OPINION OF ADVOCATE GENERAL JACOBS
delivered on 20 June 1996 *

1. In this case the Court has to consider an appeal against the judgment of the Court of First Instance in Case T-5/93 *Roger Tremblay and Others* v *Commission*. [1] In issue is a decision of the Commission not to proceed with a series of complaints against the Société des Auteurs, Compositeurs et Editeurs de Musique ('SACEM'), the society which manages copyright and performing rights in musical works in France.

2. What appears to be the main issue in this appeal is an alleged misapplication of what is referred to (perhaps somewhat confusingly) as the principle of subsidiarity: meaning in this context that the Court of First Instance was wrong in upholding (in part) the Commission's decision not to pursue the complaints for the reason given by the Commission that those complaints could more appropriately be dealt with by the national authorities.

Factual background

3. The complaints before the Commission dated back to 1979. Between 1979 and 1988 the Commission received numerous applications under Article 3(2) of Council Regulation No 17 (First Regulation implementing Articles 85 and 86 of the Treaty), [2] for a finding that SACEM had infringed Articles 85 and 86 of the EEC Treaty. The applications were made by groups of discothèque operators, including the Bureau Européen des Médias de l'Industrie Musicale, and individual operators, including the three applicants in Case T-5/93: Roger Tremblay, François Lucazeau and Harry Kestenberg.

4. The complaints lodged with the Commission contained essentially the following allegations:

(1) that the societies which managed copyright in the various Member States shared the market amongst themselves by concluding reciprocal representation contracts, under which copyright societies were prohibited from dealing directly with users established on the territory of another Member State;

* Original language: English.

1 — [1995] ECR II-185.

2 — OJ, English Special Edition 1959-1962, p. 87.

(2) that the royalty of 8.25% of turnover charged by SACEM was excessive by comparison with the rates of royalty paid by discothèques in the other Member States, and that that rate was not used to pay the management societies represented (in particular foreign societies), but accrued exclusively to SACEM, which passed on derisory sums to those whom it represented;

(3) that SACEM required every user to acquire its entire repertoire, both French and foreign, and refused to allow use of its foreign repertoire alone; and

(4) that SACEM applied the rates of royalties in a discriminatory manner in favour of discothèques which were affiliated to certain syndicates.

5. The Commission's investigation into SACEM's conduct was suspended pending the outcome of requests for preliminary rulings submitted to this Court, between December 1987 and August 1988, by the Appeal Court, Aix-en-Provence, and the Appeal Court and the Tribunal de Grande Instance, Poitiers: Case 395/87 *Ministère Public* v *Tournier* [3] and Joined Cases 110/88, 241/88 and 242/88 *Lucazeau and Others* v *SACEM and Others*, [4] respectively. The questions referred in those cases asked essentially whether the conduct forming the subject-matter of the complaints referred to above constituted a breach of Articles 85 and/or 86. In its judgments in both cases of 13 July 1989, the Court ruled in response that:

'Article 85 of the EEC Treaty must be interpreted as prohibiting any concerted practice by national copyright-management societies of the Member States having as its object or effect the refusal by each society to grant direct access to its repertoire to users established in another Member State. It is for the national courts to determine whether any concerted action by such management societies has in fact taken place.

Article 86 of the Treaty must be interpreted as meaning that a national copyright-management society holding a dominant position in a substantial part of the common market imposes unfair trading conditions where the royalties which it charges to discothèques are appreciably higher than those charged in other Member States, the rates being compared on a consistent basis. That would not be the case if the copyright-management society in question were able to justify such a difference by reference to objective and relevant dissimilarities between copyright management in the Member State concerned and copyright management in the other Member States.'

3 — [1989] ECR 2521.
4 — [1989] ECR 2811.

The Court also held in *Tournier* that:

'The refusal by a national society for the management of copyright in musical works to grant the users of recorded music access only to the foreign repertoire represented by it does not have the object or effect of restricting competition in the common market unless access to a part of the protected repertoire could entirely safeguard the interests of the authors, composers and publishers of music without thereby increasing the costs of managing contracts and monitoring the use of protected musical works.'

6. Following the judgments in those cases, the Commission continued its enquiries into SACEM's practices, mainly as a result of requests for assistance from the French courts and authorities. Although the Court had left the national authorities and national courts to decide whether the royalties charged by SACEM were appreciably higher than those charged in other Member States, the Commission considered that it would be difficult for those national bodies to carry out such a comparison themselves since they had no power to investigate matters abroad. The Commission's findings were set out in a report dated 7 November 1991. The report concerned the level of tariffs in different Member States and the alleged discrimination in favour of discothèques affiliated to certain syndicates.

7. After producing its report, however, the Commission decided to invoke Article 6 of Commission Regulation No 99/63 [5] on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17. Article 6 provides that 'Where the Commission, having received an application pursuant to Article 3(2) of Regulation No 17, considers that on the basis of the information in its possession there are insufficient grounds for granting the application, it shall inform the applicants of its reasons and fix a time-limit for them to submit any further comments in writing.' By letter dated 20 January 1992, the Commission wrote to the Bureau Européen des Médias de l'Industrie Musicale ('BEMIM'), pursuant to Article 6, informing them that it did not intend to grant their application and giving them a chance to comment before taking its final decision. (The Commission considered that the applicants in Case T-5/93 had notice of that letter, either as members of BEMIM or through their lawyer, who also acted for BEMIM, so that it was unnecessary to send them individual communications.) Having considered observations submitted in response to its letter, the Commission notified the lawyers acting for both BEMIM and the discothèques by a further letter (dated 12 November 1992) that their complaints had been definitively rejected. In answer to a query as to the meaning of that rejection, the Commission wrote a third letter (dated 17 December 1992) to the same lawyers, in which it confirmed that it had intended to leave all the

5 — OJ, English Special Edition 1963-1964, p. 47.

complaints submitted to it to the national courts, whether those concerned the level of tariffs or the alleged discrimination between discothèques. I shall turn now to consider the terms of the first two letters in some detail since an essential part of the appellants' main ground of appeal is that the Court of First Instance misinterpreted the reasons for which the Commission reached its decision.

8. The Commission claimed in its letter of 20 January 1992 that it had taken the comparison as far as possible in view of the resources available to it and that to take the matter any further by giving consideration to regional or local matters would involve considerable administrative resources with no promise of a result justifying the effort involved. The Commission also stated in that letter that the investigation provided no basis for concluding that the conditions for the application of Article 86 were fulfilled with regard to the level of the tariffs applied by SACEM at that time. It considered that because of this and because, in particular, of the fact that the effects of the alleged abuse were felt mainly only within one Member State, indeed only a part of that State, it was in the Community interest for the matter to be dealt with not by the Commission but, if necessary, by the French authorities, pursuant to the principles of subsidiarity and decentralization.

9. On the last page of the letter, under the heading 'Conclusions', the Commission stated, pursuant to Article 6 of Commission Regulation No 99/63, that it could not respond favourably to the complaint, having regard to the principles of subsidiarity and decentralization and to the fact that, the practices criticized being essentially national, there was no Community interest involved and several French courts were already seised of the matter.

10. In its second letter, the Commission explained that it did not intend to act further on the complaints for the reasons already set out in its letter of 20 January 1992 and that it did not intend to repeat these reasons but simply to deal with points raised by the applicants in their observations. In brief, the Commission's further comments were as follows:

(1) The complainants' observations did not change its finding that the centre of gravity of the alleged infringement was in France and that its effects in other Member States could only be very limited; that, therefore, the matter was not of any particular importance to the functioning of the common market; and hence that the Community interest dictated that the complaints be dealt with by the national authorities and courts, rather than the Commission. It referred in that respect to the judgment of the Court of First Instance delivered on 18 September 1992

(i. e. subsequent to its first letter) in *Automec* v *Commission* [6] ('Automec II').

(2) The judgment of the Court of First Instance in 'Automec II', at paragraph 88, had established that the Commission could reject a complaint on the ground that the national courts were already seised of the matter.

(3) The application of the principle of 'subsidiarity' did not involve abandoning all action of the public authorities but rather deciding whether the Commission or the national competition authority was best placed to deal with the matter. Since the centre of gravity of the alleged infringements was in France and there was a national competition authority in possession, as a result of the Commission's work, of the necessary information to undertake the comparison referred to by the Court, it was a matter for the national authority to pursue further if necessary. Moreover, many French courts were already seised of complaints and only national courts could award damages. It was thus a matter of a classic application of the principle of subsidiarity which took the form not of any failure by the Community authorities but of a simple transfer of competence to the national level.

(4) The use of the Commission's report was not restrained by reason of confidentiality pursuant to Article 20 of Regulation No 17 because the report concerned, not the levels of the tariffs in force, which were in any event already in the public domain, but a comparison of the practical results of applying those tariffs to five types of discothèques.

(5) National courts were not bound to follow the legal assessments of the Community or national administrative authorities.

(6) The Commission was not obliged to investigate whether breaches of the competition rules had occurred in the past if the principal aim was to facilitate the award of damages.

(7) The comparisons carried out by the Commission sufficed to enable a decision to be taken as to whether or not the royalties fixed by SACEM amounted to the

6 — Case T-24/90 [1992] ECR II-2223.

imposition of unfair trading conditions within the meaning of the Court's judgments.

11. Finally, in the last two paragraphs of its second letter, the Commission stated:

(1) as regards the alleged agreement or concerted practice between SACEM and the societies in other Member States, that it had not been able to ascertain any serious indication of such an agreement or concerted practice and that, even if such an agreement or concerted practice did exist, it did not appear to have had any precise effects on the tariff levels; but that it would be prepared to take into consideration any formal proof of the existence and effects of the alleged agreement;

(2) as regards the agreement between SACEM and certain discothèque syndicates, that the effects of that agreement could only have been felt within France, to the benefit of certain discothèques and to the disadvantage of others, and that, taking into account the principles of cooperation and division of tasks between the Commission and the Member States, it was for the national authorities to rule on the matter, especially since, even though the Commission and the national authorities shared competence in applying the Community competition rules, only the national authorities had the power to award damages; furthermore, the Commission's view of the agreement could never bind national courts.

The judgment of the Court of First Instance

12. The Court of First Instance in its judgment of 24 January 1995 [7] annulled the Commission's decision in so far as it rejected the applicants' allegation that the market had been partitioned as a result of an alleged agreement between SACEM and the copyright-management societies in the other Member States. However, it dismissed the remainder of the application, thus leaving in force that part of the Commission's decision which declined to continue investigation into agreements between SACEM and the discothèques to which SACEM charges royalties in respect of its members' musical works.

Preliminary points

13. Before turning to consider the substance of the grounds of appeal before this Court, it

7 — Cited at note. The Court of First Instance gave judgment on the same date in the related case, Case T-114/92 *BEMIM* v *Commission* [1995] ECR II-147.

is necessary to consider two preliminary points raised by the Commission concerning the admissibility of the appeal.

The nature of the relief sought

14. The appellants request the Court to annul the decision of the Court of First Instance in so far as it rejected the application to annul the part of the Commission's decision declining to investigate further the question of the agreements between SACEM and the discothèque owners, and, pursuant to Article 54 of the Statute of the Court of Justice, to annul that part of the Commission's decision itself. However, they also go further in asking the Court to rule that the Commission must reopen the proceedings and issue a statement of objections to SACEM. The Commission is correct in considering that an application for that form of relief is inadmissible. It is well established that it is not for the Community courts to address instructions to institutions and that, pursuant to Article 176 of the Treaty, it is for the institution concerned to take the necessary measures to comply with a judgment given in an action for annulment. [8]

8 — See, for example, Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraph 23 of the judgment; Case T-548/93 *Ladbroke Racing* v *Commission*, judgment of 18 September 1995, [1995] ECR II-2565, paragraph 54; and Case T-575/93 *Koelman* v *Commission*, judgment of 9 January 1996, [1996] ECR II-1, paragraph 29.

Procedural deficiencies identified by the Commission

15. The Commission points to two procedural deficiencies in the appellants' pleadings:

(1) failure to name the other parties to the proceedings before the Court of First Instance, contrary to Article 112(1)(b) of the Rules of Procedure; and

(2) failure to mention the date on which the decision appealed against was notified to the appellants, contrary to Article 112(2) of the Rules.

16. However, such deficiencies would not be sufficient to render the application inadmissible: there is no suggestion that the other parties to the proceedings before the Court of First Instance were prejudiced by not being mentioned on the face of the document; and the appeal would be in time even if time were to run from the date of the judgment.

Grounds of appeal

17. I now consider in turn the various grounds of appeal.

18. I will consider first what seems, as I have suggested, to be the main issue in this appeal: was the Commission wrong in leaving the matter to the national authorities, or more accurately was the Court of First Instance wrong to the extent that it upheld that decision? The issue is raised at a number of different points by the appellants, but it is convenient to deal with the different arguments together. First, they say that the Court of First Instance erred in law in not addressing the Commission's reference to subsidiarity. Secondly, they contest on various grounds the review by the Court of First Instance of the substance of the Commission's decision. A third series of arguments presupposes that the Court of Justice has quashed the decision of the Court of First Instance and has proceeded, pursuant to Article 54 of the Statute, to give final judgment in the matter itself: on that basis the appellants argue on various grounds that the Commission's decision was based on a wrong application of the principle of subsidiarity. Strictly the arguments in the last part of the appeal are, as I shall suggest, inadmissible, but since it is not easy to disentangle the various arguments in relation to 'subsidiarity' I shall make no distinction on that ground when considering that issue.

19. Before examining the various submissions individually, I think that some preliminary observations are necessary. The respective functions of the Commission on the one hand and of the national authorities on the other hand in the application of the Treaty rules on competition raise issues which have recently been widely debated. A recent work provides a convenient summary of the background: [9]

'The Commission is the authority responsible for shaping Community competition policy, a task which it must carry out in the public interest. For historical reasons, the Commission has also been the main authority responsible for monitoring compliance with Articles 85 and 86 of the EC Treaty in the European Community.

In the early years of the European Communities, there was a tendency to centralize the application of competition rules in the hands

9 — Luis Ortiz Blanco, *EC Competition Procedure*, Oxford, 1996, pp. 11 and 12 [footnotes omitted] . See also Editorial Comments, 'Subsidiarity in EC Competition law enforcement', *Common Market Law Review*, 1995, p. 1 and the articles cited therein; P. Kamburoglou 'EWG-Wettbewerbspolitik und Subsidiarität', *Wirtschaft und Wettbewerb*, 1993, p. 273; B. Rodgers, 'Decentralisation and National Competition Authorities: Comparison with the Conflicts/Tensions under the Merger Regulation', *European Competition Law Review*, 1994, p. 251, and M. Van Der Woude, 'Nationale rechters en de EG Commissie: Subsidiariteit, decentralisatie of gewoon samenwerken', *Nederlands Juristenblad*, 1993, p. 585.

of the Commission. In general it was considered that the application of Community competition law was primarily the task of the Commission, although, legally, it could also be applied by the national judicial authorities and competition authorities. As the Commission encountered problems in securing recognition of its powers in the Member States and the Member States lacked adequate means to apply Articles 85 and 86, the Commission willingly accepted this *de facto* quasi-monopoly in competition policy application. This also enabled it to create a homogeneous set of precedents for its decisions and administrative practice, subject to review by the European Court and, more recently, the Court of First Instance.

With the passage of time, the Commission's and the Member States' situations have evolved. The Commission is now recognized as the driving force of Community competition policy, while the Member States are generally seen as better equipped to apply both their own national competition law and that of the Community. This development will, in the future, facilitate a clear definition of the respective roles of the Community administration and the national authorities in this field of Community law.

The debate on subsidiarity has accelerated the existing trend towards reviewing the Commission's administrative practice in order to secure more active participation by the national judicial and other authorities in monitoring compliance by undertakings with Articles 85 and 86 of the Treaty.'

20. A distinction should perhaps be drawn between the term 'subsidiarity' as used in this debate and the principle of subsidiarity contained in Article 3b of the Treaty. At all events, where Community competition law is applied by national authorities it is clearly not a case of subsidiarity in the sense that the national authorities are applying *national* law. It might be more appropriate to refer to decentralization rather than subsidiarity: the idea is that of the decentralized application of Community law, by the national authorities rather than by the Commission. In practice however the distinction may be less clear, since national authorities may be applying both Community and national competition rules.

21. The question then is under what conditions the Commission may decide not to proceed with investigation of a complaint in circumstances where the complainant has a legitimate interest but the Commission con-

siders that there is not a sufficient Community interest.

22. In its judgment in 'Automec II', the Court of First Instance held that it was legitimate for the Commission to decide not to proceed with a complaint through lack of a Community interest. [10] In that respect, the Commission differs from a civil court, which must uphold the individual rights of private persons in their relations *inter se*. The Court of First Instance considers, however, that the Commission cannot merely refer to the Community interest in the abstract but must set out the factual and legal considerations which prompted it to conclude that there was insufficient Community interest, in accordance with Article 190 of the Treaty. Moreover, the Commission must take account of the extent to which the national courts can protect the complainant's rights under the Treaty. [11]

23. The Commission is entitled to reject a complaint for lack of Community interest, not only before commencing an investigation of the case, but also after taking investigative measures if that course seems appropriate to it at that stage of the procedure. [12]

24. After the judgment in 'Automec II', the Commission set out its own position in its 'Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty'. [13]

25. For its part, the Court of Justice has held that, although the Commission 'is not obliged to adopt a decision establishing the existence of an infringement of the rules on competition or to investigate a complaint brought before it under Regulation No 17, it is none the less required to examine closely the matters of fact and of law raised by the complainant in order to ascertain whether there has been any anti-competitive conduct. Moreover, where an investigation is terminated without any action being taken, the Commission is required to state reasons for its decision in order to enable the Court of First Instance to verify whether the Commission committed any errors of fact or of law or is guilty of a misuse of powers.' [14]

26. In the light of the above, I will now consider the appellants' submissions on the issue of 'subsidiarity'.

10 — See also Case T-7/92 *Asia Motor France* v *Commission* [1993] ECR II-669; Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285; *BEMIM*, cited at note; Case T-548/93 *Ladbroke Racing*, cited at note 8; and Case T-74/92 *Ladbroke* v *Commission* [1995] ECR II-115.

11 — See paragraphs 71 to 98 of the judgment.

12 — *BEMIM*, cited at note, paragraph 81 of the judgment.

13 — OJ 1993 C 39, p. 6; see in particular sections III and IV.

14 — Case C-19/93 P *Rendo and Others* [1995] ECR I-3319, paragraph 27 of the judgment.

Allegation that the Court of First Instance erred in law in not addressing the Commission's reference to subsidiarity

27. The appellants allege that, in dismissing subsidiarity as a ground of the Commission's reasoning, the Court of First Instance incorrectly interpreted the reasons behind the Commission's decision. The Court of First Instance found that 'it is apparent from paragraphs 6 to 8 of the contested decision that the Commission based its rejection of the applicants' complaints not on the principle of subsidiarity but solely on the ground of lack of a sufficient Community interest'. The appellants argue, however, that subsidiarity was a factor in the Commission's reasoning and that that principle was wrongly applied by the Commission.

28. The Commission states that it based its rejection of the complaints only on the lack of sufficient Community interest. It adds that it considered that that lack of Community interest resulted both from the essentially national impact of the alleged infringements and from the fact that several French courts and the French competition authority were seised of similar cases. The Commission states that, although it did not explain in its letters exactly what it meant by the term 'subsidiarity', the meaning was made clear in its 22nd Report on Competition Policy 1992. In that report it explained that, in advocating subsidiarity, it simply meant that it was in favour of leaving matters to the national authorities in cases in which the impact was essentially national. The Commission argues that, in referring to subsidiarity in the decision in issue, it was not purporting to apply a general, independent principle of law which had to be respected by the Community authorities.

29. It is true that the Commission made reference to 'subsidiarity' in its two letters: it did so in the conclusions to its letter of 20 January 1992 (see paragraphs and above); and in its letter of 12 November 1992 it reiterated those conclusions and added the further comments on subsidiarity set out at paragraph (3) above. [15] However it is clear in my view from the extracts from the Commission's letters set out above that the Commission was not relying on subsidiarity as an independent ground for not proceeding with the complaints. It was using the term merely to express the idea that the complaint could more appropriately be examined by the national authorities. As will be seen below, that is one of the factors to be considered in the appraisal of the Community interest. It follows that the Court of First Instance did not err in law in failing to address the point separately.

15 — See paragraphs 8 to 10 above.

30. The appellants also argue that the 'denaturation' of the Commission's decision by the Court of First Instance in discounting the reference to subsidiarity led to a violation of their rights of defence because it meant that the question whether or not it was appropriate to apply the principle of subsidiarity was not addressed. However, since I consider that the Court of First Instance did not err in discounting the reference to subsidiarity, I consider that there was accordingly no violation of the appellants' rights of defence.

The Community interest and the question of priorities

31. The appellants argue that, by virtue of the judgment in 'Automec II', [16] the Commission is entitled to take account of the Community interest displayed by a particular complaint only in order to determine the priority to be given to that complaint, not to justify a decision not to pursue the complaint. At paragraph 60 of its judgment in the present case, the Court of First Instance rejected this view. Its approach is consistent with its judgment in 'Automec II' to which the appellants refer. Although in that case the Court of First Instance did make reference to 'priorities', the judgment was given against the background of the rejection of a complaint by the Commission. Indeed in paragraph 76 of its judgment in that case the Court of First Instance reasoned that, since the Commission is not obliged to take a decision as to whether or not there is an infringement of Community law in a particular case, [17] it must follow that it cannot be obliged to carry out an investigation. The reference in the judgment to 'priorities' can and should be taken to mean that the Commission may properly decide to pursue some complaints but not to pursue others.

32. There must of course be proper safeguards of the rights of the complainant and of the Community interest. The Court of First Instance recognized in 'Automec II' that, although the Commission cannot be obliged to conduct an investigation, the procedural safeguards provided for by Article 3 of Regulation 17 and Article 6 of Regulation No 99/63 oblige it nevertheless to examine carefully the factual and legal aspects of which it is notified in order to decide whether they indicate behaviour likely to distort competition in the common market and affect trade between Member States. [18] It also pointed out that the Commission's final

16 — Cited at note 6.

17 — Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, paragraphs 17 and 18 of the judgment. See also, for example, 'Automec II', cited at note 6, paragraphs 75 and 76; Case T-16/91 *Rendo and Others* v *Commission* [1992] ECR II-2417, paragraph 98; Case C-19/93 P *Rendo*, cited at note 14, paragraph 27; and, most recently, *Koelman*, cited at note 8, paragraph 39.

18 — Paragraph 79 of the judgment. See also Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045, paragraph 19; Case 298/83 *CICCE* v *Commission* [1985] ECR 1105, paragraph 18; Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 20; and Case C-19/93 P *Rendo*, cited at note 14, paragraph 27.

letter closing the file must be sufficiently reasoned. [19] Furthermore, the Court of First Instance has shown itself willing to review the Commission's reasoning in its assessment of the Community interest in closing a file. [20] There are accordingly sufficient safeguards to ensure that the Commission appraises complaints thoroughly. I therefore consider that the Court of First Instance did not err in reasoning that, in view of the fact that the Commission is under no general obligation to take a final decision as to whether or not Community law has been infringed in a particular case, it has the right, in certain circumstances and once it has carefully examined the information in its possession, to decline to investigate a complaint.

The issue whether the practices in question had only a national impact

33. The appellants argue that the Commission erred in concluding that the practices criticized as constituting an infringement of Article 86 had essentially only a national impact. That conclusion was accepted by the Court of First Instance. However, since the question whether the practices criticized had essentially only a national impact is a question of fact, an appeal on that ground is inadmissible before this Court.

The factors to be taken into account by the Commission in deciding whether to pursue a complaint

34. The appellants' other arguments concern the factors to be taken into account in assessing whether it is in the Community interest for the Commission to pursue an investigation. Such questions are admissible questions of law, on which the judgment of the Court of First Instance in 'Automec II' provides valuable guidance. [21] In 'Automec II' the Court of First Instance reasoned that, in order to assess the Community interest in further investigation of a case, the Commission must take account of the circumstances of the case and in particular the matters of fact and law set out in the complaint; it must, in so doing, balance the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing the existence of the infringement and the scope of the investigation required to fulfil its task of ensuring that Articles 85 and 86 are complied with. [22]

19 — Paragraph 85 of the judgment; Case C-19/93 P *Rendo*, cited at note 14, paragraph 27. See also Case C-39/93 P *SFEI and Others* v *Commission* [1994] ECR I-2681, paragraphs 31 and 32, in which the Court held that a letter closing a file can be the subject of judicial review under Article 173 of the Treaty and that this is so whether or not that letter contains an assessment of whether the Treaty has been infringed.

20 — *BEUC*, cited at note 10.

21 — See also the Opinion of Judge Edward acting as Advocate General in that case.

22 — Paragraph 86 of the judgment.

35. In the present case, the Court of First Instance held that 'where the effects of the infringements alleged in a complaint are essentially confined to the territory of one Member State and where proceedings have been brought before the courts and competent administrative authorities of that Member State by the complainant against the body against which the complaint was made, the Commission is entitled to reject the complaint through lack of any sufficient Community interest in further investigation of the case, provided however that the rights of the complainant or of its members can be adequately safeguarded, in particular by the national courts'. [23]

36. However, the appellants argue that the Commission was better placed than the national courts to deal with the matter. They point to confusion amongst national courts and the need for legal certainty. They also argue that it was inappropriate for the Commission to refer to the decision in 'Automec II' in reaching its decision to close the file on their complaints because, unlike the present case, only one case had been pending before national courts in relation to the facts of 'Automec II'.

37. I shall now consider whether the Court of First Instance committed any error of law on the above grounds.

38. The Court of First Instance stressed, at paragraph 59 of its judgment, that the appellants had no right to obtain a final decision from the Commission. It observed that it has been consistently held that Article 3 of Regulation No 17 does not confer upon a person who lodges an application under that article the right to obtain from the Commission a decision, within the meaning of Article 189 of the Treaty, regarding the existence or otherwise of an infringement of Article 85 or Article 86 of the Treaty; and that the position is different only if the complaint falls within the exclusive purview of the Commission, as in the case of the withdrawal of an exemption granted under Article 85(3) of the Treaty. The Court of First Instance thus dismissed the applicants' claims in so far as they amounted to arguing that the Commission had an obligation to take a final decision on whether or not Community law had been infringed. The Court of First Instance can clearly not be said to have erred in law in so doing in so far as it is correct to say that there is no general obligation upon the Commission to reach a final decision. That view is consistent with this Court's decisions in *GEMA* [24] and *Delimitis*, [25] as well as with its own case-law in 'Automec II' and subsequent cases. [26]

39. With regard to the question whether the Commission should have pursued its investigation further, the Court of First Instance

23 — Paragraph 65 of the judgment.

24 — Cited at note 17.

25 — Case C-234/89 [1991] ECR I-935, paragraph 43 et seq. of the judgment.

26 — Cited in notes 6 and 17.

considered (at paragraph 68 of its judgment) that 'the rights of a complainant could not be regarded as sufficiently protected before the national court if that court were not reasonably able, in view of the complexity of the case, to gather the factual information necessary in order to determine whether the practices criticized in the complaint constituted an infringement of Article 85 or Article 86 of the Treaty or of both'. However, it satisfied itself that, in the present case, the Commission's report provided sufficient information with regard to the level of tariffs and the question of discrimination between discothèques. Furthermore, as regards the allegation that SACEM refused to allow French discothèques to use only the foreign repertoire, it found that the applicants had advanced no specific argument to call into question the powers of the French courts to gather the factual information needed to determine whether that practice by SACEM (a French association established in France) constituted an infringement of Article 86 of the Treaty. It is important to note in relation to those two findings that the appellants do not appear to dispute the sufficiency of the information available. In my view, therefore, the Court of First Instance did not err in the above approach. I agree that, in order to justify a refusal by the Commission to pursue a complaint further, it is essential in each case that the national courts (or national authorities) should be competent to deal with the matter themselves. I consider that, if the national courts are so competent, the question of which court or which authority would find it easier to pursue the investigation in question can be relevant, but that the fact that it might be easier for the Commission to pursue an investigation should not in itself oblige the Commission to do so. In my view, the issue of Community interest goes wider than a simple consideration of which court or which authority would find it easier to further the matter. As the Court of First Instance considered in 'Automec II', other factors can be relevant, such as the significance of the alleged infringement in relation to the functioning of the common market.

40. In response to the applicants' arguments concerning the alleged confusion amongst national courts and the need to ensure the correct and uniform application of the competition provisions of the Treaty, the Court of First Instance reasoned that the fact that the national court might encounter difficulties in interpreting Article 85 or 86 of the Treaty is not, in view of the possibility of making a reference under Article 177 of the Treaty, a factor which the Commission is required to take into account in appraising the Community interest in further investigation of a case (paragraph 67). As discussed above, the Court of First Instance considered that the national courts had or were capable of gathering sufficient information to enable them to reach a decision as to the alleged infringements. As I observed earlier, that finding is not challenged by the appellants and the reasoning of the Court of First Instance is accordingly in my view wholly persuasive. The Court of First Instance was also clearly correct in my opinion in holding that 'contrary to the applicants' assertion, the right to take account of the fact that a case has been brought before national courts as a relevant criterion for evaluation of the Community interest in further examination of a case is not limited to cases where there is a single action pending between the complainant and the subject of the complaint' (paragraph 62). It cannot be maintained that, where there are several actions pending, the

Commission is precluded from leaving the matter to the national courts.

41. The appellants also argue that two factors referred to in the Commission's letters should not have been taken into account by the Commission in its assessment of whether it was in the Community interest for it to pursue the complaints: the fact that only national courts can award damages; and the fact that national courts are not bound by a Commission 'decision'. (In its letter of 12 November 1992, the Commission does not appear to have referred to the effect upon national courts of a formal decision, but rather to the effect of a legal assessment by the Commission. [27]) Since the appellants have not identified any alleged error of law in the judgment of the Court of First Instance on these points, this part of the appeal may be regarded as inadmissible.

42. In any event, however, I consider that both factors can properly be taken into account. Whilst the fact that only national courts can award damages does not in itself, in my view, justify the Commission rejecting a complaint, I consider that, in assessing whether it is in the 'Community interest' for a matter to be dealt with by the Commission, it may be appropriate in some cases to take into account the fact that, because of the nature of a particular case, litigation will in any event be commenced at national level in order to obtain damages.

43. In referring to the fact that national courts are not bound by its legal assessments, what the Commission had in mind is presumably that, in view of the production of its report, to have taken the complaint any further, short of a final decision, would have meant reaching an informal view as to whether or not there had been an infringement, and that that would have served little purpose since the national courts would not have been bound by such an appraisal. [28] In my view such a consideration can properly be taken into account when assessing whether it is in the Community interest to pursue a complaint further.

44. Before leaving this part of the appeal, I should perhaps emphasize that it should not be thought that there will never be circumstances, even in cases where its jurisdiction is not exclusive, in which the Commission is obliged to continue an investigation and, if it considers that there is an infringement, to take a final decision to that effect. On the contrary, the above discussion makes it clear that that may be required, in some cases, by the Community interest. But the appellants have not shown that that was the case here.

45. The remaining issues raised by this appeal can be dealt with more briefly.

27 — The phrases used are 'appréciation juridique' and 'prise de position'.

28 — See e. g. Joined Cases 253/78 and 1/79 to 3/79 *Procureur de la République* v *Giry and Guerlain* [1980] ECR 2327, paragraph 13 of the judgment.

Allegation that the Court of First Instance erred in law in failing to appreciate for how long the Commission had been seised of the matter

46. The appellants allege that an error of law occurred in that the Court of First Instance considered that the investigation had stretched over only six years, as opposed to 14 (from 1979). However, an appeal to the Court of Justice is, as we have seen, limited to points of law. This ground of appeal is accordingly inadmissible since the question of the length of the investigation is a question of fact, not law. In any event the Court of First Instance judgment commences, at paragraph 1, by acknowledging that the Commission had received numerous applications from 1979.

Allegation that the Court of First Instance erred in finding that the questions of law were new

47. The appellants also allege that the Court of First Instance committed an error of law in finding that the questions raised by the 1986 complaint were new questions of law. They proceed to adduce evidence of the issues having been raised with the Commission prior to 1986. That also is a question of fact. This ground of appeal is therefore also inadmissible.

Allegation that the Court of First Instance erred in law in not identifying the Commission's errors of law

48. The appellants allege that the Court of First Instance erred in law in not identifying the Commission's errors of law. The Commission argues that the appellants' lack of reasoning in that section of the pleading which deals with this ground of appeal should make this part of the appeal inadmissible. There is much force in the Commission's argument. It is well established that an appellant must allege errors of law by the Court of First Instance if its appeal is to be admissible. [29] It is true that the appellants also deal with the question of the Commission's alleged errors in a separate part of their pleading when requesting this Court to annul the Commission's decision itself, rather than simply referring the matter back to the Court of First Instance, and that the appellants' arguments might have been elucidated by reference to that section. However, as I point out below, that part of the appeal is in any event manifestly inadmissible.

Allegation that the Court of First Instance erred in law by adopting contradictory reasoning

49. The appellants contend that the Court of First Instance erred in law by adopting contradictory reasoning. On the one hand, it annulled the part of the Commission's

29 — See Order of 24 April 1996 in Case C-87/95 P *CNPAAP*, [1996] ECR I-2003, paragraph 31.

decision in which the Commission declined to investigate further the alleged agreements between the copyright-management societies and yet, on the other hand, it upheld the part of the decision in which the Commission decided to leave the question of a breach of Article 86 to the national authorities. The appellants argue that the two aspects cannot be divorced: they allege that excessive pricing arises from the partitioning of the market. However, in annulling the Commission's decision on the first aspect, the Court of First Instance did not state that it considered that it was for the Commission rather than the national courts to reach a decision on the alleged breach of Article 85. It annulled that part of the decision simply on grounds of inadequate reasoning. It could be inferred that, if the Commission had adequately set out its reasons, it could properly have left the matter to the national courts. There is therefore nothing inconsistent in the decision of the Court of First Instance. I therefore consider that the Court of First Instance did not adopt contradictory reasoning.

Allegation that the Court of First Instance erred in law in its findings concerning the confidentiality of the Commission's investigations

50. The appellants allege that the Court of First Instance erred in law in finding that the confidentiality of the Commission's file did not constitute an obstacle to the national courts' ability to make a finding on the question of the abuse of a dominant position. The Court of First Instance found that the Commission could reveal its report on comparative tariffs to the national courts because the level of the tariffs constituted information in the public domain.

51. The appellants' arguments on this point are not entirely clear. It is difficult to ascertain in particular whether they are arguing that the report is confidential. However, even if they are arguing to this effect, the question whether the information contained in the report was in the public domain is a question of fact; an appeal on that question is therefore inadmissible before this Court.

52. The appellants also allege that there are other elements of proof in the Commission's file which cannot be revealed to the national courts. However, that argument is irrelevant because, as I mentioned earlier, they do not appear to allege that the documentation which the Commission revealed to the national courts is not sufficient to enable the national courts to reach a decision as to whether Article 86 has been infringed.

Alleged violation by the Commission of general principles of law and alleged misuse of powers by the Commission

53. In their final submissions, the appellants allege infringements of general principles of

law and misuse of powers by the Commission. However those submissions, together with certain arguments on subsidiarity which have been considered above, appear in a separate part of the appellants' pleading which expressly presupposes that the Court of Justice has quashed the decision of the Court of First Instance and is proceeding, pursuant to Article 54 of the Statute, to give final judgment in the matter itself. Thus this part of the appellants' pleading does not seek to allege errors of law on the part of the Court of First Instance but makes allegations about the Commission which are wholly independent of their criticisms of the judgment. Indeed, in part, they merely repeat their submissions before the Court of First Instance.

54. In taking that course the appellants have in my view misunderstood the nature of the appeal procedure. The grounds of appeal must be based on contested elements in the judgment of the Court of First Instance. [30] The Court can give final judgment only if the issues are resolved by analysis of that judgment. Appellants cannot advance submissions independent of their criticisms of the judgment, nor may they simply repeat submissions made before the Court of First Instance. [31]

55. It follows that the final submissions of the appellants are manifestly inadmissible.

Conclusion

56. It follows that all the grounds of appeal are either inadmissible or unfounded.

57. Accordingly the Court should in my opinion:

(1) dismiss the appeal;

(2) order the appellants to pay the costs.

30 — See, for example, *CNPAAP*, cited at note 29, paragraphs 29 and 31.

31 — See Case C-26/94 P *Mrs X* v *Commission* [1994] ECR I-4379, paragraph 13; Case C-173/95 P *Hogan* v *Court of Justice* [1995] ECR I-4905, paragraph 20; and *CNPAAP*, cited at note 29, paragraph 30.