Article 81(2) of the Rules of Procedure);

(2) That the two statements made by the Commission do not constitute an express rejection of the formal application for a hearing since the Commission refused to express any opinion on this point. Since those statements do not constitute decisions against which proceedings for annulment may be instituted within the meaning of the second paragraph of Article 173 of the Treaty the application for failure to act is the appropriate form of action.

(b) In its statement lodged in accordance with Article 91 of the Rules of Procedure the defendant states as follows:

(1) Since the applicant is asking the Court to order the Commission 'to give it the formal right to be heard under the second sentence of Article 19(2) of Regulation No 17/62' the application is not for a ruling regarding a failure to act within the meaning of the first and third paragraphs

of Article 175 but to obtain performance by the defendant. For this reason alone the application is inadmissible.

(2) The applicant's argument that the request of 13 November 1970 to be heard in accordance with Article 19(2) of Regulation No 17 and of Article 5 of Regulation No 99/63 constitutes a request to act within the meaning of the second paragraph of Article 175 would produce unacceptable results because, if this argument were conceded, any person making a request could immediately initiate an application for failure to act if the Council or the Commission did not define its position within the period of two months laid down in the second paragraph of Article 175, and any person submitting a request would be bound to initiate proceedings for failure to act within two months of submitting the said request in order to avoid losing the right to lodge an application conferred upon him by Article 175 as a result of his failure to observe the time-limit prescribed for lodging such an application.

It is clear from the provisions of Article 175 that any person submitting a request may, under the conditions laid down in the second and third paragraphs of Article 175, initiate proceedings by expressly calling upon the institution concerned to act.

The first condition laid down by Article 175 with regard to the admissibility of an application for failure to act is therefore that the person concerned should, within a reasonable period after making the request, have unambiguously called upon the institution concerned to act.

In its judgment of 4 February 1959 (Case 17/57, *Gezamenlijke Steenkolenmijnen* v *High Authority*, Rec. 1958/1959, pp. 13 to 26) on the scope of Article 35 of the ECSC Treaty (analogous to that of Article 175 of the EEC Treaty from the point of view in question in the present proceedings), the Court approved the same argument with regard to the procedure in an application for failure to act.

Furthermore, it is clear from the fact that the defendant merely relies on its telex message of 13 November with regard to the request to act, which is an essential requirement in these proceedings, that its letter of 2 December does not constitute a request within the meaning of Article 175 either.

For all these reasons these proceedings for failure to act are inadmissible.

(3) Even if it were possible to regard the telex message of 13 November and the applicants' subsequent letter of 2 December 1970 as calling upon the defendant to act, the application would be inadmissible since the defendant defined its position and communicated its point of view to the applicant by its letters of 17 November 1970 (in reply to the applicant's telex message of 13 November) and 17 December 1970 (in reply to the letter of 2 December 1970) within the period prescribed in the second sentence of the second paragraph of Article 175. In support of its argument the defendant refers to the judgment of the Court of Justice of 1 March 1966 (Case 48/65, *Alfons Lütticke GmbH and Others* v *Commission*, [1966] ECR 19).

(c) In its observations on the objection of inadmissibility raised by the defendant, the *applicant*, the defendant with regard to the objection, rejects the Commission's arguments and claims that the application is admissible on the following grounds:

(1) The argument that the aim of the application is not to obtain a ruling to the effect that the defendant has failed to act but rather to obtain performance is irrelevant since the wording of the third paragraph of

Article 175 leaves open the question whether such an application may only be used to obtain a ruling regarding failure to act or whether the defendant's obligations may be defined to a greater or lesser degree. Furthermore, the question is irrelevant in the present case since, in the form in which it has been drawn up, the application satisfies the requirements arising from both interpretations.

(2) Where Community law expressly confers on natural or legal persons the right to require a Community institution to perform a certain act ('Antragsrecht'), the request of itself implies that the institution has been called upon to act, within the meaning of the first sentence of the second paragraph of Article 175. This interpretation is imperative in particular where, as in the present case, the institution concerned must be aware that failure to perform the act which has been requested will give rise to legal proceedings.
In support of these arguments the applicant refers to the case-law of the Court regarding Article 35 of the ECSC Treaty (Joined Cases 7 and 9/54, *Groupement des Industries Sidérurgiques Luxembourgeoises* v *High Authority*, Rec. 1959, p. 83; Joined Cases 24 and 35/58, *Chambre Syndicale de la Sidérurgie de l'Est de la France* v *High Authority*, Rec. 1960, p. 625; Joined Cases 41 and 50/59, *Hamborner Bergbau AG, Friedrich Thyssen Bergbau AG* v *High Authority*, Rec. 1960, p. 1051). The applicant maintains that its interpretation would not produce unacceptable results, as a distinction is made between cases where there is a clearly specified 'Antragsrecht' and other cases.

(3) The alternative argument of the defendant, namely, that it had already defined its position regarding the applicant's request within the period prescribed in the second sentence of the second paragraph of Article 175, will not stand up to examination. Since the defendant refused to define its position as regards the subject-matter of the request, that is to say, to take notice of the existence of the conditions laid down in the second sentence of Article 19(2) of Regulation No 17, its argument that the replies of 2 December 1970 and 17 December 1970 defined its position within the meaning of the second sentence of the second paragraph of Article 175 cannot be accepted, especially in view of the fact that in its statement regarding the objection of inadmissibility it refrains from specifying what position was defined in the two letters in question. It must be deduced from this that the defendant itself does not claim that those letters could constitute a legal measure against which proceedings may be instituted under Article 173.

(4) In case the Court should not regard its requests of 13 November 1970 an 2 December 1970 as formally calling upon the defendant to act within the meaning of the first sentence of the second paragraph of Article 175, the applicant points to its letter of 30 January 1971, which it appends to its observations. In this letter it stated that if the Commission failed to grant it a formal hearing within the meaning of the second sentence of Article 19(2), it would both institute proceedings under Article 173 against such formal refusal and bring an action for failure to act, under the third paragraph of Article 175, in connexion with the defendant's failure to define its position as regards the applicant's request. The letter of 30 January 1971 may be invoked even after the expiry of the time-limit for bringing proceedings (second sentence of the second paragraph of Article 19 of the Protocol on the Statute of the Court of Justice). If

the Court of Justice regards this letter as the request required by the second paragraph of Article 175 it must be accepted as such in the present procedure since the period prescribed had not yet expired when it was lodged.

Since it considered all the conditions regarding the admissibility of the present application to have been fulfilled, the applicant refrained from making a fresh application against the failure of the Commission to define its position as regards its letter of 30 January 1971.

(d) In oral argument the *defendant*, the applicant as regards the objection, maintained that in accordance with Article 42(2) of the Rules of Procedure of the Court of Justice of the European Communities the lodging of the letter of 30 January 1971 must be refused as being out of time.

The argument of the applicant, to the effect that the second sentence of the second paragraph of Article 19 of the Protocol on the Statute of the Court of Justice of the European Community applies, is irrelevant since that article does not refer to a situation comparable to that obtaining in the present case.

Furthermore, since the letter of 30 January 1971 merely constituted a repetition of the request addressed to the Commission, calling upon it to define its position, it does not fulfil the conditions prescribed by Article 175. The correspondence between the defendant and the applicant prior to the letter of 30 January 1971 shows clearly that the applicant itself did not consider that letter as calling upon the defendant to act within the meaning of the second sentence of the second paragraph of Article 175.

Finally, the argument of the applicant, to the effect that an application regarding failure to act may be lodged in advance, must be rejected as unfounded.

Grounds of judgment

1 On 11 March 1971 the applicant initiated proceedings under Article 175 of the Treaty with the object of obtaining a declaration that the Commission had failed in its obligation to hear it in its capacity as a legal person showing a sufficient interest in the procedure commenced under Articles 85 and 86 of the Treaty against the Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA).

By a statement of 23 April 1971 the defendant, under Article 91 of the Rules of Procedure, raised an objection of inadmissibility on the basis of Article 175.

2 The third paragraph of Article 175 provides that any natural or legal person may, under the conditions laid down in the preceding paragraphs of the same article, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.

It is clear from the context, especially from the first paragraph, that by its use of the phrase 'has failed to address to that person any act', the article refers to failure to act in the sense of failure to take a decision or to define a position, and not the adoption of a measure different from that desired or considered necessary by the persons concerned.

[3] By a telex message of 13 November 1970 the applicant asked to be heard pursuant to Article 19(2) of Regulation No 17, read together with Article 5 of Regulation No 99/63, in the various procedures pending against GEMA.

In a letter of 17 November 1970 it received the reply that, without prejudice to the question whether it was a person having a sufficient interest within the meaning of the provisions cited, the Commission was giving it the opportunity of submitting its written observations within a period of one month; that period was extended on two occasions.

Thus the Commission acted under Article 5 of Regulation No 99/63 on the subject of the hearings provided for in Article 19 of Regulation No 17.

It follows from this that in the present case the Commission has not refrained from acting when called upon by the applicant to do so.

Consequently, the conditions laid down by Article 175 are lacking in the present case.

[4] The application must therefore be dismissed as inadmissible.

Costs

[5] Under Article 69/(2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs. The application has been declared to be inadmissible and the applicant must therefore be ordered to pay the costs of the proceedings.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the parties on the objection;
Upon hearing the opinion of the Advocate-General on the objection;
Having regard to the Treaty establishing the European Economic Community, especially Article 175;
Having regard to Regulation No 17 of the Council of 6 February 1962, especially Article 19;
Having regard to Regulation No 99/63 of the Council of 25 July 1963, especially Article 5;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 91,

THE COURT

hereby:

1. **Dismisses the application as inadmissible;**

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

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 13 July 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 1 JULY 1971[1]

Mr President,
Members of the Court,

On 13 November 1970, in connexion with proceedings initiated on 5 June 1970 on the ground of an infringement of Articles 85 and 86 of the EEC Treaty against the Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (hereinafter referred to as 'GEMA'), a registered association having its office in Berlin, following receipt of a notice of objections in accordance with Article 19(1) of Regulation No 17/62 on restrictive practices, the Deutscher Komponistenverband (hereinafter referred to as 'the Association'), a registered association having legal personality, of which most German composers are members and whose object is the protection and promotion of their common professional interests, sent by Telex to the Director for Agreements and Dominant Positions in the Directorate-General for Competition in the Commission from its President, who alone is entitled to represent the Association, a request pursuant to the combined provisions of Article 19(2) of Regulation No 17/62 (OJ, English Special Edition, 1959-1962, p. 87) and Article 5 of Regulation No 99/63 (OJ, English Special Edition, 1963-1964, p. 47) to be heard in the various proceedings initiated by the Commission against GEMA. It was stated in the telex message that the composers participated in the founding of GEMA and consequently had an interest in knowing what financial advantages they might expect from the proceedings initiated by the Commission. In particular, information was requested as to the effect of the proceedings on the social security arrangements of GEMA, on the cultural and artistic encouragement of contemporary composers of serious music and the role of bodies exploiting such compositions

1 — Translated from the German.