

JUDGMENT OF THE COURT
OF 18 OCTOBER 1979 ¹

**GEMA, Gesellschaft für musikalische Aufführungs- und
mechanische Vervielfältigungsrechte
v Commission of the European Communities**

Case 125/78

1. *Competition — Administrative proceedings — Initiation on application by natural or legal person — Commission's duty to arrive at a decision within the meaning of Article 189 of the Treaty — Non-existent — Communication referred to in Article 6 of Regulation No 99/63 — Effects*

(Regulation No 17 of the Council, Art. 3 (2) (b); Regulation No 99/63 of the Commission, Art. 6)

2. *Action for failure to act — Notice to the institution — Defining position within the meaning of the second paragraph of Article 175 of the Treaty — Concept*

(EEC Treaty, Art. 175, second paragraph)

3. *Procedure — Raising fresh issue in course of proceedings — Scope — Fresh conclusions — Not permissible*

(Rules of Procedure, Art. 42 (2), first subparagraph)

1. As is shown by the phrase "... shall inform the applicants of its reasons", the communication referred to in Article 6 of Regulation No 99/63 of the Commission only seeks to ensure that an applicant within the meaning of Article 3 (2) (b) of Regulation No 17 of the Council be informed of the reasons which have led the Commission to conclude that on the basis of the information obtained in the course of the inquiry there are insufficient grounds for granting the application. Such a communication implies the discontinuance of the proceedings without, however, pre-

venting the Commission from re-opening the file if it considers it advisable, in particular where, within the period allowed by the Commission for that purpose in accordance with the provisions of Article 6, the applicant puts forward fresh elements of law or of fact. The argument that a person putting forward such an application is entitled to obtain from the Commission a decision within the meaning of Article 189 of the Treaty on the existence of the alleged infringement cannot therefore be accepted.

¹ — Language of the Case: German.

Moreover, even assuming that such a communication may be in the nature of a decision capable of being contested by way of Article 173 of the Treaty, that in no way implies that the applicant within the meaning of Article 3 (2) of Regulation No 17 is entitled to require from the Commission a final decision as regards the existence or non-existence of the alleged infringement. In fact the Commission cannot be obliged to continue the proceedings whatever the circumstances up to the stage of a final decision. A contrary interpretation would remove all meaning from Article 3 of Regulation No 17 which in certain circumstances allows the Commission the opportunity of not adopting a decision to compel the undertakings concerned to put an end to the infringement established.

2. A letter, by which the Commission, in accordance with Article 6 of Regulation No 99/63, replies to a person

who has made an application under Article 3 (2) (b) of Regulation No 17, stating reasons, fixing a time-limit for the applicant to submit any comments, and explaining that the information obtained does not permit a finding of the existence of an infringement of Article 85 or 86 of the EEC Treaty, constitutes a defining of its position under the second paragraph of Article 175 of the Treaty.

3. The first subparagraph of Article 42 (2) of the Rules of Procedure allows an applicant, in exceptional circumstances, to raise fresh issues in order to support conclusions set out in the document instituting the proceedings. However, that provision does not in any way provide for the possibility of an applicant's introducing fresh conclusions or, *a fortiori*, of transforming an application on grounds of failure to act into an application for annulment.

In Case 125/78

GEMA, GESELLSCHAFT FÜR MUSIKALISCHE AUFFÜHRUNGS- UND MECHANISCHE Vervielfältigungsrechte, 29 Herzog-Wilhelm-Straße, Munich, represented by Ernest Arendt, of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of Mr Arendt,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Erich Zimmermann, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Plateau du Kirchberg,

defendant,