defined by the undertaking on the basis of nationality or residence must be regarded as an abuse of a dominant position within the meaning of the first paragraph of Article 86 of the Treaty.

In Case 7/82

GESELLSCHAFT ZUR VERWERTUNG VON LEISTUNGSSCHUTZRECHTEN MBH (GVL), 36a Esplanade, 2000 Hamburg 36, represented by K. Peter Mailänder and Rolf Winkler, Rechtsanwälte at the Landgericht [Regional Court] and Oberlandesgericht [Higher Regional Court] Stuttgart, with an address for service in Luxembourg at the chambers of Ernest Arendt, 34 Rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, 200 Rue de la Loi, 1049 Brussels, represented by Götz zur Hausen, a member of its Legal Department, with an address for service in Luxembourg at the office of Oreste Montalto, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that the Commission Decision of 29 October 1981 relating to a proceeding under Article 86 of the EEC Treaty (IV/29.839 — GVL) (Official Journal 1981, L 370, p. 49) is void,

THE COURT,

composed of: J. Mertens de Wilmars, President, P. Pescatore, A. O'Keeffe and U. Everling (Presidents of Chambers), Lord Mackenzie Stuart, G. Bosco and T. Koopmans, Judges,

Advocate General: G. Reischl
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community may be summarized as follows:

I — Facts and written procedure

A — Introduction

The Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (hereinafter referred to as 'GVL') is a German Verwertungsgesellschaft, a company set up to exploit and manage rights which are vested pursuant to the German Gesetz über Urheberrechte und verwandte Schutzrechte [Law on copyright and related rights] (hereinafter referred to as "the Copyright Law") in performing artists, manufacturers of sound recording equipment and videograms, film artists and promoters or of rights assigned to such manufacturers and promoters. The purpose of GVL is therefore to protect "performers' rights", that is to say those rights which arise out of the reproduction of the artist's creative work. The activities of such companies are governed by the German Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten [Law on the Management of Copyright and Related Rights] (hereinafter referred to as "the Management Law").

GVL was created jointly by the Deutsche Orchestervereinigung eV, whose registered office is in Hamburg, which represents the interests of performing artists, principally musicians, and by the Deutsche Landesgruppe der IFPI eV, also of Hamburg, which represents the interests of sound recording manufacturers. These two associations are the sole members of GVL which is a limited liability company.

This case is concerned with GVL's conduct towards performing artists who are neither of German nationality nor resident in the Federal Republic of Germany.

On 25 August 1980 the Commission decided to initiate the procedure provided for in Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-1962, p. 87). By letter of 4 September 1980 it sent GVL a notice of objections. GVL expressed its views on that notice by two letters dated 5 November 1980 and 9 January 1981. In accordance with Article 19 of Regulation No 17 of the Council and the provisions of Regulation No 99/63/EEC of the Commission of 25 July 1963 (Official Journal, English Special Edition 1963-1964, p. 47) GVL was heard on 12 February 1981.

On 29 October 1981 the Commission adopted the decision at issue (published in Official Journal 1981, L 370, p. 49) which was communicated to GVL on 9 November 1981. Article 1 of the decision is worded as follows:

"GVL's conduct prior to 21 November 1980, characterized by its failure to conclude management agreements with foreign artists where the latter were not resident in Germany, or otherwise to manage performers' rights vested in such artists in Germany, constituted, in so far as such artists possessed the nationality

of a Member State of the European Communities or were resident in a Member State, an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty."

B — Summary of the grounds of the decision

1. The relevant law

Pursuant to Paragraph 73 et seq. of the Copyright Law artists enjoy rights similar to copyright. Artists are entitled under Paragraphs 74, 75 and 76 (1) to ensure that their performances are utilized in public, recorded on visual or sound recordings, reproduced or broadcast only with their consent (primary exploitation). As a rule, they give such consent only on payment of a fee.

Moreover, Paragraphs 76 (2) and 77 of the Copyright Law confer on artists a statutory right to payment of royalties where a performance which has been recorded on a visual or sound recording with their consent is subsequently broadcast or otherwise made public (secondary exploitation). Artists are also entitled pursuant to Paragraph 53 (5) to claim payment of a fee from manufacturers of reproduction equipment, known as royalties in respect of equipment.

Where an artist's performance has been recorded with his consent on visual or sound recordings and the recordings have been published, the artist may no longer prevent the broadcasting or public reproduction of such recordings on the strength of his rights as a performer.

Pursuant to Paragraph 86 of the Copyright Law, manufacturers of sound recordings, (hereinafter referred to as "the manufacturers" have, with regard to the artist's right to payment of a royalty in respect of secondary exploitation, a claim against the artist for a reasonable share of such royalty.

Manufacturers and artists, therefore, have an equal interest in the royalty payable in respect of secondary exploitation. As far as the pursuit of such claims against parties liable for payment (broadcasting companies, theatres, hotels, restaurants, and the like) is concerned, their interests run parallel. A conflict of interest occurs only when the royalty has been paid and the question arises of the "reasonable share of the manufacturer".

Whilst in all Member States artists are entitled to withhold their consent to primary exploitation, a statutory right to payment of a royalty in respect of secondary exploitation exists in only a few Member States.

Under Article 12 of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, made at Rome on 26 October 1961 (United Nations Treaty Series, Volume 496, p. 45), contracting States must ensure that users of published sound recordings pay the sound recording manufacturer or the artist, or both, a single, equitable remuneration in respect of broadcasting or any communication to the public.

The Rome Convention, however, has not yet been ratified by all Member States. When ratifying the Convention, the Federal Republic of Germany expressed a reservation to the effect that, in the case of sound recordings manufactured by a national of another Contracting State, the extent and duration of the

protection afforded to manufacturers and artists were to be limited to the extent and duration of the protection granted by that State to sound recordings which were first made by a German national.

The performers' rights described above are also vested in artists having a foreign nationality irrespective of their place of residence. Where the artist concerned is not a national of a country which has ratified the Rome Convention, Paragraph 125 of the Copyright Law confers on him the same rights as on German artists if his performance takes place in Germany or, where it has been recorded with his consent on visual or sound recordings, if such recordings have been published in Germany. Similarly, such foreign artists also enjoy the same rights as German nationals in respect of broadcasts where the latter are transmitted in Germany.

Under Paragraph 1 of the Management Law, any person who exploits rights of use, rights of consent or rights to payment of royalties pursuant to the Copyright Law on behalf of several copyright holders or owners of similar rights for their collective benefit requires official authorization, irrespective of whether he acts in his own name or on behalf of another person. Such authorization is granted where certain basic pre-conditions relating to the pursuit of this activity are satisfied.

The Management Law does not confer a legal monopoly on companies set up to exploit and manage performers' rights. Under it the establishment of "competing" companies of this kind is perfectly possible in law.

Companies of the kind described above, authorized under the Management Law, must apportion the income earned from their activities in accordance with firm rules.

Under Paragraph 11 of that Law, such companies must, on the basis of the rights they exploit, grant any individual on request rights of use or consent on reasonable terms (obligation to contract), subject to certain conditions.

Under Paragraph 6 those companies must manage the rights falling within their field of activity on reasonable terms at the request of the proprietors where the latter are German nationals within the meaning of the Grundgesetz [Basic Law] or are resident in the area in which the Management Law is in force and where the rights cannot otherwise be effectively exploited (obligation to manage).

2. GVL's conduct towards foreign artists

GVL is the only company set up to exploit performers' rights which is engaged in the management of rights arising from secondary exploitation. Other comparable companies manage other types of copyright or similar rights.

Prior to 21 November 1980 GVL refused to conclude management agreements with foreign artists having no residence in Germany, irrespective of whether or not they were artists from Member States of the European Economic Community, or otherwise to manage their performers' rights in Germany. GVL does not deny, in that connection, that foreign artists are entitled to the payment of royalties in respect of secondary exploitation in Germany. However, it used to point out to foreign artists who sought to conclude a

management contract with it that it concluded such agreements only with holders of rights who were German nationals or were resident in Germany.

GVL's general meeting decided on 21 November 1980 henceforth also to conclude management contracts with eligible artists who were nationals of any of the other Member States of the Community without requiring such foreign artists to furnish proof that they were resident in Germany. Moreover, holders of rights from other Community Member States, whose rights GVL had refused to manage on an individual basis, were thereafter afforded the opportunity of sharing in the income from royalties retroactively.

Following the adoption by GVL of this new policy, royalties collected in respect of broadcasting, public performance, hire and reproduction are distributed among artists in proportion to the income earned by them during the financial year in question from primary exploitation on the domestic, that is German, market (Article 2, paragraph 4a of the new articles of association). It is now no longer necessary for the fee payable in respect of primary exploitation to be paid in Germany, and even a fee paid abroad serves, after notification by the artist, as a basis for calculation where part of the fee may be attributed to exploitation of the performance in Germany. In that event, the foreign artist participates in the distribution of the royalties in proportion to that part of the fee.

C — Procedure

On the basis of the above findings the Commission took the view that GVL's refusal to enter into commercial relations with foreign artists who were not resident in Germany amounted to an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty.

By application lodged on 8 January 1982 GVL instituted the present proceedings. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without holding any preparatory inquiry.

II — Conclusions of the parties

GVL, the *applicant* in the case, claims that the Court should:

Declare void the Commission's decision of 29 October 1981 relating to a proceeding under Article 86 of the EEC Treaty (IV/29.839 — GVL);

Order the defendant to pay the costs.

The Commission, the *defendant* in the case, contends that the Court should:

Dismiss the application;

Order the applicant to pay the costs.

III — Submissions and arguments of the parties

1. First submission: infringement of essential procedural requirements in the course of the administrative procedure

The *applicant* claims first that it was impossible to tell from the notice of objections whether or not the artists who

had complained to the Commission about the applicant's conduct were nationals of the Member States. It was therefore unable to defend itself. The Commission's decision thus infringed Articles 2 (1) and 4 of Regulation No 99/63/EEC of the Commission of 25 July 1963 (Official Journal, English Special Edition 1963-1964, p. 47).

Secondly it accuses the defendant of not having taking into account representations emanating from it or from its legal representatives, with the result that a decision founded on such a manner of conduct is based on procedural errors.

For those reasons GVL maintains that there are several errors of fact in the decision at issue. Thus, for example, the Commission does not state why it is in practice impossible for artists themselves to assert their rights (paragraph 20 of the decision). In fact it is not at all impossible for foreign artists to make agreements with visual and sound recording manufacturers abroad as a result of which they would also share in the rights of secondary exploitation. This is particularly so in the case of those States in which artists have no rights on secondary exploitation, even in the national context, except indirectly through such agreements.

The *defendant* replies that in its notice of objections it used the term "foreign artists" and that it even expressly observed that GVL made no distinction between nationals of other Member States and nationals of non-member countries. It states that the decision at issue does not contain any finding in relation to an infringement of Article 86 of the Treaty which was not included in the notice of objections. Furthermore the decision reproduces in detail the case put forward by GVL (paragraphs 37 to 41) and examines it very closely (paragraphs 57 et seq., 65 et seq., and 69 et seq.). Most GVL's arguments had already been considered in the notice of objections because they were already known to the Commission at that time. The Commission emphasizes that it is under no duty either to accept the applicant's arguments put forward during the administrative procedure or to deal in detail with all the arguments raised (judgment of the Court of 29 October 1980 in Joined Cases 209 to 215 and 218/78 *Heintz van Landewyck Sàrl and Others* v *Commission of the European Communities* [1980] ECR 3125, paragraph 68 at p. 3245).

2. Second submission: lack of competence on the part of the Commission

The *applicant* argues that the Commission does not have the power to adopt a decision once the infringement has been terminated and points out that it extended its offer to manage the rights in question to the nationals of the other Member States by modifying its standard contract accordingly by a decision of its general meeting of 21 November 1980.

The applicant claims that, from a legal point of view, Article 3 of Regulation No 17 only authorizes the Commission to take action in order to bring to an end the applicant's previous conduct. In the notice of objections the infringement in question was described as the refusal to conclude management agreements with nationals of other Member States not resident in Germany. Once the applicant put an end to that conduct the procedure intended to bring about that termination had achieved its object.

It follows from Article 89 (2) of the Treaty that a Commission decision declaring the existence of an infringement may only be taken if that

infringement has not been brought to an end. Likewise according to the applicant, Article 3 of Regulation No 17 does not provide for the making of such a finding except, incidentally, as a part of a decision designed to bring about the termination of the infringement. That regulation contains no independent power to adopt a decision to "record" an infringement which is already at an end.

Furthermore there is from the legal point of view no longer any interest in recording a past infringement since the applicant is prepared to offer, upon request, the possibility of participating in the royalties system, even retroactively.

The *defendant* states in its defence that it has the impression, on reading the application, that GVL has, in fact, still not completely terminated the infringement in question, contrary to what is stated in paragraph 71 of the decision at issue. The applicant extends its management services to foreign artists only if they possess the nationality of a Member State. It therefore excludes, even in its application, those who are resident in another Member State but do not possess the nationality of a Member State.

The defendant states that it did have the competence to adopt the decision at issue. Regulation No 17, which gives specific form to the task and the powers of the Commission set forth in Articles 155 and 89 of the Treaty, provides for a series of measures which may be summarized as follows:

(1) A decision requiring an undertaking to bring an infringement to an end and imposing a fine on it in respect of such infringement and imposing periodic penalty payments to compel it to put an end to such infringement (Articles 3 (1), 15 (2) and 16);

(2) A decision requiring an undertaking to bring an infringement to an end but without imposing a fine or periodic penalty payments;

(3) A decision imposing a fine in respect of an infringement without, however, requiring such infringement to be brought to an end because it no longer exists in its original form or because such a requirement is not necessary for other reasons in the case in question; such a decision may contain in an appropriate case a requirement that no measures may be taken having the same effect as the infringement, so as to eliminate all doubt (Articles 3 (1) and 15 (2));

(4) A decision declaring, after a preliminary examination, that Article 85 (1) applies (Article 15 (6));

(5) A decision taking provisional measures (Article 3 (1));

(6) A recommendation for the termination of an infringement (Article 3 (3)).

A Commission decision which merely records a past infringement which has already been brought to an end when the decision is adopted and does not impose a fine or any requirements whatever has certain effects for the undertaking concerned. First, there is an effect of publicity (judgment of the Court of 15 July 1970 in Case 41/69 *ACF Chemiefarma NV* v *Commission of the European Communities* [1970] ECR 661, paragraphs 101 to 104 at p. 692).

Secondly, other effects have an impact on the undertaking's position in the event of a repetition of the infringement. Thirdly, there are effects in disputes between the undertaking and third parties affected by its conduct. Such effects are less radical than those of a decision imposing a fine. A decision which simply records the existence of an infringement should therefore be placed, in the list set out above, between the third and fourth types of measure.

The defendant's view is also based on arguments relating to a sound competition policy.

If the Commission did not have the power to make a mere finding it would be forced, in cases where the infringement has already been brought to an end, always to impose a fine (possibly of the minimum amount of 1 000 units of account provided for in Article 15 (2) of Regulation No 17), as it has the right to do (judgment of the Court of 15 July 1970 in Case 44/69 *Buchler and Co.* v *Commission of the European Communities* [1970] ECR 733, paragraph 49 at pp. 760 and 761).

If the Commission did not have such a power an undertaking could always bring the infringement to an end a short time before the adoption of a decision requiring such termination, and then resume the infringement, terminate it once more, and so on.

Furthermore it has been the Commission's standing administrative practice to take decisions which simply declare that an infringement which has already been terminated was in breach of the rules of competition law. In the course of the years it has adopted a whole series of such decisions (see, for example, the following decisions: 15 July 1975 (IFTRA rules for producers of virgin aluminium), Official Journal 1975, L 228, p. 3; 26 July 1976 (Pabst and Richarz/BNIA), Official Journal 1976, L 231, p. 24; 19 April 1977 (ABG oil companies operating in the Netherlands), Official Journal 1977, L 117, p. 1; 20 December 1977 (video cassette recorders), Official Journal 1978, L 47, p. 42; 20 October 1978 (WANO Schwarzpulver) Official Journal 1978, L 322, p. 26; 5 September 1979 (BP Kemi-DDSF), Official Journal 1979, L 286, p. 32; 17 December 1980 (Italian cast glass), Official Journal 1980, L 383, p. 19; 28 September 1981 (Italian flat glass), Official Journal 1981, L 326, p. 32). The Commission also refers to the judgment of the Court of 29 June 1978 in Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV and Others* v *Commission of the European Communities* [1978] ECR 1513.

In its reply, the *applicant* states that publication of a decision under Article 21 (1) of Regulation No 17 is a form of penalty according to the defendant itself. However, the use of penal effects cannot justify an extension of the Commission's competence. On the contrary it is a decisive argument for forbidding the taking advantage of the possibility of applying penalties which are not provided for in the Treaty or in Regulation No 17. Practical considerations are in no way sufficient to enable the Commission to extend, on its own initiative, the powers conferred upon it by the Council.

The applicant states, furthermore, that the history of Regulation No 17 shows that the Council did not confer on the Commission the power to declare an infringement, a power which had been claimed by the Commission in the draft of that regulation.

In its rejoinder the *defendant* adheres to the point of view expounded in its defence.

3. Third submission: breach of Article 86 of the Treaty

(a) GVL as an undertaking

The *applicant,* in its reply, repeats the arguments on the applicability of Article 90 (2) of the Treaty which it had already put forward in the course of the administrative procedure. It states that it follows from the Management Law, in particular Paragraphs 1, 4, 6, 7, 8, 11, 18, 19 and 20 thereof, that it should be

regarded as an 'undertaking entrusted with the operation of services of general economic interest.'

The *defendant* refers to the notice of objections (p. 26 et seq.) and the decision at issue (paragraphs 65 to 68). It adds that the Management Law merely provides that all undertakings wishing to carry on their activities in the form of companies set up to exploit and manage performers' rights must fulfil certain pre-conditions and be subject to certain obligations (judgment of the Court of 27 March 1974 in Case 127/73 *Belgische Radio en Televisie and Société Belge des Auteurs, Compositeurs et Éditeurs* v *SV SABAM and NV Fonior* [1974] ECR 313, see especially paragraph 23 and the Opinion of Mr Advocate General Mayras).

(b) GVL's dominant position

The *applicant* maintains that it is necessary to define correctly the market on which the exchange of services between performing artists and users of artistic performances takes place. According to the applicant the artist enjoys rights of primary and secondary exploitation. As regards the former rights, there is an exchange of services with promoters and with visual and sound recording manufactures who are therefore the partners of the artist. As regards the latter rights, these, on the other hand, amount to much more than consequential rights: either the artists will already have disposed of such rights in the contract for the exploitation of primary rights made with the aforementioned partners, or they reserve such rights in order to have them managed by GVL. In GVL's view it follows that the relevant market, where the holders of rights carry out their activities themselves, is the market in the supply of and the demand for exploitation rights. A company set up to exploit and manage performer's rights carries on its activities in this market by managing the interests of the performing artists who hold rights.

Unlike organizations such as GEHA or SABAM the applicant is the source of only an insignificant amount of the income of the holders of rights which it represents. The rights of secondary exploitation vested in them provide only a very small complementary income which amounts on average to less than DM 3 000 per annum for each artist. That means that the artists do not depend on the applicant as the only undertaking concerned with exploiting rights of secondary exploitation.

The *defendant* maintains that the relevant market is that of the *management* of rights, for a consideration, on behalf of artists. GVL's position on the market may be compared to that of an estate agent. The market position of an estate agent is not based on supply and demand in the property market. Rather it is a question of knowing what possibilities there are for an owner wishing to sell of obtaining, in return for the payment of a fee, certain services which consist in the search for a purchaser and the accomplishment of the tasks of an intermediary.

The amount of the royalty the artist receives from the exploitation of his right is irrelevant to any assessment of GVL's position on the market. In any case the amount referred to by the applicant amounts to a salary for a 13th month.

The Commission does not accept that sound recording manufacturers and the other partners referred to by the applicant are in competition with it: where a producer of gramophone records has rights of secondary exploitation which the artist has assigned to him he looks to GVL for the payment of the relevant royalty. He is therefore

not a competitor but a contractual partner of GVL.

(c) Abuse of a dominant position

The *applicant* states that it did not treat artists differently according to their nationality but rather according to the nature of the rights vested in them. However, the fact that the situation differed from country to country had prompted it to deal with artists only where the rights they sought to have managed seemed to it to be capable of reliable verification. This is possible in the case of German artists (Paragraph 125 of the Copyright Law). The applicant accepted that by virtue of Paragraph 6 of the Management Law that condition was also complied with by foreign artists who were at least resident in Germany. In its reply the applicant presents the reasons for which it considers residence to be an objective criterion.

The applicant claims, furthermore, that an artist who wishes to conclude a management contract with it must prove that he has rights which are capable of being managed in Germany. It cannot be under a duty to conclude management contracts on a basis of uncertainty.

The *defendant* states that the pre-condition of having German residence has no connection with "the status of a holder of rights" of the artist in question. Furthermore, GVL provided its services for Germans even where they were not resident in Germany and it was not certain that they had "the status of a holder of rights", since it was possible that there had been assignments.

Furthermore, the question whether the artist is actually the holder of the rights which he claims to have arises only at the stage of performance of the management contract and not at the time when it is concluded. Approximately 20 000 persons holding rights have entered into a management contract, of whom hardly more than 10 000 receive an annual payment of royalties in return for the exploitation of their rights. But the applicant refused to give foreigners not resident in Germany the opportunity to prove the actual existence of rights of secondary exploitation. In imposing the requirement that foreign artists must be resident in Germany it thus discriminated on grounds of nationality.

(d) Discrimination for the purposes of subparagraph (c) of the second paragraph of Article 86

The *applicant* accuses the Commission of having failed to take account of the conditions for and limitations on the application of the special prohibition of discrimination arising from Article 86.

Thus performing artists are not GVL's trading partners in competition with each other as regards the exercise of their rights of secondary exploitation. Instead they are to be regarded as consumers.

Furthermore, the applicant does not place artists at a disadvantage in the context of competition between national and foreign artists. So far as an artistic service is concerned it is the performance which is important and not financial capacity. The applicant emphasizes that national and foreign artists do not offer it the same services, as is clear from a comparison of subparagraphs (1) and (3) of Paragraph 125 of the Copyright Law. So far as the applicant is concerned, what matters is to know in the first place, in regard to foreign artists, whether and to what extent performers' rights exist. As the defendant itself admits, such rights have quite different

features and some do not even exist. In any case, for the most part, they cannot be compared with the legal position of such rights in Germany.

It is not just a question whether foreign artists may benefit in Germany from performers' rights pursuant to Paragraph 125 (1) of the Copyright Law. There is another, fundamental, question, namely whether the foreign artists have already disposed of their rights in some other manner: for example, by recording contracts with foreign producers. The applicant explains that it did no more than require foreign artists, as a pre-condition to entering into a management contract with them, to prove that they still had rights which might be exploited in the Federal Republic of Germany. Those were the reasons why GVL asked foreign artists to provide evidence of residence in Germany.

The *defendant* replies that the exchange of consideration between GVL and the artists, as described in paragraph 49 of the decision, is the criterion for determining the status of "trading parties" within the meaning of subparagraph (c) of the second paragraph of Article 86 of the Treaty. GVL places foreign artists at a disadvantage by depriving them of a means of exploiting their work. Thus the foreigner is forced to demand higher fees if he wishes to obtain the same profit from his work as his German counterpart who, unlike the foreigner, receives income from secondary exploitation.

As regards the "preliminary issue" of the existence of the artist's performing rights the Commission emphasizes that the question cannot be resolved prior to the conclusion of the management contract. All artists, whether German nationals, resident in or outside Germany, or foreigners, ask for no more than the production of the rights of secondary exploitation which they hold. For all of them the remuneration received is determined by the royalties paid by the users. The Commission states once again that GVL required foreign artists to furnish proof that they resided in Germany and that such residence was of no significance as regards the actual existence of rights of secondary exploitation.

If the applicant had, prior to the conclusion of the management contract, asked for proof not only of residence in Germany but also of the existence of rights capable of exploitation in Germany — and there is nothing in the file relating to the administrative procedure to indicate that such was the case — this would have amounted to further discriminatory treatment. It is plain that the applicant did not demand such proof from German artists even if they resided abroad, although those artists, too, might already have disposed of their rights elsewhere.

(e) Grounds of justification

The *applicant* states that the different treatment of national and foreign artists is justified by the different conditions relating to their acquisition of performers' rights. There are differences, *inter alia*, with regard to the origin of such rights, to their transfer to GVL, to the distribution of royalties and to the absence of reciprocity.

Furthermore, it is stated by the applicant that broadcasting organizations provide a major part of the royalties to be distributed. For the purpose of assessing the agreed royalties for performing artists the agreements had already taken into account the fact that the first question was that of payment in respect

of the performers' rights of artists having German nationality or resident in Germany. Artists who first propose their services within the field of application of another legal system do not as a general rule have independent performing rights in Germany or are paid in some other manner under the rules of some other system of law or of royalties prevailing in that other State. To include foreign artists in the system of royalties operated by the applicant would, as regards its economic effects, be to the detriment of national artists who could not expect from the conclusion of management contracts with their foreign colleagues any significant increase in the applicant's total receipts.

The *defendant* replies that it finds it hard to see what conclusion is to be drawn from the considerations put forward by the applicant on the subject of the transfer of rights. In any event it must be presumed that there are also national artists who enter into contracts with foreign sound recording manufacturers. The applicant does not seem to see any difficulties in that situation.

Reciprocity is not a precondition for the recognition by the German legislature of secondary exploitation rights held by foreigners not resident in the Federal Republic of Germany.

The Commission disagrees with the view that the inclusion of foreign artists necessarily has the effect that the amount of royalties available for distribution must be divided amongst a greater number of beneficiaries and therefore ultimately causes damage to the interests of national artists. However, since the user of musical works will in future receive more from the applicant in so far as he will be freed from the secondary exploitation rights which may be claimed by foreign artists not resident in Germany, the applicant will be able to agree with such a user higher royalties under general contracts made with him. When the applicant states that previously the royalty was the "first" means of satisfying the rights claimed by national artists it sounds as if it regards the royalty as having compensated for more then this, although nothing was paid to foreign artists not resident in Germany.

(f) The effects on trade between Member States

The *applicant* claims that "it is not obvious" that in transferring rights so that they may be managed the persons concerned are engaging in a trade which must be protected within the framework of the common market. The applicant does not do business with performing artists in the framework of inter-State trade but only manages legal rights to the payment of royalties which may accrue in Germany.

Furthermore the decision asserts, theoretically, the existence of an appreciable effect on inter-State trade whereas the defendant has undertaken no inquiry whatever on this point.

The *defendant* states that the question in this case is not one of trade in secondary exploitation rights. Instead the decisive factor is the effect on international trade in the provision of services. GVL's refusal to enter into management contracts with foreigners resident in other Member States prevented it from providing its services for foreign nationals. As regards the question of appreciable effect, the Commission explains that it is sufficient for GVL's conduct to be capable of affecting trade to an appreciable extent. The number of artists who have complained to the

Commission is irrelevant. Having regard to the number of artists resident in the other Member States of the Community and having, in principle, secondary exploitation rights in Germany, a considerable number of them will, it may be predicted, approach the applicant.

(g) Conflict with international conventions

In its reply the *applicant* argues that the Commission's decision requires it to manage non-existent rights because foreign artists, in certain cases, can neither acquire rights based on national legislation nor rely on the Rome Convention of 26 October 1961.

The *defendant* argues that its decision may create new secondary exploitation rights in favour of foreign artists who do not have such rights vested in them under the law as it stands at present. On the other hand its decision is intended to ensure that the foreign artists referred to in it also have the opportunity of enforcing the secondary exploitation rights conferred upon them by the German Copyright Law alone or in conjunction with international treaties.

IV — Oral procedure

At the sitting on 6 October 1982 the parties presented oral argument.

The Advocate General delivered his Opinion at the sitting on 16 November 1982. In it he expressed his views on certain of the applicant's submissions but requested the Court to allow him an extension of time so that he might examine the other submissions should the Court decide not to accept his views. The Court, without coming to any decision on the arguments presented by the Advocate General, considered it to be desirable that he should supplement his Opinion and examine in their entirety the problems raised in the case. The Advocate General delivered a further Opinion at the sitting on 11 January 1983.

Decision

1 By application lodged at the Court Registry on 8 January 1982 the Gesellschaft zur Verwertung von Leistungsschutzrechten mbH, a limited company having its registered office in Hamburg (hereinafter referred to as "GVL") brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that the Commission's decision of 29 October 1981 relating to a proceeding under Article 86 of the EEC Treaty (IV/29.839 — GVL) which was communicated to the applicant on 9 November 1981 and was published in the Official Journal (Official Journal 1981, L 370, p. 49) was void.

2 The applicant is the only copyright management company in the Federal Republic of Germany which deals with the protection of copyright and of

the rights, described as being related to copyright, namely performers' rights. In particular it undertakes the collection and distribution of the royalties to which performing artists are entitled by virtue of the provisions of the German Copyright Law (Urheberrechtgesetz) where their performance, which has previously been recorded on visual or sound recordings with their consent, is broadcast or disseminated to the public in some other manner ("secondary exploitation").

3 Prior to 21 November 1980 the applicant refused to conclude management contracts with performing artists who were neither German nationals nor resident in the Federal Republic of Germany or to protect the rights of such artists in Germany in any other way. From that date it terminated that practice by amending its articles of association and its standard management agreement in such a way that any performing artist established in the territory of one of the Member States of the European Community would be permitted to enter into a management contract and would receive his share of the income from royalties, even retroactively.

4 The contested decision declares that GVL's failure prior to 21 November 1980 to conclude management agreements with foreign artists where the latter were not resident in the Federal Republic of Germany, or otherwise to manage performers' rights vested in such artists in Germany, constituted, in so far as such artists possessed the nationality of another Member State or were resident in a Member State, an abuse of a dominant position within the meaning of Article 86 of the Treaty.

5 In the recitals (paragraph 71) in the preamble to the decision it is explained that after 21 November 1980 GVL, by amending its articles of association and its standard management agreement, ended its discrimination against artists not having German nationality in so far as it affected Member States' nationals or artists resident in one of the Member States. It is stated that the present apportionment procedure applies equally to German artists and such foreign artists.

6 In support of its action the applicant makes the following five submissions:

First submission: In the course of the administrative procedure preceding the contested decision the Commission infringed essential procedural requirements;

Second submission: The Commission did not have the power to take a decision the sole purpose of which was to "declare" that there had been an infringement, already terminated, of Article 86 of the Treaty;

Third submission: Article 86 does not apply to the applicant as the latter must be regarded as an undertaking entrusted with the operation of services of general economic interest within the meaning of Article 90 (2) of the Treaty;

Fourth submission: The conduct of the applicant to which the Commission objects is not capable of affecting trade between Member States;

Fifth submission: That conduct cannot be considered to be an abuse of a dominant position within the meaning of Article 86 of the Treaty; in particular the applicant did not apply dissimilar conditions to equivalent transactions with its trading partners (Article 86, second paragraph, sub-paragraph (c)).

First submission: infringement of essential procedural requirements

7 The applicant claims in the first place that the Commission infringed Article 19 (1) of Regulation No 17 of the Council of 6 February 1962, First regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-1962, p. 87), and Article 4 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Regulation No 17 of the Council (Official Journal, English Special Edition 1963-1964, p. 47) inasmuch as the Commission based its decision on complaints other than those in relation to which the applicant had had the opportunity to make its views known.

8 With regard to that allegation the applicant contends that the Commission did not make it sufficiently clear in its notice of objections that the objections related not only to the refusal to conclude management agreements with nationals of other Member States but also to cases where artists were resident in a Member State without being nationals of that State. This lack of clarity is said to be particularly unfortunate since the complaint which gave rise to the notice of objections, that is to say the complaint lodged in London by Interpar, did not raise the question of the position of artists who were resident in a Member State without being nationals of that State.

9 This series of allegations is not supported by the facts. Before referring to the complaint lodged by Interpar the notice of objections described the applicant's conduct in the following terms: "GVL refuses to conclude management agreements with foreign artists who are not resident in Germany, whether or not they have the nationality of one of the Member States of the Community, or to protect the rights of such artists in Germany in any other way" (paragraph 27). The legal considerations contained in the same document refer in particular to GVL's discrimination between German artists or foreign artists resident in Germany on the one hand and "foreign artists not resident in Germany" on the other (paragraphs 51, 52 and 55).

10 In more general terms the notice of objections contained nothing which might lead the applicant to think that the sole complaint made against it by the Commission concerned the position of artists having the nationality of one of the other Member States.

11 The next contention of the applicant is that the contested decision only repeats the considerations set out in the notice of objections and that therefore the Commission did not attach any importance to the arguments put forward by the applicant or contained in the legal opinions which it had sent to the Commission. In conducting itself in this way the Commission had infringed GVL's right to be heard ("rechtliches Gehör") guaranteed by Regulation No 99/63.

12 Even if it is correct to say that the purpose of Regulation No 99/63 is to ensure that undertakings have the right, upon the conclusion of the inquiry, to submit their observations on all the objections which the Commission intends to raise against them, the regulation does not require the Commission to discuss all those observations in the statement of the reasons on which its decision is based if those reasons are, of themselves, such as to justify the conclusions at which the Commission has arrived.

13 It must be added that the contested decision sets out and discusses in its recitals the essential features of the observations submitted on behalf of GVL during the hearing of that undertaking on 12 February 1981.

14 The applicant finally contends that the Commission's refusal to take into account the observations submitted resulted in various errors of fact being made in the decision. Those complaints can, however, be examined only in the context of the substantive submissions to which they relate.

15 Consequently the first submission must be rejected.

Second submission: lack of competence

16 In making this submission the applicant contends that the Commission lacks the power to declare, by means of a decision, that the rules of Community law on competition have been infringed when the infringement has been terminated by the undertaking in question. Such a power arises neither from the provisions of the Treaty nor from those of Regulation No 17.

17 The applicant points out in that respect that both the notice of objections and the complaints made by Interpar on which the notice was based concerned GVL's practice prior to 21 November 1980. As a result of the Commission's intervention GVL altered its practice so as to terminate the alleged infringement. Consequently the administrative proceedings instituted by the Commission had become devoid of purpose.

18 The applicant emphasizes that in adopting Regulation No 17 the Council laid down exhaustively the Commission's powers of decision in the matters governed by Articles 85 and 86 of the Treaty. Those powers do not include the power to take a decision which is solely intended to record that an infringement has occurred in the past. In particular Article 3 of Regulation No 17 makes no reference to the recording of an infringement except in connection with a decision intended to bring that infringement to an end.

19 The defendant is of the opinion that its competence to take the contested decision is derived on the one hand from the interpretation of the provisions of the Treaty and of Regulation No 17 and on the other hand from the fact that there are powerful practical reasons in favour of this view, on the basis of which the Commission has, furthermore, constantly acted.

20 According to the defendant the provisions of Regulation No 17 must be interpreted in the light of the powers, in the field of competition, which are

conferred upon the Commission by the Treaty and which are given specific form by the regulaton. That regulation lays down a range of powers, of varying scope, especially in Articles 3 (1) and (3), 15 (2) and (6) and 16. The decision declaratory of an infringement which has already been terminated comes within this corpus of powers. It occupies a position between two decisions expressly provided for by the regulation, that is to say, the decision imposing a fine in respect of an infringement which has been established but has already been terminated and the decision which finds, after a provisional examination, that the conditions for the application of Article 85 (1) are met.

21 From a practical point of view the defendant draws attention to the fact that if the Commission did not have the power to make a simple declaration it would always have to impose a fine in order to prevent the undertaking in question from subsequently resuming its infringement after it had brought it to an end a short time before a decision requiring it to terminate the infringement had been adopted.

22 It should be observed in the first place that, as the defendant has rightly pointed out, the provisions of Regulation No 17, and in particular those provisions which prescribe the measures to be adopted by the Commission in order to ensure that Articles 85 and 86 of the Treaty are applied, must be interpreted within the framework of the rules on competition contained in the Treaty. Those rules are based on the premise, which finds expression in particular in Articles 87 (2) (d) and 89, that it is for the Commission to ensure the rules on competition are applied by undertakings and to determine, where necessary, whether there has been an infringement of those rules.

23 As is clear from the recitals in the preamble to Regulation No 17 and from Article 87 (a) of the Treaty, the purpose of Regulation No 17 is to ensure compliance with the rules on competition by undertakings and, to that end, to enable the Commission to require undertakings to bring to an end any infringement which it establishes and to impose fines and periodic penalty payments in respect of an infringement. The power to take decisions of such a type necessarily implies a power to make a finding that the infringement in question exists.

24 In reality, the question raised by the second submission is therefore not whether the Commission has the competence to take a decision establishing

the existence of an infringement of the rules on competition but whether the Commission had, in this case, a legitimate interest in taking a decision declaring conduct which had already been terminated by the undertaking concerned to be an infringement.

25 In that connection the contested decision states that even after the amendment of its articles of association and its standard agreement in November 1980 GVL considers itself justified, in view of the uncertain legal position, in excluding artists not having German nationality or not resident in the Federal Republic of Germany from availing themselves of its management services. A decision is therefore said to be needed to clarify the legal position both for the benefit of the complainants and in order to prevent identical or similar infringements in future (paragraph 74).

26 Although GVL made it known in the course of these proceedings that it regarded the amendment of its articles of association and its standard agreement in November 1980 as irrevocable, it also stated both during the administrative proceedings before the Court that it did not consider itself bound by that amendment as regards the conclusion of management contracts with artists who were nationals of a non-member country but resident in another Member State. Furthermore, in the course of the above-mentioned proceedings it stressed that it did not consider itself bound by Community law to make the amendment and that it was therefore quite free to resume its previous practice.

27 In those circumstances the Commission was entitled to take the view that there was a real danger of a resumption of that practice if GVL's obligation to terminate it were not expressly confirmed and that consequently it was necessary to clarify the legal position.

28 It follows from the foregoing that a legitimate interest on the part of the defendant to establish by means of the contested decision, an infringement of the rules on competition prior to the amendment of the applicant's articles of association has been adequately demonstrated and that therefore the second submission must be rejected.

Third submission: application of Article 90 of the Treaty

29 The third submission is to the effect that GVL is an undertaking entrusted with the operation of services of general economic interest within the meaning of Article 90 (2) of the Treaty and that therefore it is subject to the rules on competition only in so far as the application of such rules does not obstruct the performance of the particular tasks assigned to it.

30 For the purposes of that submission the applicant relies on the German Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten [Law on the Management of Copyright and Related Rights] (Bundesgesetzblatt I, p. 1294) which provides, *inter alia*, that a management company such as GVL must be officially authorized, is subject to monitoring by the Patentamt [Patent Office] and is under a duty to conclude certain management agreements.

31 An examination of the aforementioned law shows, however, that the German legislation does not confer the managment of copyright and related rights on specific undertakings but defines in a general manner the rules applying to the activities of companies which intend to undertake the collective exploitation of such rights.

32 Even if it is true that the monitoring of the activities of such companies as provided for by that law goes further than the public supervision of many other undertakings, that is however not sufficient for those companies to be included in the category of undertakings referred to in Article 90 (2) of the Treaty.

33 Consequently the third submission cannot be accepted.

Fourth submission: the effect on trade between Member States

34 By means of this submission the applicant claims that the infringement of the rules on competition of which it is accused in the contested decision, even if it had existed, was not capable of affecting trade between Member States in the sense of the first paragraph of Article 86 of the Treaty.

35 In that connection the decision states (paragraph 63) that GVL's refusal to assume responsibility for exploitation of the rights of foreign artists resident in a Member State other than the Federal Republic of Germany hindered the creation of a uniform market for services in the Community. Such foreigners could not avail themselves of GVL's services. The cross-frontier movement of services within the Community which would have developed had it not been for GVL's refusal was therefore hindered within the Community. This restriction of the movement of services was appreciable, moreover, since a multitude of foreign holders of rights were prevented from exploiting their rights in Germany.

36 The applicant denies that the effect on trade between Member States was appreciable. It argues that at the commencement of the administrative procedure there was but one complaint, and that came from Interpar. Subsequently only one further case, which concerned a choir of Italian mountaineers, was drawn to the attention of the Commission. The nine artists referred to as complainants in the decision all belonged to the same group. The applicant itself had never previously received any request for the management of performers' rights from foreign artists except in very special cases. GVL's previous practice therefore had a negligible impact on trade between Member States.

37 It is necessary to recall that in order to determine whether trade between Member States is capable of being affected by an abuse of a dominant position in the relevant market for the puposes of Article 86 of the Treaty, account must be taken of the consequences for the effective competitive structure in the common market (judgment of 6 March 1974 in Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation* v *Commission of the European Communities* [1974] ECR 223).

38 The Court has already adopted the view, in its judgment of 25 October 1979 in Case 22/79 *(Greenwich Film Production* v *Société des Auteurs, Compositeurs et Éditeurs de Musique (SACEM) and Société des Éditions Labrador* [1979] ECR 3275), that the activities of undertakings managing copyrights may be conducted in such a way that their effect is to partition the common market and thereby to restrict the freedom to provide services which constitutes one of the objectives of the Treaty. The Court added that such activities are therefore capable of affecting trade between Member States within the meaning of Article 86 of the Treaty.

39 The Commission's objection to the applicant's past activities relates precisely to the fact that they were conducted in such a way as to impede the free movement of services to the extent of partitioning the common market. The applicant's practice was such that it prevented the exploitation, on the German market, of the rights of non-German performers who were resident in other Member States.

40 Consequently the fourth submission must be rejected.

Fifth submission: abuse of a dominant position

41 This submission, which relates to the substantive conditions laid down by Article 86 of the Treaty, is divided into various parts, in the first of which GVL's dominant position on the market is disputed.

42 The applicant acknowledges that the service it provides consists of the management of performers' rights of secondary exploitation and that it is the only undertaking in the Federal Republic of Germany engaged in such management. Nevertheless, it maintains that it is not the only trading partner of performing artists since the latter may exploit their rights of primary exploitation and may therefore exchange services with, for example, promoters or sound recording manufacturers.

43 The defendant contends that the applicant's reasoning is based on a misunderstanding as to the relevant market to be taken into account. According to the defendant the relevant market is not that of the exchange of services in the field of the performance of artistic works but that of the management of the royalties due to performing artists as a result of the secondary exploitation of their performances. That is the market in which GVL has a dominant position.

44 In that connection the decision finds (paragraph 45) that the market in which GVL is active is the market in services relating to the management of secondary exploitation rights vested in performing artists and manufacturers in Germany, which may be precisely differentiated from the activities of other undertakings engaged in the exploitation of rights. GVL has a *de facto* monopoly in that market in Germany, that is to say in a substantial part of the common market.

45 The Court considers that these findings are correct and that therefore the first part of the submission cannot be upheld.

46 In the second part of the fifth submission it is denied that there has been an abuse of that dominant position as set out in the decision. In particular, the Commission is said to have wrongly accused the applicant of treating artists differently on grounds of nationality.

47 In the contested decision it is considered, first, (paragraph 46), that any discriminatory treatment by a dominant undertaking on grounds of nationality must be regarded as an infringement of Article 86 and, secondly (paragraph 47), that the refusal by GVL, as a *de facto* monopoly undertaking, to conclude management agreements with foreign artists having no residence in Germany constitutes discrimination on grounds of nationality.

48 The applicant objects strongly to the latter conclusion. It refers to the fact that throughout the proceedings brought against it it maintained that the distinction it made between different artists was based solely on the nature of the rights vested in them. The real problem lies, according to the applicant, in the disparity in the national laws regarding copyright and related rights. As a result of that disparity the rights of artists established outside the Federal Republic of Germany are governed by laws which do not recognize royalties in respect of the secondary exploitation of copyright.

49 The applicant explains that it is able to manage rights only where it is in a position to verify their existence and scope. It is able to do that in the case of artists with German nationality who, by virtue of Paragraph 125 of the German Copyright Law, benefit from the legal protection granted by that Law. The applicant has admitted that the same requirement was complied with in the case of foreign artists resident in the Federal Republic of Germany as such residence constitutes a sufficiently strong connecting factor for the Law to apply in that case.

50 The applicant is of the opinion that that view of the law is confirmed by Paragraph 6 (1) of the German Management Law of 1965. According to that provision a company set up to exploit and manage performers' rights is under a duty to manage the rights falling within its field of activity at the request of the holders of those rights "where the latter are German nationals within the meaning of the Basic Law or are resident in the areas in which the present statute is in force," that is to say in the Federal Republic of Germany.

51 The defendant concedes that disparity exists between national laws and that the majority of the laws of the other Member States are less comprehensive than the German Law as regards secondary exploitation rights. Nevertheless those facts cannot justify the refusal to conclude contracts with foreign artists who are not resident in the Federal Republic of Germany since that refusal deprives them of the opportunity of proving that they do in fact hold the rights in question.

52 The Court notes in the first place that Paragraph 6 of the Management Law, whilst requiring management companies to manage the rights of all artists of German nationality or resident in the Federal Republic of Germany, does not prevent such companies from pursuing their activities on behalf of other artists. This interpretation of the Law was confirmed by implication by the Patentamt [Patent Office] when it approved the amendment made to GVL's articles of association on 21 November 1980.

53 It should next be observed that the freedom thus left to GVL by the Law is limited by the provisions of the Treaty, in particular those in the field of competition, especially as GVL occupied a dominant position in a substantial part of the common market.

54 In those circumstances it was not permissible for GVL to limit its services, even in the absence of harmonization of copyright laws, to artists whose rights it knew were governed by the German Law. It could not exclude the possibility that certain foreign artists not resident in the Federal Republic of

Germany might be able to assert rights of secondary exploitation. Furthermore, it knew that by refusing to manage such rights it was in fact preventing those artists from being paid the royalties to which they were entitled.

55 The applicant therefore conducted its activities in such a way that any foreign artist who was not resident in the Federal Republic of Germany was not in a position to benefit from rights of secondary exploitation, even if he could show that he held such rights either because German law was applicable or because the law of some other State recognized the same rights.

56 Such a refusal by an undertaking having a *de facto* monopoly to provide its services for all those who may be in need of them but who do not come within a certain category of persons defined by the undertaking on the basis of nationality or residence must be regarded as an abuse of a dominant position within the meaning of the first paragraph of Article 86 of the Treaty.

57 It therefore follows that the Commission rightly took the view that the first paragraph of Article 86 applied in this case.

58 Thus the fifth submission cannot be accepted and it is not necessary to examine the other parts of that submission, in particular concerning the allegation of discrimination as contemplated by subparagraph (c) of the second paragraph of Article 86 of the Treaty.

59 The application must therefore be dismissed.

Costs

60 Pursuant to Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the applicant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application;**

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

Mertens de Wilmars Pescatore O'Keeffe

Everling Mackenzie Stuart Bosco Koopmans

Delivered in open court in Luxembourg on 2 March 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 16 NOVEMBER 1982 [1]

Mr President,
Members of the Court,

The subject of the case on which I am giving my Opinion today is a Commission decision of 29 October 1981 (Official Journal 1981, L 370, p. 49) taken in pursuance of Article 86 of the EEC Treaty and Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-1962, p. 87). It concerns the past conduct of the Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (hereinafter referred to as "GVL"), whose registered office is in Hamburg, in relation to performing artists who were not of German nationality but did have the nationality of one of the Member States of the European Communities or were resident in a Member State. For the purposes of understanding the case I should like simply to recall to mind the main factual and legal points and as regards the details refer the Court to the account given in the Report for the Hearing.

1 — Translated from the German.