

OPINION OF ADVOCATE GENERAL

MENGGOZZI

delivered on 27 November 2008¹

Background, procedure and forms of order sought by the parties

1. On 22 March 2001, AEPI Elliniki Etaireia pros Prostasian tis Pnevmatikis Idioktisias AE ('AEPI' or 'the appellant'), a company constituted under Greek law engaged in the collective management of copyright relating to musical works, lodged a complaint with the Commission against the Hellenic Republic and three Greek bodies which collectively manage rights relating to the copyright held, respectively, by singers, performance musicians and producers in the recording and/or film industry (Erato, Apollon and Grammo; 'the related rights management companies').

2. In that complaint, AEPI maintained, first, that those companies had infringed Articles 81 EC and 82 EC by setting fees for

related rights at too high a level, at up to 5% of the gross income of Greek radio and television broadcasters and, secondly, that the Hellenic Republic had infringed Article 81 EC by permitting those companies to engage in concerted practices and enter agreements to that effect. AEPI claimed that it had suffered serious and irreparable damage as a result of that conduct, which, by imposing an excessive burden on undertakings using musical works, prevented them from meeting the demands for royalty payments made of them.

3. By two separate decisions of 18 and 20 April 2005, the Commission, respectively, rejected the complaint made against the related rights management companies and placed the complaint against the Hellenic Republic on the file.²

1 — Original language: Italian.

2 — AEPI brought an action for annulment of the decision of 20 April 2005 before the Court of First Instance of the European Communities, which was dismissed by judgment of 5 September 2006 in Case T-242/05 *AEPI v Commission* and upheld by the Court of Justice by order of 10 July 2007 in Case C-461/06 P *AEPI v Commission*.

4. The decision of 18 April 2005 ('the contested decision') is based, in particular, on the following considerations:

'In the present case, the alleged infringement is unlikely seriously to impede the proper functioning of the common market, given that all the parties involved are established in Greece and pursue their activities in that country alone. It is not foreseeable that that situation will change, that is to say, the three [related rights management] companies will start to pursue their activities in other countries in the near future, in view of the structure of the markets providing services for the protection of related rights and the practical difficulties that would be entailed in such an undertaking. Moreover, the effects of the alleged practices are felt only in the Greek market. Contracts for rights to use music are concluded only with radio and television broadcasters and other users in Greece. The three [related rights management] companies are empowered to act only in respect of the protection of related rights in Greece and do not, in practice, have the possibility of exercising such powers outside that country.

Secondly, in order to demonstrate that an infringement may have occurred, the Commission is required to undertake a complex investigation into the conditions prevailing in the market in question and the available alternatives. First of all, given that, on the one hand, Greek law (in accordance with Directive 92/100/EEC) provides that a single remuneration is to be paid for all related rights and, on the other, that the alleged infringement arises from the fact that the three [related rights management] companies make a collective demand to the user for payment of that remuneration, the Commis-

sion would have to demonstrate that effective methods exist by which it is possible to seek payment of the single remuneration separately. Second, the Commission would have to show not only that the three [related rights management] companies held a collective dominant position but also, according to the judgments of the Court in *Tournier* and in *Lucazeau [and Others]*³, investigate the relative levels of fees charged in respect of copyright and related rights in all the countries of the European Union, the respective bases on which the calculations are made, the criteria employed and the conditions which prevail in the Greek market by comparison with [the markets] in other European countries.

Moreover, it must be made clear that your company has the opportunity available to it of making its own complaints to the national authorities. In particular, it may bring a case before the Greek competition authorities. On account of its in-depth knowledge of the conditions prevailing in the national market, [those authorities] are perfectly capable of dealing with your complaint. The fact that all the parties involved and all the music users in question are established in Greece and pursue their activities in the Greek market adds greater significance to its detailed knowledge of the conditions in the local market. Furthermore, those authorities have competence to apply Articles [81 EC and 82 EC] in the same way as the European Commission.

It must therefore be concluded that the extent and complexity of the measures of investiga-

3 — Case 395/87 [1989] ECR 2521, and Joined Cases 110/88, 241/88 and 242/88 [1989] ECR 2811 respectively.

tion sought in order to determine whether the conduct of the three related rights management companies complies with the Community competition rules are disproportionate in relation to the relatively minor importance of any infringement in terms of the functioning of the common market. The case does not, therefore, present the level of Community interest necessary for the Commission to open an investigation.⁴

5. By application lodged at the Registry of the Court of First Instance of the European Communities ('the Court of First Instance') on 15 June 2005, AEPI sought the annulment of the contested decision. That action, in which the appellant alleged a manifest error in the assessment of the Community interest and breach of the obligation to state adequate reasons, was dismissed by the Court of First Instance by judgment of 12 July 2007 in Case T-229/05 *AEPI v Commission* (the 'judgment under appeal'), in which the appellant was ordered to pay the costs.

6. In examining the plea alleging a manifest error of assessment, the Court of First Instance⁵ pointed out that '[i]n order to assess the Community interest in continuing with the investigation of a practice, the Commission ... must, in particular, strike a balance between the [effects] of the alleged infringement on the functioning of the common market and the likelihood of its being able to establish the existence of such an infringement and the extent of the investigative measures necessary, in order to fulfil to the best of its ability the task of ensuring the

observance of Articles 81 EC and 82 EC' (paragraph 40 of the judgment under appeal).⁶

7. The Court of First Instance therefore stated, with regard to the 'adverse effects on the functioning of the common market', that, according to established case-law, 'in order for an agreement between undertakings to be able to affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, which might harm the attainment of the objectives of a single market between States' (paragraph 42 of the judgment under appeal).⁷ It added that 'any practice or any agreement that may have an effect on freedom of trade between Member States which might harm the attainment of the objectives of a single market between the Member States, in particular by isolating national markets or altering the structure of competition in the common market, is governed by Community law', whereas 'where the effects of such conduct are confined to the territory of one Member State alone, such conduct is governed by the national legal system' (paragraph 43 of the judgment under appeal).⁸

6 — The Court of First Instance referred, in that regard, to Case T-24/90 *Automec v Commission* [1992] ECR II-2223, paragraph 86; Case T-5/93 *Tremblay and Others v Commission* [1995] ECR II-185, paragraph 62; and Case T-62/99 *Sodima v Commission* [2001] ECR II-655, paragraph 46.

7 — The Court of First Instance referred, in that regard, to Case 42/84 *Remia and Others v Commission* [1985] ECR 2545, paragraph 22, and Case T-395/94 *Atlantic Container Line and Others v Commission* [2002] ECR II-875, paragraph 90.

8 — The Court of First Instance referred, in that regard, in particular, to Case 22/78 *Hugin v Commission* [1979] ECR 1869, paragraph 17.

4 — Unofficial translation of an extract from the original French version of the contested decision.

5 — None of the extracts from the judgment under appeal which appear in quotation marks in this Opinion is an official translation of the original French text.

8. The Court of First Instance went on to state that '[m]ore specifically, in the field of copyright ..., according to settled case-law, where the effects of the infringements alleged in a complaint are essentially confined to the territory of one Member State and where complaints have been brought before the courts and competent administrative authorities of that Member State by the complainant against the body in question, 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 can be adequately safeguarded, in particular by the national courts'⁹ (paragraph 44 of the judgment under appeal).

(paragraphs 45 to 47 of the judgment under appeal).

10. 'In that connection' — the Court of First Instance continued — 'the Commission took the view that ... all the parties involved in the case were established and pursued their activities in Greece ..., that it was unlikely that the activities of the three [related rights] management companies could be extended to other countries ..., that the music users were Greek nationals and that the powers of [those] companies were confined to Greek territory' (paragraph 48 of the judgment under appeal).

9. Furthermore, the Court of First Instance noted that, in the course of the written procedure, the appellant had challenged only the first of the three grounds on which the Commission had decided in the contested decision to rule out the existence in the case of sufficient Community interest, that is to say, the ground claiming that the practices complained of were incapable of seriously impeding the proper functioning of the common market. The Court of First Instance therefore found that it could restrict its analysis to 'the arguments by which [the appellant] dispute[d] the contention that there were no adverse effects on trade between Member States, contending that the imposition of excessively high fees in respect of related rights constitute[d] a practice that may affect the common market within the meaning of Articles 81 EC and 82 EC, even though it is confined to Greek territory'

11. According to the Court of First Instance, the points of fact and law put forward by the appellant were not capable of 'demonstrating that the practices complained of had an effect on the pattern of trade between Member States which might harm the attainment of the objectives of a single market'. In fact, it considered that the appellant did no more than 'refer to the financial difficulties suffered by companies handling copyright and music users in Greece and in all the Member States', but failed to demonstrate its own claims and even to adduce suitable evidence for that purpose (paragraph 49 of the judgment under appeal).

12. At paragraph 50 of the judgment under appeal, the Court of First Instance then found, with regard to 'the applicant's argument that the fact that the royalties of Greek and foreign

9 — The Court of First Instance referred, in that regard, to *Automec v Commission*, paragraphs 89 and 90; *Tremblay and Others v Commission*, paragraphs 65 and 74; and Case T-114/92 *BEMIM v Commission* [1995] ECR II-147, paragraph 86.

authors are paid over to companies established in the European Union will have the effect of seriously impeding the proper functioning of the common market', that 'the powers of the three [related rights] management companies are confined to Greek territory and, therefore, it is essentially users of music in that territory and Greek authors who suffer the alleged adverse effects of the practices in question'.

13. The Court of First Instance concluded its reasoning with the following considerations:

⁵⁴ In the light of the foregoing, the applicant has not adduced any specific evidence to demonstrate the actual or potential existence of serious impediments to the proper functioning of the [common] market.

⁵⁵ Consequently, the applicant has failed to demonstrate that, in the contested decision, the Commission made a manifest error of assessment by considering that the effects of the practices complained of were felt for the most part, or even entirely, in the Greek market and, accordingly, were unlikely to affect trade within the meaning of Articles 81 EC and 82 EC.'

14. The Court of First Instance therefore rejected the plea in law alleging a manifest error in the assessment of the Community interest.

15. Finally, the Court of First Instance also rejected the plea in law alleging breach of the obligation to state adequate reasons, finding that, in the contested decision, the Commission had set out clearly the specific reasons on which its own assessment was based, which led to the rejection of the complaint (paragraph 63 of the judgment under appeal).

16. By document lodged at the Registry of the Court of Justice on 14 September 2007, AEPI claimed that the Court should set aside the judgment under appeal, grant the form of order sought at first instance or refer the case back to the Court of First Instance, and order the Commission to pay all the costs.

17. The Commission contends that the appeal should be dismissed and the appellant ordered to pay the costs.

18. The parties' representatives were heard at the hearing which took place on 15 October 2008.

Legal analysis

The appeal

19. The appellant relies on five grounds of appeal. By its first ground, it complains of a failure to state adequate grounds in the judgment under appeal as regards the question whether the Commission exceeded the limits of its discretion in the relevant area. The second, third and fourth grounds all, essentially, seek to establish that the judgment under appeal is vitiated by errors of assessment or a failure to state adequate grounds as regards the finding that intra-Community trade was not affected. By its fifth ground, it is contended that the Court of First Instance misinterpreted Articles 81 EC and 82 EC, since it considered that, in order for those provisions to be applicable, it is necessary for there to be actual damage to intra-Community trade.

Admissibility

20. In its response, before proceeding with an examination of the individual grounds of appeal, the Commission contends that the appeal is inadmissible, in so far as it does not set out arguments directed at identifying an error of law which affects the judgment under appeal, but simply reproduces the grounds and arguments previously put forward before the Court of First Instance.

21. I consider that that objection is without foundation. Although it presents its arguments in a rather disorganised and often repetitive fashion, the appellant has, in my view, as will be apparent from the grounds of appeal as set out below, identified specific findings in the judgment under appeal against which it has formulated its criticisms and explained the reasons for those criticisms. The objection that the appeal is inadmissible must, accordingly, be rejected.

Substance

— The first ground of appeal

22. The first ground of appeal alleges that the Court of First Instance failed to state whether, in the present case, the Commission exceeded or stayed within the bounds of its discretion. For that reason, the judgment under appeal is, in its view, vitiated by a complete absence of reasoning.

23. As submitted by the Commission, that ground is manifestly unfounded.

24. The Court of First Instance stated, first, that the assessment of the Community interest raised by a complaint depends on

the factual and legal circumstances in each case, which can differ considerably from case to case, and cannot be carried out by reference to predetermined criteria which are of mandatory application and that the Commission, entrusted by Article 85(1) EC with the task of ensuring application of the principles laid down in Articles 81 EC and 82 EC, is responsible for defining the orientation of and implementing Community competition policy and, for that purpose, has a discretion as to the manner in which it handles complaints.¹⁰ It went on to observe that when, in exercising that power, the Commission decides upon certain priorities in examining complaints brought before it, it may legitimately refer to the Community interest residing in a particular practice as being the predominant criterion.¹¹ Those considerations are perfectly in line with the Court's findings in *Ufex and Others v Commission*.¹²

on three grounds and that the appellant's criticisms focused on only one of those, namely the ground alleging that the conduct complained of was incapable of seriously impeding the proper functioning of the common market.¹⁴

26. The Court of First Instance therefore focused on examining those complaints, holding that they were unfounded, on the basis of assessments which are specifically challenged in the four grounds of appeal considered below.

25. The Court of First Instance then stated that, in order to assess the Community interest in continuing with the investigation of a practice, the Commission must, in particular, strike a balance between the effects of the alleged infringement on the functioning of the common market, the likelihood of being able to establish the existence of such an infringement and the extent of the investigative measures necessary.¹³ It found that, in the contested decision, the Commission had based its conclusion that there was no Community interest in its pursuing the investigation of the complaint

27. In so doing, the Court of First Instance clearly considered that the appellant had failed to adduce evidence to demonstrate that, in the present case, the Commission had exceeded the bounds of its discretion.

28. In my opinion, the first ground of appeal must therefore be rejected.

10 — Judgment under appeal, paragraph 38.

11 — Judgment under appeal, paragraph 39.

12 — Case C-119/97 P [1999] ECR I-1341, in particular paragraphs 79 to 81, 88, 89 and 92.

13 — Judgment under appeal, paragraph 40.

14 — Judgment under appeal, paragraphs 45 and 46.

— The remaining grounds of appeal

29. The second and third grounds of appeal allege errors of assessment and failure to state adequate reasons with reference to paragraph 44 of the judgment under appeal, at which the Court of First Instance held, incorrectly, that, where the effects of a breach are felt only in the territory of one Member State, the Commission is entitled to reject the complaint on the ground of lack of any sufficient Community interest, since trade between Member States is not affected. The Court of First Instance based that finding, moreover, on case-law which, contrary to what it claims, is not concerned with copyright and, indeed, failed to consider a series of judgments of the Community judicature, many of which deal specifically with that subject, from which it is apparent that the rules laid down in Articles 81 EC and 82 EC may also be infringed where the conduct complained of occurs exclusively in the territory of one Member State.¹⁵ By its third ground, the appellant also contends that the reference made on a number of occasions in the contested decision and the judgment under appeal to the judgment in *Automec v Commission* is irrelevant and inappropriate, since that judgment, unlike the present case, concerns ‘not an actual breach but a hypothetical breach’, given that the subject of the complaint, namely a circular sent by BMW Italia to its distributors, which was considered in that judgment, was never applied.

30. The fourth ground of appeal alleges errors of assessment or inadequate reasoning with regard to the considerations set out at paragraphs 49 and 50 of the judgment under appeal, which state, first, that the appellant failed to adduce evidence capable of demonstrating that the practices at issue had an effect on the pattern of trade between Member States which might harm the attainment of the objectives of a single market and, secondly, that the damage allegedly caused by those practices was suffered essentially by music users in Greek territory and Greek authors. The appellant puts forward a range of evidence which demonstrates that, contrary to the findings of the Court of First Instance, the practices in question are not only capable of affecting intra-Community trade in the near future but have already done so.

31. Lastly, by the fifth ground of appeal, the Court of First Instance is criticised for misinterpreting Articles 81 EC and 82 EC by holding that, in order for those provisions to be applicable, there must be actual harm to intra-Community trade, thus disregarding the significance, for that purpose, of merely potential harm. Criticism is also made of the finding at paragraph 54 of the judgment under appeal that the appellant had failed to produce any specific evidence to demonstrate that, as a result of the practices in question, there were in fact or could potentially be serious impediments to the proper functioning of the common market. The appellant puts forward a range of arguments designed to show that such practices are likely to affect trade between Member States.

15 — The appellant refers to *Hugin v Commission*; *Lucazeau and Others, Tournier*; Case C-41/90 *Höfner and Elser* [1991] ECR I-1979; Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889; Case C-18/93 *Corsica Ferries* [1994] ECR I-1783; Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* [1995] ECR I-743; *Tremblay and Others v Commission*; and Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969.

32. The Commission contends that all of those grounds of appeal are unfounded and submits that the judgment under appeal is not vitiated by inadequate reasoning or errors of assessment.

33. I would observe that the arguments raised in these proceedings are characterised by obvious confusion between two notions which must be distinguished, a confusion which, it seems to me, affects both the appellant and, in turn, the Commission. These are, first, the notion that, in order for Articles 81 EC and 82 EC to be applicable, trade between Member States must be affected and, secondly, that the criterion for assessing whether there is sufficient Community interest to necessitate the investigation of a complaint by the Commission is that serious impediments exist to the proper functioning of the common market.

34. As is well known, as they expressly provide, Articles 81 EC and 82 EC are applicable to agreements restricting competition and abuse of a dominant position which may affect trade between Member States. According to case-law, that condition is intended to define the sphere of application of Community rules for the protection of competition among undertakings as distinct from that of national competition laws. It is indeed only in so far as a restrictive agreement or abuse of a dominant position may affect

trade between Member States that the deterioration in competition caused by conduct of either kind falls under the prohibitions laid down in Articles 81 EC and 82 EC; otherwise, it escapes that prohibition.¹⁶

35. According to settled case-law, in order for an agreement between undertakings or abuse of a dominant position to be able to affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States which might harm the attainment of the objectives of a single market between States.¹⁷

36. That influence on trade must, according to case-law, be 'significant'; thus, 'an agreement falls outside the prohibition in [Article 81 EC] when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question'.¹⁸

16 — See Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, in particular p. 341, and Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* [1974] ECR 223, paragraph 31.

17 — See *Remia and Others v Commission*, paragraph 22, and Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135, paragraph 47.

18 — Case 5/69 *Völk* [1969] ECR 295, paragraph 7. See also Case 22/71 *Béguelin Import* [1971] ECR 949, paragraph 16, and Case C-306/96 *Javico* [1998] ECR I-1983, paragraph 16.

37. In the contested decision, the Commission did not reject the appellant's complaint because it was of the view that the practices that were the subject of the complaint could not have a significant effect on trade between Member States. The Commission did not, in fact, take a view on whether such practices were contrary to Articles 81 EC and 82 EC. It rejected that complaint because, exercising the power conferred upon it by case-law to give differing degrees of priority to the complaints brought before it,¹⁹ it decided that there was insufficient Community interest to proceed with the investigation of that issue, given, in particular, that those practices did not appear likely 'seriously to impede the proper functioning of the common market'. By those words, the Commission clearly did not mean that the adverse effects which such practices may potentially have on intra-Community trade did not exceed the threshold for the application of Articles 81 EC or 82 EC. It simply intended to emphasise 'the very limited significance of any infringement [for] the functioning of the common market' — that is, to indicate that, in any event, those were not practices likely to have a significant impact on the functioning of that market.

38. It is also apparent from the case-law of the Court that, when the Commission decides the order of priority for dealing with the

complaints brought before it, it may legitimately refer to the Community interest²⁰ and, in that context, 'it is required to assess in each case *how serious the alleged interferences with competition are* and how persistent their consequences are', an obligation which 'means in particular that it must take into account the duration and *extent of the infringements complained of and their effect on the competition situation in the Community*'.²¹

39. When the Commission stated in the part of the contested decision which is reproduced at point 4 above that all the parties involved are established in Greece and pursue their activities in that country alone, that the effects of the alleged practices are felt only in the Greek market, that contracts for rights to use music are concluded only with radio and television broadcasters and other users in Greece and that the three related rights management companies are empowered to act only in respect of the protection of related rights in Greece and do not, in practice, have the possibility of exercising such powers outside that country, it did not intend to deny that Community trade was actually or could potentially be harmed, but simply to exclude the possibility that such harm could have a *considerable impact* on that trade, even if harm could be established that was not negligible.

19 — *Ufex and Others v Commission*, paragraph 88, and *Automec v Commission*, paragraph 83.

20 — See, by implication, *Ufex and Others v Commission*, paragraphs 52, 79, 95 and 96; Case C-449/98 P *IECC v Commission* [2001] ECR I-3875, paragraph 46; Case C-450/98 P *IECC v Commission* [2001] ECR I-3947, paragraphs 54 and 58; and the order in Case C-39/00 P *SGA v Commission* [2000] ECR I-11201, paragraph 67.

21 — *Ufex and Others v Commission*, paragraphs 92 and 93. Emphasis added.

40. It is clear that in the judgment under appeal the Court of First Instance itself confused the question of whether intra-Community trade is actually affected, leading, therefore, to infringement of Articles 81 EC and 82 EC, with the question of whether any such effects may be sufficiently serious to warrant an investigation by the Commission into any possible infringement.

41. At paragraphs 42 and 43 of the judgment under appeal, the Court of First Instance begins by setting out some of the principles established by the case-law on the subject of intra-Community trade being affected as a condition for the applicability of Articles 81 EC and 82 EC and criterion for the division of jurisdiction between Community and national law.

42. At paragraph 44, which is incongruously introduced with the words '[i]n particular, in the field of copyright', the Court of First Instance refers to its own case-law, which is not, however, relevant to the question dealt with in the preceding paragraphs of harm to intra-Community trade, as well as that of the requirement for there to be sufficient Community interest in order to proceed with an investigation of a complaint concerning a practice whose effects are essentially confined to the territory of one Member State.

43. At paragraph 47 of the judgment under appeal, the Court of First Instance states that it will confine its analysis to the appellant's arguments challenging the alleged lack of harm to intra-Community trade and contending that 'the imposition of excessively high fees in respect of related rights consti-

tutes a practice that may affect the common market within the meaning of Articles 81 EC and 82 EC, even though it is confined to Greek territory'.

44. Paragraph 48, which begins with the words '[i]n that connection', sets out the factual circumstances relied on by the Commission in the contested decision, not in order to deny that intra-Community trade could potentially be affected, but to conclude its assessment of whether there was sufficient Community interest in proceeding with its investigation of the complaint with the finding that there was no *serious impediment to the proper functioning* of the common market.

45. That the Court of First Instance continues to oscillate between references to intra-Community trade (or the common market) being affected and references to serious impediments to the proper functioning of the common market is further apparent from a reading of the following paragraphs of the judgment under appeal, some of which deal with the former point (paragraphs 49 and 51) and another with the latter (paragraph 50), without following any sufficiently logical order, concluding with the manifest inconsistency of the two concluding paragraphs of its reasoning, in which, having first found that 'the applicant has not adduced any specific evidence to demonstrate the actual or potential existence of serious impediments to the proper functioning of the [common] market' (paragraph 54), it then goes on to conclude that '[c]onsequently, the applicant has failed to demonstrate that, in the contested decision, the Commission made a manifest error of assessment by considering that the effects of the practices complained of were felt for the

most part, or even entirely, in the Greek market and, accordingly, were unlikely to affect trade between Member States within the meaning of Articles 81 EC and 82 EC'.²²

46. Nor can the Court of First Instance be regarded — setting aside the issue of the less than perfect drafting — as having meant, in essence, that, contrary to the logic followed at paragraphs 54 and 55 of the judgment under appeal, since there is no possible adverse effect on intra-Community trade in this case, there can be, a fortiori, no serious impediment to the proper functioning of the common market.

47. Such an interpretation of the judgment under appeal would be not only incompatible with the whole tenor of the judgment but also inconsistent with the limits imposed on the Court's powers of judicial review, which the Community judicature is required to exercise under Article 230 EC. In that connection, the Community judicature is, in fact, required in particular to determine whether the grounds put forward by the author of the contested measure are adequate and correct and to annul that measure if, as a result of that determination, the grounds fail to satisfy either of those conditions. On the other hand, it is not empowered, in that situation, to propose a new different statement of reasons for the operative part of the contested measure, which may justify its being kept in force. By so doing, the Community judicature would be substituting its own assessment for that of the institution whose task it is to adopt that measure, interfering with active admin-

istration and upsetting the institutional balance intended by the EC Treaty.

48. The Court of Justice has already pointed out, with reference to a case in which a Commission decision to reject a complaint alleging infringement of the competition rules of the EC Treaty was challenged before the Court of First Instance, that '[s]ince, in the context of the review of legality provided for in Article 173 of the [EC] Treaty [now, after amendment, Article 230 EC], the Court of First Instance does not, in a case such as that in point here, have unlimited jurisdiction, unlike that exercised by the Community Courts on the basis of Article 172 of the EC Treaty (now Article 229 EC) with regard to, for example, decisions imposing penalties, the Court of First Instance was not, in the present case, entitled to substitute another decision for the contested decision or to amend that decision'.²³ In that decision, the Court held that 'it is not for the Court of First Instance, in an action seeking the annulment of a [Commission] decision which did not find that there was abuse of a dominant position, to establish the existence of such an abuse'. I would add that the Court of First Instance does not have the authority even to conclude that no infringement exists where the Commission itself has refrained from so doing in the decision of which annulment is sought.

49. Since, in the contested decision, the Commission did not intend to rule out the possibility of there being an infringement of

22 — Emphasis added.

23 — Order in Case C-428/98 P *Deutsche Post v IECC and Commission* [2000] ECR I-3061, paragraph 28.

Articles 81 EC and 82 EC, the Court of First Instance could certainly not have done so in the context of its judicial review of that decision.

Instance are contradictory is a point of law which is amenable, as such, to judicial review on appeal.²⁴

50. Moreover, while, in the contested decision, the Commission pointed out that AEPI had ‘the opportunity available to it of making its own complaints to the national authorities’, in particular the Greek competition authorities, and that the latter ‘have competence to apply Articles [81 EC and 82 EC]’ in the same way as the Commission itself, a finding by the Court of First Instance that intra-Community trade is not affected in the present case would bind those authorities, which could no longer, therefore, intervene to apply Articles 81 EC and 82 EC but, possibly, only the provisions of national competition law.

53. Even though the appellant, while contending in the first four grounds of appeal that the grounds of the judgment under appeal are inadequate, has failed to plead that the grounds are contradictory in the manner I have just outlined, the Court can, in my view, find of its own motion that the judgment is defective in that respect, which prevents it from carrying out an adequate judicial review of that judgment, in addition to interfering in the appellant’s full exercise of its rights of defence, making it excessively difficult for it to understand the reasoning on which the judgment is based and, therefore, to examine whether it is well founded.²⁵

51. I am of the view that the confusion which characterises the reasoning of the Court of First Instance is sufficiently serious to constitute clearly contradictory grounds, over and above any errors of law there may be in individual paragraphs of the judgment under appeal.

54. The judgment under appeal must therefore, in my view, be set aside on the ground that its reasoning is contradictory, in so far as it rejects the appellant’s plea for annulment alleging a manifest error in the assessment of the Community interest.

52. It must be borne in mind that, according to established case-law, the question whether the grounds of a judgment of the Court of First

24 — See Case C-401/96 P *Somaco v Commission* [1998] ECR I-2587, paragraph 53; Case C-446/00 P *Cubero Vermurie v Commission* [2001] ECR I-10315, paragraph 20; and Case C-3/06 P *Groupe Danone v Commission* [2007] ECR I-1331, paragraph 45.

25 — See, by analogy, Case 18/57 *Nold v High Authority* [1959] ECR 41, in particular 51; Case 185/85 *Usinor v Commission* [1986] ECR 2079, paragraphs 20 and 21; and Case C-166/95 P *Commission v Daffix* [1997] ECR I-983, paragraphs 23 and 24.

The action against the contested decision

55. Under Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court is to quash the decision of the Court of First Instance. It may then itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

56. In the present case, the state of the proceedings permits the Court, in my estimation, to give final judgment in the matter.

57. By its plea alleging a manifest error in the assessment of the Community interest, set out at paragraphs 1 and 3 of the application initiating the proceedings at first instance, the appellant complained that it was not possible for the Commission to conclude that ‘the alleged infringement was insignificant’ simply because it had occurred in the territory of just one Member State. The appellant refers, in that connection, to a number of judgments of the Community judicature, some of which deal specifically with copyright, from which it is apparent that infringement of the competition rules of the EC Treaty can also occur if the infringement is committed in the territory of one Member State alone;²⁶ it points out that, in order for there to be infringement, it is required under Articles 81 EC and 82 EC that

the conduct in question ‘may affect trade between Member States’ and not that it has already in fact affected such trade, and indicates a number of factors which, in its view, could demonstrate that the practices complained of constitute a serious infringement of those provisions.

58. Those factors were, first of all, the economic importance of the appellant’s business activities — its receipts from royalties for the year in which it submitted its complaint (2001) were more than EUR 30 million — and the fact that, given the very widespread use in Greece of foreign music, a considerable part of those receipts is passed on to equivalent organisations, situated mainly in the other Member States of the European Union, which represent the interests of right-holders established in those States and, secondly, the extraordinarily high level of the sums charged by the three related rights management companies.

59. While many of the arguments put forward by the appellant in the proceedings at first instance are not without ambiguity or confusion similar to that characterising the judgment under appeal, I none the less consider that the action at first instance discloses with sufficient clarity the idea that the Commission could not rule out the possibility that the practices complained of could have serious repercussions for the functioning of the common market on the basis of the fact that they were confined to Greek territory. By challenging in the application initiating the proceedings at first instance the claim that ‘the alleged infringement [was] insignificant’, the appellant was necessarily

26 — The relevant cases are *Tournier*; *Lucazeau and Others*; *Merci convenzionali porto di Genova*; *Corsica Ferries*; *RTE and ITP v Commission* and *Irish Sugar v Commission*, also referred to in the contested measure; and *Case 7/82 GVL v Commission* [1983] ECR 483.

referring not to the problem of the *existence* of an infringement, that is to say, a restrictive practice that could affect intra-Community trade in a significant (that is, not negligible) manner but to the problem of the *degree of seriousness* of the infringement in question. That is borne out by the references to the seriousness of such infringements in the fourth and sixth paragraphs of Section 1 of that application.

60. The issue to be determined that is raised by the plea for annulment in question is therefore whether, in the light of the criticisms levelled by the appellant, it was possible for the Commission validly to rule out in the present case the existence of serious impediments to the proper functioning of the common market, on the basis of the considerations set out in that regard in the contested decision (see point 39 above).

61. Before proceeding with the examination of that issue, however, it is necessary to consider whether it is relevant for the purpose of granting the appellant's application for annulment of the contested decision. In fact, as the Court of First Instance found at paragraph 45 of the judgment under appeal, in that decision, the Commission concluded that there was no sufficient Community interest in the present case on the basis of three separate factors: the absence of serious impediments to the proper functioning of the common market, the complexity of the investigation that would need to be conducted to determine whether there was infringement and the fact that it was possible for the parties concerned to obtain protection from the national authorities. However, as the Court of First Instance pointed out at paragraph 46 of the judgment under appeal, the appellant, by the present plea in support of annulment, challenges only

the considerations taken into account by the Commission with regard to the first of those factors.

62. It appears clear to me, however, that that plea cannot be regarded as ineffective for that reason.

63. It cannot be maintained that, in the context of the contested decision, each of those three factors is presented as constituting sufficient ground in itself to justify the rejection of the appellant's complaint.

64. After setting out, separately, those three factors, the Commission stated that it had to be concluded that 'the extent and complexity of the measures of investigation sought in order to determine whether the conduct of the three related rights management companies complies with Community competition rules are disproportionate in relation to the relatively minor importance of any infringement in terms of the functioning of the common market'.

65. It follows from this that the Commission concluded that in the present case there was no sufficient Community interest, on the basis of an overall consideration of those factors, striking a balance, in particular, between the first two of those factors.

66. Any manifest error of assessment which must call into question the Commission's conclusions as regards the first of those factors will, therefore, necessarily affect the lawfulness of the contested decision.

67. Turning now to the examination of whether the plea seeking annulment in question is well founded, it seems to me that decisive importance must be attached to the fact, which was pointed out by the appellant, that, on the basis of reciprocal representation contracts concluded with equivalent organisations situated in other Member States, the appellant also collects royalties in Greece in connection with the use of music by right-holders established in those other States and passes them on to those organisations. That fact, which was previously set out by the appellant in its complaint, was not challenged by the Commission and would appear to demonstrate that not only the interests of Greek authors but those of right-holders established in other Member States (and of the organisations representing them) may be affected by the reduction in revenue from royalties in Greece which the appellant complains of and which it attributes to the practices in question.

68. The appellant has thus put forward factors which, having previously been disclosed to the Commission before the contested decision was adopted, would appear to me to refute the two findings on which the Commission essentially based its conclusion that there were, in the present case, no serious impediments to the proper functioning of the common market: namely, the findings that 'all the parties involved are

established in Greece and pursue their activities in that country alone' and that 'the effects of the alleged practices are felt only in the Greek market'.

69. The fact that '[c]ontracts for rights to use music are concluded only with radio and television broadcasters and other users in Greece' and the fact that the three related rights management companies 'are empowered to act only in respect of the protection of related rights in Greece and do not, in practice, have the possibility of exercising such powers outside that country' do not in any way make it permissible to rule out the possibility that the effects of the practices in question may be felt outside Greek territory, to the detriment of right-holders and organisations established in other Member States. It is possible on the basis of those facts, which are referred to in the contested decision, only to state that, *among music users*, only those established in Greece suffer as a result of the adverse effects of the alleged infringement. On the other hand, as regards the *group of copyright holders* and of *organisations protecting such rights* which may potentially be affected, it is not possible, on the basis of those same facts, to conclude that that group is limited to those established in Greece.²⁷

70. It is true that, in its rejoinder lodged in the proceedings at first instance, the Commission observed that 'the relevant factor is whether

27 — In that respect, the analysis carried out by the Court of First Instance at paragraph 50 of the judgment under appeal appears to be inadequate, in the light of the fourth ground of appeal.

the practice of the three companies in question which is described in the applicant's complaint operates either *primarily* or entirely within Greek territory'. In that regard, it also stated that all the constituent elements of the alleged infringement of Articles 81 EC and 82 EC 'occur *primarily*, if not exclusively, in the Greek market' and maintained that it is 'logical to regard the centre of gravity of the infringement as being situated within the Greek market, since it is *essentially* there that the effects of the alleged infringement must be felt'.²⁸

71. That approach would appear, however, to differ significantly from the position adopted in the contested decision, in which the Commission ruled out clearly and unequivocally the possibility that the effects of the practices in issue could be felt outside Greek territory. On the other hand, in its rejoinder in the proceedings at first instance, by the use of the words 'primarily' and 'essentially', the Commission left open the possibility that the effects of those practices may be felt, albeit to a minor extent, outside that territory.

72. However, in annulment proceedings, the Community judicature is required to determine whether the decision that is contested in those proceedings complies with the law, and not the arguments put forward before it by the author of that decision which alter, totally or partially, those on which the decision itself was based.

73. In the contested decision, the conclusion that there were unlikely to be serious impediments to the proper functioning of the common market is based on the finding, which the appellant has demonstrated to be manifestly incorrect, that the persons affected by and any effects of the infringement in issue were located *only in Greek territory*.

74. Even supposing, however, as suggested by the Commission in its rejoinder in the proceedings at first instance, that the effects of the infringement at issue in the territory of other Member States were only minor — something which, in my view, cannot in any event be presumed on the basis of the mere fact that the powers of the bodies criticised by the appellant are confined to Greece — that would not in any way alter the fact that that finding is manifestly incorrect or, consequently, for the reasons set out at points 63 to 66 above, the fact that the contested decision is unlawful.

75. I can therefore only propose that the Court uphold the present plea seeking annulment and annul the contested decision.

Costs

76. Under the first paragraph of Article 122 of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, it is to make a decision as to costs. Under

²⁸ — Rejoinder, paragraphs 29 and 30. Emphasis added.

Article 69(2) of the Rules of Procedure, applicable to appeals by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the successful party's costs if they have been applied for in the successful party's pleadings.

77. Since I propose that the Court grant both the appeal and the action for annulment, I also suggest that the Commission, which has been unsuccessful, be ordered to pay the costs of both sets of proceedings, in accordance with the form of order sought by the appellant.

Conclusion

78. In the light of the foregoing considerations, I propose that the Court should:

- (1) set aside the judgment of the Court of First Instance of the European Communities of 12 July 2007 in Case T-229/05 *AEPI v Commission*;
- (2) annul the decision of the Commission of the European Communities of 18 April 2005 rejecting a complaint concerning an alleged infringement of Articles 81 EC and 82 EC by Greek companies responsible for the collective management of rights pertaining to copyright in the field of music;
- (3) order the Commission of the European Communities to pay the costs of both the proceedings before the Court of First Instance and the present appeal proceedings.