OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 12 DECEMBER 1973 [1]

Mr President,
Members of the Court,

I — Introduction

1. Facts

The Belgian Association of Authors, Composers and Publishers, in abbreviated form SABAM, is a cooperative association governed by civil law with the object of exploiting, administering and managing, in the widest sense of those terms, all copyrights and kindred rights in Belgium and abroad, on its own behalf, for its members and associates and for its clients and affiliated undertakings.

It acquires copyrights and distributes them among its members.

By Article 10 of its statutes as they existed in 1967 any author, composer or producer who wishes to be admitted as a member of the association must in particular assign to SABAM by contract all copyrights and kindred rights which he holds or will hold in all his present or future works.

It is in accordance with those provisions that, by standard form contracts, Mr Davis, a composer of music and Mr Rozenstraten, a song writer, assigned to SABAM, in 1963 and 1967 respectively, their copyrights in all their present or future works as well as their rights as performers and producers of gramophone records.

They both nonetheless concluded, in March 1969, with the Belgian Radio and Television (BRT) a contract providing for the exclusive assignment of their rights in the words or the music of a song called 'Sperciebonen', which was in fact composed at the request of certain officials of the BRT.

Mr Davis and Mr Rozenstraten assigned their rights exclusively to BRT for a period of two years.

Repeated broadcasts of the song took place on radio and television.

The Belgian Company Fonior, which holds under contract the nonexclusive right to phonographic exploitation of works in the repertoire of the Bureau international d'Édition mécanique, an agency entrusted by SABAM with the task of managing its own repertoire and granting permission for mechancial reproduction, recorded the song 'Sperciebonen' and marketed it in its own version on DECCA records.

On the instructions of the composer and song writer, SABAM and later BRT ordered Fonior to stop production. But it was in vain: the record continued to be pressed and sold.

2. Legal proceedings

Consequently, BRT and SABAM, both taking advantage of the rights which they had acquired from the authors, brought actions in April and November 1969 respectively before the Tribunal de première instance at Brussels claiming that Fonior should be condemned for illegal recording and infringement of copyright.

Moreover, during the proceedings, BRT filed with the Tribunal an application to intervene, seeking to contest the validity of the contracts between SABAM and Messrs Davis and Rozenstraten, alleging that the provision in the statutes of SABAM whereby each member of that co-operative association assigns to the

1 — Translated from the French.

said association the copyrights and kindred rights in all his present or future works is incompatible with the principle of the right of self-determination, which is a matter of public policy and is expressed, *inter alia,* in Article 1123 of the Belgian Code civil.

While dismissing this argument, the Brussels court nevertheless considered it necessary to examine whether the SABAM contracts are not based on an illegal motive (cause illicite), in that they were concluded by an undertaking, having a dominant position which it abuses within the meaning of Article 86 of the Treaty establishing the European Economic Community.

While pointing out that a national court has no jurisdiction to hear proceedings for the establishment of an abuse of a dominant position the Belgian court nevertheless decided, by Judgment of 4 April 1973, basing itself on the direct effect of the provisions of Article 86, one of the consequences of which is that interested parties can invoke before the national court the rights which they enjoy by virtue of those provisions, to stay the proceedings and to refer four preliminary questions to this Court.

The first two refer to the interpretation of Article 86. The Brussels court asks this Court in effect whether the fact that an undertaking which enjoys an actual monopoly in a Member State, in the management of copyrights, requires the global assignment of all copyrights without drawing any distinction between specific categories, can be regarded as an abuse of a dominant position.

It asks you secondly whether an abuse of a dominant position can consist in the fact that such an undertaking stipulates that an author shall assign his present and future rights, and demands that the rights assigned continue to be exercised by that undertaking for five of the undertaking's years following withdrawal of the member.

The last two questions concern the interpretation of Article 90 of the Treaty. Does the expression 'undertaking entrusted with the operation of services of general economic interest' necessarily imply that the undertaking in question enjoys certain privileges which are denied to other undertakings? Finally, can the provisions of Article 90 (2) create rights in respect of private parties which national courts must safeguard?

3. *Administrative procedure initiated by the Commission*

While these proceedings were taking place before the Belgian court the Commission of the European Communities, whose attention had previously been drawn to the position of copyright management associations because of the possible incompatibility of the statutes of such undertakings and their members with the rules of the Treaty in the field of competition and more particularly with those of Article 86, decided, on 3 June 1970, to initiate of its own motion the procedure under Regulation No 17 of the Council in respect of three associations of authors, composers and producers: GEMA in Germany, SACEM in France and SABAM.

This Decision, which was notified to Member States, was made known to SABAM on 8 June 1970 by the Director-General for Competition who sent it an account of the objections raised against it. These objections concern in particular the clauses of the contracts relating to the assignment of copyrights and the withdrawal of members; they are the subject of the first two questions referred by the Brussels court.

Within the framework of the administrative procedure so initiated views were exchanged in September 1970 and also in the autumn of 1971 between the Directorate-General for Competition and SABAM, the latter being thus given notice to submit its observations with regard to the objections laid against it. SABAM moreover took account of some of those

objections when it amended its statutes in May 1971 and then in May 1973 with regard to two essential points.

Abandoning the requirement of the assignment of all present or future copyrights, SABAM accepted that members should be able to decide to restrict the assignment of their copyrights to one or more categories of exploitation and that this should have effect for the whole world or only for certain countries.

Secondly, the period during which the rights remain the property of the association after the withdrawal of a member was reduced from five years to three.

As other amendments to the statutes or the internal rules of SABAM were envisaged for the end of 1973 the procedure has been kept open to enable the Commission to examine whether the clauses which have been amended up to the present time are such as no longer to constitute an abuse of a dominant position.

Those, Gentlemen, are the circumstances of the reference made to this Court by the national court under Article 177 of the Treaty, while at the same time the position of one of the parties to the dispute was the subject of a procedure initiated by the Commission under Regulation No 17.

4. Appeal brought by SABAM against the order for reference

The order for reference was notified to the Court of Justice on 19 April 1973 by the registry of the Tribunal de première instance at Brussels.

But, on 18 July 1973, SABAM brought an appeal against this order before the Cour d'appel of Brussels and, maintaining in particular that the Tribunal de première instance was not competent to apply Article 86 of the Treaty in the dispute before it, it invoked the provisions of Article 9 (3) of Regulation No 17, according to which: 'As long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article 85 (1) and Article 86 in accordance with Article 88 of the Treaty . . .'.

SABAM concludes from that Article that the words 'authorities of the Member States' apply not only to administrative authorities but also to national courts, whether the latter are competent to make direct findings of infringement of Community rules on competition or whether they must rule on an indirect basis on the applicability of Articles 85 (1) or 86 when dealing with civil disputes which question the validity of contracts in the light of those Articles. SABAM asserts that once a procedure had in fact been initiated by the Commission under Regulation No 17 for the purpose of deciding whether its statutes and the contracts which it concludes with its members fall within the ambit of Article 86 of the Treaty, the Brussels court temporarily lost jurisdiction to examine that same question and should simply have stayed the proceedings until the Commission had reached a decision.

On 24 July SABAM's lawyer informed the Registry of the Court of Justice of the appeal brought against the order for reference.

In confirmation of the fact that an appeal had been brought by SABAM the registrar of the Brussels court, for his part, sent a letter on 30 July 1973 to the Court of Justice in which he stated expressly that the initiation of this appeal 'suspends the proceedings before the Court of Justice'.

But on 18 September the same registrar, upon reconsideration of this statement, informed the Court that the Brussels court 'does not wish the Court of Justice to suspend the examination (of the preliminary questions).'

II — Discussion

Gentlemen, I must now examine the procedural questions raised by this case.

1. *Has the matter been duly referred to the Court of Justice, notwithstanding the appeal brought against the order for reference?*

The appeal brought by SABAM against the order for reference poses the first of these questions, that is, whether this appeal by one of the parties to the main action means that the Court should abstain from making any preliminary decision at least until the Cour d'appel of Brussels has given a ruling.

That is the solution the merits of which the applicant's lawyer endeavoured to establish during the oral procedure by drawing attention to the two consequences which legally characterize an appeal in Belgian law; the effect of suspension and that of transmission.

Under Article 1397 of the Belgian Code judiciaire, an appeal brought against a final judgment suspends its execution. A judgment is final — within the meaning of the Code judiciare — when it exhausts the jurisdiction of the court in respect of a question in dispute, save for appeals prescribed by the law. On the other hand, the suspensory effect does not apply to an appeal brought against an interim judgment in which the court merely orders, in particular, a measure of inquiry.

But, according to SABAM's lawyer the order for reference of the Brussels court must be regarded as final as, first, that court considers that it is competent to apply Article 86 of the Treaty — even if only after having received a reply to the preliminary questions which it has referred to the Court of Justice — and secondly because it recognizes the relevance of those questions for the solution of the dispute.

Secondly, even though it appears from Article 1496 of the Code judiciaire that 'interim execution is in accordance with the law when a judgment prescribes a measure of inquiry and insofar as it relates thereto', SABAM's lawyer maintains that a request for a preliminary ruling under Article 177 of the Treaty which relates to a question of law (interpretation of a Community rule) and not fact, and which does not require the intervention of the parties for the execution of that request, is not a measure of inquiry within the meaning of Belgian law. In addition, the national court is bound by the reply given by the Court of Justice whereas measures of inquiry are subject to debate before the national court.

Finally, by the transmissive effect of an appeal, the general conditions of which appear in Article 1068 of the Code judiciaire, the dispute, in all its aspects, is referred to the Cour d'appel which has the obligation of resolving it to the full extent of its own jurisdiction, either by quashing the judgment taken or by endorsing it.

But the transmissive effect applies just as much to an appeal from an interim judgment as from a final judgment.

The only exception to this principle appears in the second paragraph of Article 1068 which provides that where the appeal court endorses — even partially — a measure of inquiry it must refer the case back to the first court.

Thus the Cour d'appel of Brussels, which is at the present time dealing with the entire dispute referred to it, would have the power — and the sole power — to decide whether the preliminary questions are not relevant to the solution of this dispute. As for the Tribunal de première instance, it would be relieved of all jurisdiction. It could neither send any additional information to the Court of Justice nor make use of the interpretation which it might be given for the solution of the dispute.

Likewise, the legal basis on which this Court was duly seized of the matter would become totally invalid because of

the fact of the appeal brought against the order for reference.

Whatever, Gentlemen, may be the merits in domestic law of this line of argument, I think it is impossible for you to adopt it for the sole reason that by so doing you will exceed your jurisdiction and encroach upon that of the Belgian courts, since you will be forced to appraise the effects of the appeal against the order for reference in accordance with the rules of the national law.

Article 177 of the Treaty does indeed confer on you the task of giving a ruling on the questions of interpretation or of appraisal of the validity of Community rules which the national courts have either the power or even the obligation to refer to you. The device of preliminary questions has the aim of ensuring the coherence and uniformity of interpretation of Community law.

But, just as you refuse to judge the relevance of questions referred to the solution of the main action and as you do not have the power either to satisfy yourselves as to the jurisdiction of the national court which refers the matter to you or as to the regularity of the procedure before it, so you cannot inquire whether the exercise of an appeal such as that against an order for reference produces effects such as to disseize you, at least until the appeal court has given a ruling.

For in all these cases it would be necessary for you to interpret the domestic law and, more than that, to apply it to a specific case, which is outside your jurisdiction.

At the very most you might perhaps draw conclusions from the domestic law if its application was clear and not subject to any dispute. But the explanation which SABAM's lawyer endeavoured to give before this Court shows clearly enough that this is not the case. To arrive at the conclusion that the appeal brought against the order for reference has a suspensory effect was it not necessary for him to overcome two objections, one drawn from the fact that this order is not a final judgment and the second drawn from the classification of the request for a preliminary ruling as a measure of inquiry?

For you to adopt his conclusion would be to substitute your appraisal for that of the Belgian Cour de Cassation, which alone is qualified to give final judgment in disputes of this nature.

Article 177 establishes direct cooperation between the Court of Justice and the national courts of the Member States wihch can make use of the power to refer to it, for preliminary rulings, any question of interpretation of Community law which they consider necessary for the solution of disputes brought before them.

In my opinion, it is not even necessary for such a question to have been raised by one of the parties. The national court can pose it of its own motion. Moreover, the procedure prescribed by Article 177, dominated by the concept of the public interest, takes place without the actual participation of the parties to the main action, who are only allowed to present written and oral observations before this Court and are not as such parties to the procedure.

Under Article 20 of the Protocol on the Statute of the Court of Justice:

'In the cases governed by Article 177 of this Treaty, the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court shall be notified to the Court *by the court or tribunal concerned.*'

In effect, a case can only be referred to you by such a court and never by persons in dispute before it.

In the same way only that same court can withdraw the reference from this Court whatever the ground on which it does so, whether it has considered that it must give a solution to the case which does not require the interpretation of Community law or whether it itself considers that the form of action — for

example the appeal — brought against its order for reference has the effect of depriving it of the power to give a decision.

But in any case it is solely a matter for that court to inform this Court of the withdrawal of its request for a preliminary ruling.

But, in this case, it is clear that the request of the Tribunal de première instance at Brussels still subsists.

Is there any need to go further and to inquire if the combined provisions of Article 177 of the Treaty and of Article 20 of the Protocol on the Statute of the Court ought not to be interpreted as automatically excluding the normal exercise of forms of action, whether appeal or final appeal, in the case of orders for reference by national courts to the Court of Justice?

On this matter I think that Mr Advocate-General Lagrange in his opinion in Case 13/61, *Bosch* (Rec. 1962, p. 118 *et seq.),* defined the precise reasons for not adopting that interpretation.

First of all, the terms of Article 20 of the Statute of the Court only refer to the suspension of proceedings at that time before the court which referred a case to the Court of Justice and not the suspension of 'all national proceedings' and, consequently, the exercise of forms of action in the courts.

Secondly, the two-tier system of jurisdiction is, in most Member States, a traditional principle which applies, in those States where proceedings for reference for preliminary rulings exist, to orders or judgments to stay proceedings.

Finally, neither the Treaty nor the Protocol on the Statute of the Court of Justice could, without an express provision, have adversely affected the exercise of forms of action and thereby have put in question the rules on the organization and procedure of the national courts.

Moreover, it is for the Cour d'appel of Brussels alone, to which the dispute has now been referred, or possibly, the Belgian Cour de Cassation, to refer to this Court the problem of the interpretation of Article 20 of the Protocol on the Statute of the Court if one of these courts should have doubts with regard to this matter justifying a request for a preliminary ruling.

In sum, I therefore consider that if, in the circumstances laid down by the domestic law of each Member State, forms of action and in particular appeals, are open to parties against orders or judgments for reference it is not for you to assess the effects of those forms of action in the context of the national legal order. You have, on the other hand, the obligation to reply to the request for a preliminary ruling which has been notified to you by a court unless the latter has expressly withdrawn it.

It is only when a higher court has given a ruling before you have had the time to make a decision yourselves and where it has either quashed or set aside the judgment or order for reference that you must then refrain from making any reply, since in such a case the legal basis represented by such a judgment or order has been nullified.

On the other hand, in the case where the order is quashed or set aside after you have supplied a reply to the preliminary question it is clear that your decision can no longer have any effect on the settlement of the dispute in the main action.

But, would not similar consequences result even if it is accepted that no form of action is available in the domestic legal order against judgments or orders for reference? An appeal, whether to a higher court or to the Cour de Cassation, can in fact always be brought against a judgment or order in which the national court decides on the merits of the dispute in accordance with the interpretation given by this Court. If an

appeal court or the Cour de Cassation considered that the questions referred were not relevant they could nevertheless decide on a solution based on grounds relating to domestic law without raising in issue the Community rules.

2. *Interpretation of Article 9 (3) of Regulation No 17*

The second procedural question concerns the interpretation of Article 9 (3) of Regulation No 17. More particularly it raises the issue of the meaning of the words 'authorities of the Member States'.

In effect, whereas by virtue of Article 9 (1) the Commission has *sole* power to declare the provisions of Article 85 (1) of the Treaty inapplicable pursuant to Article 85 (3), the national authorities are themselves competent to apply Article 85 (1) and Article 86. But this competence is suspended from the moment the Commission initiates a procedure under, in particular, Article 3 of Regulation No 17 for the purpose of bringing an infringement to an end, the national authorities being then bound to stay the proceedings.

A — The concept of initiation of the procedure by the Commission has been the subject of theoretical disputes which are now a little out of date.

Certain authors have considered, in the context of Article 85, that the procedure must be regarded as having been initiated from the moment of notification of an agreement.

But, as the initiative for notification is with the undertaking, this argument contradicts Article 9 (3) which, by requiring the procedure to be initiated *by the Commission,* implies a positive act by the latter.

The fact that the Commission has acknowledged receipt of a notification or of a request for negative clearance is equally inconclusive; as this Court held in its Judgment of 6 February 1973 (Case 48/42, *Brasserie de Haecht v Spouses Wilkin-Jannsen,* Rec. 1973, p. 87), this merely constitutes an administrative action.

The initiation of a procedure implies, according to that same Judgment, 'an authoritative act of the Commission, evidencing its intention of taking a decision . . .'.

Without requiring the Commission to make a formal record of the initiation of the procedure, as it did for example in respect of undertakings concerned in the concerted practices with regard to pricefixing for dyestuffs (Decision of 31 May 1967), the Court did lay down two conditions:

— Necessity for an authoritative act of the Commission;

— Necessity for such act to show evidence of its intention to take one of the decisions under Articles 2, 3 or 6 of Regulation No 17.

These two criteria seem to apply to the request for information referred to in Article 11 of the Regulation and especially to the investigations authorized by Article 14, these being authoritative acts which clearly show an intention to take a decision insofar as, with reference to a specific agreement or the abuse of a dominant position by a particular undertaking, those measures raise the presumption of an infringement.

The conditions required by the case law of this Court as evidence that a procedure has been initiated seem to me to be fulfilled, *a fortiori,* when the Commission decides to notify the undertakings concerned of the objections made against them on the basis of Article 85 (1) or Article 86.

This statement of objections constitutes in a certain sense an accusation made against the undertakings, which are thereby warned that they have infringed the rules on competition. Moreover, it can only be drawn up in the terms and with regard to the conclusions of a preliminary inquiry.

Its notification is thus indeed an authoritative act evidencing unequivocally the intention on the part of the Commission to establish the existence of an infringement and to draw conclusions thereform.

With regard to authors' associations the Commission took, on 3 June 1970, a formal decision to initiate of its own motion a procedure under Regulation No 17 in respect of GEMA, SACEM and SABAM. It informed the Member States of this decision. Several days later it informed SABAM of this decision and of the objections laid against it.

Thus we are here dealing with a procedure actually initiated by the Commission, as envisaged by Article 9 (3).

B — Are we to conclude, because of the above, that the Brussels court had ceased to have jurisdiction, at least until the Commission had taken its decision, to resolve the dispute brought before this Court?

To reply to this question in the affirmative, one would have to admit that that court is one of the 'authorities of the Member States' referred to by Article 9 (3) of Regulation No 17 and, consequently, to attempt to delimit the meaning and scope of those words.

The national authorities can apply Article 85 (1) and Article 86 either on a direct or an indirect basis (soit à titre principal, soit à titre incident).

They act directly when they proceed against undertakings informed of having infringed the Community rules on competition.

Depending on the State concerned, this may involve administrative authorities like the Bundeskartellamt in Germany or courts, like the tribunaux correctionnels in France when they judge penal actions brought by the Ministère public which has had the matter referred to it by the Minister for the Economy and Finance after consultation with the Commission technique des ententes.

German courts, such as the Berlin Kammergericht or the Bundesgerichtshof, which deal with appeals brought by undertakings against decisions of the Bundeskartellamt, also give direct judgments.

Whether the national courts decide directly in criminal proceedings or whether they pronounce on appeals brought against decisions of the administration it can hardly be contested that these national courts are 'authorities of the Member States' within the meaning of Article 9 (3) of the Regulation and that they are therefore bound to relinquish their jurisdiction once a procedure has been initiated by the Commission. This provision is binding and directly applicable in all the Member States. Consequently, it matters little that in certain of these States the application of the rules on competition is entrusted to administrative bodies whereas in others it falls within the competence of the judiciary. The obligation to relinquish jurisdiction imposed by Regulation No 17 cannot be evaded.

Can it be otherwise where civil or commercial courts of the Member States have to judge disputes between individuals, the solution of which depends on actions or behaviour in respect of the rules on competition laid down by the Treaty of Rome?

In such a case, the object of the action is not to establish an infringement. The Court has only to give a decision on the civil consequences of that infringement: nullity or termination of a contract, grant of damages to the injured party.

But to arrive at these consequences it is still necessary for the court to decide, before on the existence and nature of an agreement, of a concerted practice or of an abuse of a dominant position within the meaning of Articles 85 or 86 of the Treaty.

In other words, it is necessary in such cases for the court to interpret Community law.

Thereafter, the national court can, if need be, make use of the power to refer a request for a preliminary ruling to this Court.

When the courts apply Article 85 indirectly in this way are they still authorities within the meaning of Regulation No 17?

The question has been the subject of much discussion between legal writers, and national courts have adopted differing standpoints on the matter.

I propose to deal with it firstly by examining the text of the Regulation. Secondly, I will endeavour to give an objective survey of the arguments of legal writers and of the case law of the national courts and then I will move on to a study of the judgments of this Court.

From these various considerations I will attempt to determine the solution which must be sought in accordance with the aims of the Treaty and of the Regulation.

1. The Regulation

Article 9 (3) of Regulation No 17 employs the expression 'authorities of the Member States' but among the other provisions of this Regulation there are many in which there appears the similar expression 'competent authorities of the Member States'.

Thus Article 10 (1) deals with transmission by the Commission to those authorities of 'a copy of the applications and notifications together with copies of the most important documents lodged with the Commission for the purpose of establishing the existence of infringements of Articles 85 or 86 of the Treaty or of obtaining negative clearance or a decision in application of Article 85 (3)'.

In the same way Article 11 (2) provides that when sending a request for information to an undertaking or association of undertakings, the Commission shall at the same time forward a copy of the request to the competent authority of the Member State concerned.

These authorities, having the right to be informed of documents issued by the Commission, can clearly only be administrative bodies.

Under Article 13, the competent authorities of the Member States shall undertake the investigations which the Commission considers necessary. According to Article 14 (4) the Commission can also take decisions ordering such investigations after consultation with the competent authority of the Member State in whose territory the investigation is to be made.

Under Article 20 (2) the competent authorities of the Member States shall not disclose information acquired in the course of those inquiries or investigations.

In all these cases the competent authorities are those which the States entrust with the responsibility of undertaking investigations; generally, they are administrative departments with the task of economic supervision.

Some authors (Mégret — *Le droit de la Communauté économique européenne,* Vol. IV: Concurrence, p. 157) conclude from this that the words 'competent authorities of the Member States' are thus used on several occasions in Regulation No 17 in such a way that they cannot refer to ordinary courts of law giving judgment on an indirect basis.

However, the above interpretation of the Regulation is not convincing. The fact that in other Articles of the Regulation this expression clearly does not refer to courts of law is not sufficient for it to be inferred that Article 9 (3) does not relate to such courts.

Another argument relating to the terms of the Regulation is drawn from the fact that Article 9 (3) mentions the competence of the authorities of the Member States only in relation to the application of Article 85 (1) and Article 86.

But, whereas Article 9 (1) recognizes the sole competence of the Commission to apply Article 85 (3), no provision in the Regulation defines the authority competent to decide that agreements or decisions are void under Article 85 (2). Must one deduce from this that the authors of the Regulation considered that this task was to be undertaken by the ordinary courts judging disputes between private persons, since those courts normally have the task of inferring the consequences, on the level of private law, of any infringement of the rules contained in Articles 85 and 86?

This interpretation is also based on the grounds in your Judgment of 6 April 1962 — *Bosch* — (cited above); in that case you distinguished, in effect, between the competence of the courts to find agreements automatically void in pursuance of Article 85 (2) and the competence of the authorities of the Member States to apply Article 85 (1). According to your Judgment, in the first case competence is based on the directly applicable nature of Article 85 (2) whereas, in the second case, competence is based on Article 88 of the Treaty in conjunction with Article 9 of Regulation No 17.

Should one not deduce from the above that the provisions of Regulation No 17 do not concern the ordinary courts, whose competence to apply Articles 85 and 86 indirectly is only based on the direct effect of those Articles of the Treaty and not on Article 9 (3) of the Regulation?

That inference does not appear to me to be necessarily correct. Although it is true that private persons can invoke the rights which they hold by virtue of Articles 85 and 86 before their national courts and that the latter have power to recognize their enjoyment of them, it is not a necessary consequence of that finding that national courts, even when they judge on an indirect basis, are not affected by Article 9 (3) of Regulation No 17 and can avoid the obligation temporarily to relinquish jurisdiction when the Commission has initiated a procedure on the basis of those same provisions of the Treaty.

With regard to this matter, it is in no respect clear whether one ought to distinguish between domestic courts on the basis of whether they deliver judgments on a direct or indirect basis.

As regards the case laws of the national courts, they are very much divided on the question.

In Germany, courts judging civil cases are not regarded as authorities, on the ground that they can take account only of the civil consequences of decisions taken by the Bundeskartellamt. That emerges in particular from a decision delivered on 9 April 1970 by the German Federal Court (Bundesgerichtshof). But one of those commenting on that decision, Dr. Kurt Markert, referring to the Judgment of this Court in *Bilger*, of 18 March 1970 (Case 43/69, Rec. 1970, p. 137), and observing that this Court had affirmed in that Judgment that civil courts of the Member States were to be included in the expression 'national authorities' considers, for his part, that the Federal Court could not decide that the question of the competence of civil courts is to be settled according to domestic German law.

In France, the case law seems unequivocal: civil courts are 'authorities', bound to stay proceedings when the Commission initiates a procedure (Cour d'appel of Paris, 26 January 1963 and 22 February 1967). In effect, this solution is explained by the fact that in that counrty the only authorities competent to take decisions implementing the law on competition both at the Community level and at the domestic level are the ordinary judicial authorities. The Commission technique des ententes et des positions dominantes is merely a consultative body and the Minister for the Economy and Finance only has the power to refer matters to the public

prosecutor's office. Only the courts have the power to impose penalties, to find agreements void or valid and to decide on the civil consequences.

In Belgium, the case law is less rigid. In 1966 the Tribunal civil of Brussels held that the courts must be regarded as authorities within the meaning of Regulation No 17; but the Cour de Cassation, considering an appeal brought before it against a decision of the Cour d'appel, which had stayed proceedings, held that a national court can in all cases stay proceedings until the Commission has given a decision if it considers that it does not have at its disposal adequate information to decide on the application of Article 85 (1). It thus adopted the theory of the optional stay and held that it was unnecessary, in that case, to have recourse to an interpretation of the words 'authorities of the Member States'.

As for legal writers, they are also divided. Some, like the Advocate-General F. Dumon of the Belgian Cour de Cassation, have maintained that the authorities mentioned in Article 9 (3) of the Regulation do not include ordinary courts deciding on an indirect basis (article in *Liber Amicorum*, in honour of Professor L. Frédéricq, 1965, T. I, p. 337).

On the other hand, other authors have expressed the opinion that this expression covers all national bodies — both administrative and judicial — concerned in one way or another with the application of the law of competition, even if the decisions which those bodies are required to take are based on private law (Metzger, article under 'Cour d'appel of Paris', 26 January 1963, in the *Revue critique de droit international privé*, 1963, heading 398).

A third body of opinion has considered that in the absence of an autonomous concept of Community law the definition of the authorities is a matter, in each State, of domestic law.

The majority of these opinions were expressed before the *Bilger* Judgment was delivered by this Court. It is thus a question of what conclusions may be drawn from the case law of this Court.

The *Bilger* Judgment seems to have settled the question since you clearly affirmed there that 'the expression authorities of the Member States covers national courts'. Certainly, you also declare that this solution results from the fact that 'Article 88 of the Treaty refers to the national rules on competence and procedure', which, according to Professor Berthold Goldmann, signifies that this Court has not definitively settled the problem and that the solution to it must be sought in the various national laws. Although other authors, such as Professor Etienne Cerexhe (Congrès international de droit européen — Berlin — September 1970), have maintained that the Judgment of this Court of 18 March 1970 no longer leaves room for any doubt, that is not the opinion of other commentators who have even wondered whether the Court really intended to take part in the controversy (Mégret and others, *op. cit.*, p. 159). The Procureur genéral at the Belgian Cour de Cassation, Ganshof Van der Meersch, was also very much less explicit when referring to the scope of the *Bilger* Judgment (see his opinion preceding the decision of the Belgian Cour de Cassation of 24 December 1970, Bulletin des arrêts de la Cour de Cassation, 1971, I, 392 *et seq.)*. We must also however note that the question raised in the *Bilger* case concerned a dispute between private individuals in which the problem of the application of Article 85 (2) arose only indirectly. It thus seems out of the question that this Court intended to refer to the national courts only insofar as they apply Articles 85 and 86 directly.

In a more recent Judgment of 6 February 1973, *Brasserie de Haecht v Wilkin Janssen,* this Court made the following statement in respect of a request for a

preliminary ruling made by the Tribunal de Commerce of Liège: 'Without the necessity of re-examining the question whether by the words "authorities of the Member States" Article 9 also refers to the national courts acting pursuant to Article 85 (2) of the Treaty'. That was of course merely an incidental statement in the grounds of that Judgment, but it tends to support a wide interpretation of the *Bilger* Judgment. In considering that there was no point to a *re-examination* of the problem did this Court not intend to reject the argument according to which the previous judgment of this Court had not settled the problem? Secondly, the *Haecht* Judgment is also concerned with cases where the national courts act in pursuance of Article 85 (2), in other words where they decide indirectly.

Does not that confirm that the *Bilger* Judgment must be interpreted as meaning that when these courts deliver decisions on an indirect basis they must be regarded as 'authorities of the Member States'?

Be that as it may, the search for a general definition of that expression must concentrate an the application of Article 9 of Regulation No 17. It is in fact a question of establishing the authorities in each State which must relinquish their jurisdiction if the Commission itself has initiated or initiates a procedure based on the provisions of Article 85 (1) or Article 86.

Although it is true that each State has the right to determine those of its authorities which are responsible, within its own territory, for applying directly or indirectly Community law on competition, the States have not, on the other hand, the power to indicate the authorities which are bound to relinquish their jurisdiction.

In reality, to admit that such a power can be exercised by the States would amount to recognising that the extent and even the very existence of the Commission's competence depend on the whim of the States. But this competence is based on Community law which must be applied uniformly.

We are thus led to consider, with Professor Goldmann, that, in order that this uniformity of application be brought about, it must 'be established as a general Community rule that any body within a Member State which contributes to the application of the law of competition — whether by the initiation of prosecutions, by the finding and suppression of infringements or even by decisions relating to the civil consequences of acts restricting competition — is an authority within the meaning of Article 9 of Regulation No 17'. (B. Goldmann, *Droit Commercial européen,* Dalloz 2nd edition, p. 375).

What is in effect the object of that provision, if not to avoid the risk of conflict between Community and national decisions and to ensure in addition the precedence of Community decisions over national decisions?

Moreover, from a terminological point of view, the words 'authorities of the Member States' are used both in Article 88 of the Treaty and in Article 9 (3) of Regulation No 17, as well as in Article 15 of Regulation No 1017/68 applying rules of competition to transport.

The *ratio legis* of these provisions is identical, except for the fact that the date on which the competence conferred on the authorities of the Member States is temporarily suspended, is, in one case, that of the entry into force of the provisions adopted in accordance with Article 87 of the Treaty, and in the other case, that of the initiation of a procedure by the Commission or, in the case of a transport undertaking, the notification referred to in Article 12 (3) of Regulation No 1017. In all these cases the problem is that of ensuring a uniform application, throughout the Common Market, of the rules on competition while not interfering with the direct effect of the provisions of the

Treaty relating to agreements and dominant positions.

It would be paradoxical to say, at this time, that that same expression 'authorities of the Member States' only referred to administrative or judicial bodies judging the matter directly and that courts judging on an indirect basis were left jurisdiction to find that an agreement was void or that there was abuse of a dominant position or to assess the civil law consequences without having to concern themselves in any way with the fact that the Commission had initiated a procedure. The risk of conflicting decisions and, consequently, of divergence in the application of rules on competition would be no less in the case of an indirect finding than in the case of a domestic decision of an administrative or judicial body judging the matter directly.

It would likewise be paradoxical to recognise that national courts judging on an indirect basis had the power, before the entry into force of Regulation No 17, to declare that an agreement was not void or that there existed no abuse of a dominant position, and to state that from the moment when the Commission initiated a procedure these same courts, as they were no longer regarded as 'authorities of the Member States', would thus have complete power to declare, judging the matter indirectly, that Article 85 or 86 should not be applied.

It must be added that the risk of conflicting decisions exists not only in relations between the national courts and the Community institution, which for this purpose is the Commission.

If, when dealing with disputes similar to the one before the Brussels court, these courts refer questions of interpretation to the Court of Justice under Article 177 it is the judgment of this Court which, if delivered before the Commission's decision, is likely to be ill-founded in relation to that decision. The examination of preliminary questions which are referred to you in cases of this nature does not, in all likelihood, enable you to consider all aspects of the problem and will lead you to deliver an interpretative judgment when you are not in a position to evaluate all the consequences of that interpretation.

Finally, if subsequently the decision of the Commission were to be contested directly before you and if, as a Court of unlimited jurisdiction, having before you all the documents relating to the procedure followed by the Commission, you were to decide to give a judgment different from that which you gave as a preliminary judgment on the basis of the same situation you would be likely to contradict yourselves.

When this Court is deciding in particular if an undertaking is abusing a dominant position must it not be fully informed of all the facts of the affair? Did you not approve the legal reasoning of the Commission in the Continental Can decision but nevertheless quash that decision on grounds relating to certain factors which you were only able to grasp by an examination of all the documents relating to the procedure?

These considerations lead me, for my part, to favour a wide interpretation of Article 9(3) of Regulation No 17, which alone would seem to me capable of ensuring the efficacy of that provision and thus of avoiding not only differences between national and Community decisions but also the risk of a lack of coherence between the different solutions which you may be led to adopt according to whether the matter is referred to you in pursuance of Article 177 or whether it is an action in which you have unlimited jurisdiction.

Two objections can undoubtedly be made to the point of view which I have just expounded.

The first results from the fact that neither Article 87 of the Treaty nor the Regulation of the Council implementing that Article gives the Community institutions power to override national

rules on the competence of the domestic courts by obliging the latter to stay proceedings in the case of disputes at private law.

That argument is not decisive. A stay of proceedings is not a denial of the competence of those courts and does not involve the definitive loss of their power to decide the matter. It only forces them temporarily to suspend the examination of a dispute until the Commission has reached its decision. Thereafter the court concerned, duly informed of that decision, will be in a position to judge the matter, this time with full knowledge of the facts, and must conform with the Community decision insofar as it has become final, save, if need be, to refer to this Court such questions on the interpretation of Community law as it may still consider necessary to settle the civil dispute.

I must add that although this Court does not have the power, as I stated in the first part of my opinion, to examine the competence of a national court with respect to the domestic law applicable to it, it does however have the obligation to examine whether, by virtue of Community law, in this case Regulation No 17, such a court was or was not bound to suspend proceedings when, as is here the case, it had to apply, albeit indirectly, Article 86 of the Treaty at a time when the Commission had already initiated a procedure.

A second objection can be based on the necessity to safeguard the individual rights in question. Can one possibly accept that an action for annulment of a contract and for damages should be held in abeyance before the national court while the latter waits for a decision of the Commission of the European Communities, especially as experience shows that procedures initiated by that institution can extend over a long period of time?

It is of course regrettable that national courts may be obliged to suspend the settlement of disputes of civil law for months at a time, and even for years, because of the slowness of the Community procedure. But then again I do not think that the objection is decisive. There are no doubt means of preventing prolonged delays from causing great prejudice to the interests of private parties. These means are of two kinds: it is for the national court to adopt measures of conservation at the request of one or other of the parties. These measures should be such as to preserve the rights of the parties in question without prejudging the substance of the case. One can also include here an action for failure to act against the Commission which could encourage the latter to adopt its decision within a reasonable time. Finally, if one had to weigh up, on the one hand, the private interests arising from the execution of a certain contract and, on the other hand, the general interest of a coherent application of Community law, I would be most inclined to consider that the latter must have precedence over the former.

There remain two problems: that of the national authorities' knowledge of the initiation of a procedure by the Commission and that of knowing when the national court must stay proceedings.

As to the first point, the parties to the main action are largely to blame and one can only be surprised that SABAM did not point out earlier to the Brussels court the procedure which the Commission was pursuing in connexion with the Association. Also the Belgian Government had itself received notification of the decision of the Commission taken in June 1970 to open the procedure. In any case, the interpretation of the expression 'authorities of the Member States' cannot be altered by reason of the possible inadequacy of the information which those authorities would have of the Commission's initiatives.

As to the second point, it matters little in my opinion that the Community procedure was initiated after a national

court had had brought before it a dispute raising as an issue the indirect application of Article 85 or of Article 86. It is necessary and it suffices that the initiation of the procedure occurs during the course of the action before the national court, in other words before it has delivered its decision. Such was most certainly the case here since, even though the Brussels court had the matter brought before it in 1969, it was the following year that the Commission initiated of its own motion a procedure in pursuance of Article 86 of the Treaty against SABAM, and it was not until 1973 that, the submissions of the parties having been lodged and the intervention of Belgian Radio-Television entered against SABAM, the Brussels court believed that it was in a position to refer to this Court the preliminary questions which are the subject of this affair. At that time, the court could not fail to be aware that a procedure had been initiated by the Commission; it should therefore have stayed proceedings and, as a necessary consequence, could not refer the matter to you under Article 177.

The national court — of first instance or, possibly, of appeal — ought only to have resumed examination of the dispute when the Commission had delivered its decision, and, until then, a request for a preliminary ruling was premature.

On those grounds, I would advise you to decide that there is no need, in this case, to give a ruling on the preliminary questions which have been referred to you.