JUDGMENT OF THE COURT
13 July 1989 *

In Joined Cases 110/88, 241/88 and 242/88

REFERENCE to the Court under Article 177 of the EEC Treaty

in Case 110/88, by the cour d'appel (Court of Appeal), Poitiers, for a preliminary ruling in the proceedings pending before that court between

François Lucazeau, of Epargnes,

and

Société des auteurs, compositeurs et éditeurs de musique (Sacem), Neuilly,

and in Cases 241/88 and 242/88, by the tribunal de grande instance (Regional Court), Poitiers, for a preliminary ruling in the proceedings pending before that court between

Société des auteurs, compositeurs et éditeurs de musique (Sacem), Neuilly

and

Xavier Debelle, of Poitiers,

and between

Société des auteurs, compositeurs et éditeurs de musique (Sacem), Neuilly,

and

Christian Soumagnac, of Poitiers,

* Language of the case: French.

on the interpretation of Articles 85 and 86 of the EEC Treaty,

THE COURT

composed of: T. Koopmans, President of Chamber, acting as President, G. F. Mancini, C. N. Kakouris, F. A. Schockweiler, J. C. Moitinho de Almeida, M. Díez de Velasco and M. Zuleeg, Judges,

Advocate General: F. G. Jacobs
Registrar: D. Louterman, Principal Administrator

after considering the observations submitted on behalf of

F. Lucazeau, the appellant in the main proceedings in Case 110/88, and C. Sougmagnac, the defendant in the main proceedings in Case 242/88, by J. C. Fourgoux, of the Paris Bar, and, at the hearing, also by P. F. Ryziger, of the Paris Bar;

Sacem, the plaintiff in the main proceedings in Cases 241/88 and 242/88 and the respondent in the main proceedings in Case 110/88, by O. Carmet, of the Paris Bar;

the Government of the French Republic, by R. De Gouttes, M. Giacomini and E. Belliard, acting as Agents;

the Government of the Italian Republic, by L. Ferrari Bravo, acting as Agent, assisted by I. Braguglia, avvocato dello Stato;

the Government of the Hellenic Republic, by E. M. Mamouna, G. Crippa and S. Zissimopoulos, acting as Agents;

the Commission of the European Communities, by its Legal Advisers G. Marenco and I. Langermann, acting as Agents;

having regard to the Report for the Hearing and further to the hearing on 8 March 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 26 May 1989,

gives the following

Judgment

1 By judgment of 3 March 1988, which was received at the Court on 5 April 1988, the cour d'appel, Poitiers, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Articles 85 and 86 of that Treaty, with a view to deciding whether certain trading conditions imposed on users by a national society managing copyright for authors, composers and publishers of music were compatible with those provisions (Case 110/88).

2 By two judgments of 6 June 1988, which were received at the Court on 23 August 1988, the tribunal de grande instance, Poitiers, submitted the same questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty (Cases 241/88 and 242/88).

3 The questions were raised in proceedings between three discothèque operators and the Société des auteurs, compositeurs et éditeurs de musique (hereinafter referred to as 'Sacem'), the society which manages copyright in musical works in France. The three disputes relate in particular to the refusal of the discothèque operators to pay royalties to Sacem for the performance of protected musical works on their premises.

4 The discothèque operators put forward a number of arguments to show that Sacem's conduct towards them constituted anti-competitive conduct prohibited by the EEC Treaty. They claim first that the rate of royalties demanded by Sacem is arbitrary and unfair and therefore constitutes an abuse of the dominant position

held by that society. The level of royalties is appreciably higher than that applied in the other Member States and, moreover, the rates charged to discothèques bear no relation to those charged to other large-scale users of recorded music, such as television and radio stations.

5 They also claim that discothèques use music of Anglo-American origin to a very considerable extent, a fact not taken into account in Sacem's method of calculating royalties, which is based on the application of a fixed rate of 8.25% to the turnover, including value-added tax, of the discothèque in question. The discothèque operators must pay those very high royalties to obtain access to the whole of Sacem's repertoire even though only part of it is of any interest to them; Sacem has always refused to grant them access to just part of the repertoire, and they can not make a direct approach to the copyright-management societies in other countries since the latter are bound by 'reciprocal representation contracts' with Sacem and accordingly refuse to grant direct access to their repertoires.

6 The cour d'appel, Poitiers, considers that, whilst there is no doubt that Sacem holds a dominant position on French territory, the fact that it demands the payment of a flat-rate royalty does not in itself appear to be an abuse of its dominant position, in so far as the application of that flat rate simplifies collection and ensures that authors and composers are paid. However, the cour d'appel entertains doubts as to whether the rate of 8.25% is justified. Accordingly, it referred two questions to the Court for a preliminary ruling, which were adopted and submitted by the tribunal de grande instance, Poitiers, in the two cases pending before that court.

7 The two questions are as follows:

'1. Does the imposition by Sacem, an association of authors, composers and publishers of music which occupies a dominant position in a substantial part of the common market and is bound by reciprocal representation contracts with copyright societies in other countries of the EEC, of aggregate royalties on the basis of 8.25% of the gross turnover of a discothèque amount to the direct or

indirect imposition on those entering into contracts with it of unfair trading conditions within the meaning of Article 86 of the Treaty of Rome if that rate is manifestly higher than that applied by identical copyright societies in other Member States of the European Economic Community?

2. Is the establishment, by means of a set of "reciprocal representation agreements", of a *de facto* monopoly in the countries of the European Economic Community, enabling a copyright-management society pursuing its activities in a Member State to fix under a standard-form contract a comprehensive royalty which must be paid by users before exploiting foreign works, liable to constitute a concerted practice covered by the prohibition in Article 85(1) of the Treaty?'

8 Reference is made to the Report for the Hearing for a fuller account of the facts and procedure, the French law on copyright and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 It is appropriate to examine first the second question, on the interpretation of Article 85 of the Treaty, before addressing the problem of the application of Article 86 raised in the first question.

The second question (Article 85)

10 It is apparent from the considerations set out in the order for reference from the cour d'appel, Poitiers, that the concerted practice within the meaning of Article 85 referred to in the question is a practice engaged in by national copyright-management societies in the various Member States. However, the wording of the question does not clearly indicate whether that practice consists in setting up a network of reciprocal representation agreements or in collectively denying any access to their respective repertoires by users established in other Member States.

11 With regard to the first point, it is apparent from the documents before the Court that a 'reciprocal representation contract', as referred to by the national court, must be taken to mean a contract between two national copyright-management societies concerned with musical works whereby the societies give each other the right to grant, within the territory for which they are responsible, the requisite authorizations for any public performance of copyrighted musical works of the other society and to subject those authorizations to certain conditions, in conformity with the laws applicable in the territory in question. Those conditions include in particular the payment of royalties, which are collected for the other society by the society which it has empowered to act as its agent. The contract specifies that each society is to apply, with respect to works in the other society's repertoire, the same scales, methods and means of collection and distribution of royalties as those which it applies for works in its own repertoire.

12 Under the international copyright conventions, the owners of copyright recognized under the legislation of a contracting State are entitled, in the territory of every other contracting State, to the same protection against the infringement of copyright, and the same remedies for such infringement, as the nationals of the latter State.

13 Consequently, it is apparent that reciprocal representation contracts between copyright-management societies have a twofold purpose: first, they are intended to make all protected musical works, whatever their origin, subject to the same conditions for all users in the same Member State, in accordance with the principle laid down in the international provisions; secondly, they enable copyright-management societies to rely, for the protection of their repertoires in another State, on the organization established by the copyright-management society operating there, without being obliged to add to that organization their own network of contracts with users and their own local monitoring arrangements.

14 It follows from the foregoing considerations that the reciprocal representation contracts in question are contracts for services which are not in themselves restrictive of competition in such a way as to be caught by Article 85(1) of the Treaty. The position might be different if the contracts established exclusive rights whereby copyright-management societies undertook not to allow direct access to their repertoires by users of recorded music established abroad; however, it is

apparent from the documents before the Court that exclusive-rights clauses of that kind which previously appeared in reciprocal representation contracts were removed at the request of the Commission.

15 The Commission points out, however, that the removal of that exclusive-rights clause from the contracts has not resulted in any change in the conduct of the management societies; they still refuse to grant a licence or to entrust their repertoire abroad to a society other than the one established in the territory in question. That statement raises the second problem raised in the question, namely whether the management societies have in fact retained their exclusive rights by means of a concerted practice.

16 In that connection the Commission and Sacem maintain that the management societies have no interest in using a method different from that of appointing as agent the society established in the territory concerned and that it does not seem realistic in those circumstances to regard the management societies' refusal to allow direct access to their repertoires by foreign users as a concerted practice. The discothèque operators, whilst recognizing that the foreign societies entrust the management of their repertoires to Sacem because it would be too burdensome to set up a system of direct collection of royalties in France, nevertheless consider that the societies have acted in concert in that regard. In support of that view, they refer to the letters which the French users have received from various foreign management societies refusing them access to their repertoires in substantially identical terms.

17 Concerted action by national copyright-management societies with the effect of systematically refusing to grant direct access to their repertoires to foreign users must be regarded as amounting to a concerted practice restrictive of competition and capable of affecting trade between the Member States.

18 As the Court held in its judgment in Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, mere parallel behaviour may amount to strong evidence of a concerted practice if it leads to conditions of competition which do not correspond to the normal conditions of competition. However, concerted action of that kind cannot be presumed where the parallel behaviour can be

accounted for by reasons other than the existence of concerted action. Such a reason might be that the copyright-management societies of other Member States would be obliged, in the event of direct access to their repertoires, to organize their own management and monitoring system in another country.

19 The question whether concerted action prohibited by the Treaty has actually been taken can thus only be answered by appraising certain presumptions and evaluating certain documents and other evidence. By virtue of the division of powers under Article 177 of the Treaty, that is a task for the national courts.

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

The first question (Article 86)

21 The first question seeks to determine what criteria must be applied in order to determine whether an undertaking which holds a dominant position in a substantial part of the common market is imposing unfair trading conditions. The question relates more specifically to the case where the undertaking in question is a national copyright-management society dealing with musical works which also manages the repertoires of national societies of other Member States, following the conclusion of reciprocal representation contracts, and fixes an aggregate rate of royalty based on 8.5% of a discothèque's turnover, including all taxes.

22 It is appropriate to consider first the criterion to which much importance is attached by the discothèque operators, and which is embodied in the wording of the question, namely the relationship between the rate applied in France and that applied by the copyright-management societies in other Member States.

23 Sacem contends that the methods used in the various Member States to determine the basis of assessment for the rate of royalty are dissimilar, since royalties calculated on the basis of the turnover of a discothèque, as in France, are not comparable with those determined by reference to the floor area of the establishment in question, as in other Member States. If it were possible to neutralize those differences of method by means of a comparative examination based on the same criteria, the conclusion would be that the differences between the Member States in the level of royalties are minor.

24 Those contentions have been contested not only by the discothèque operators but also by the Commission. The latter stated that in conducting an inquiry into royalties charged to French discothèques by Sacem it asked all the copyright-management societies dealing with music in the Community to inform it of the royalties charged to a national discothèque with specific characteristics as regards the number of places, area, opening hours, location cost of entry, cost of the most popular drink and total annual receipts including tax. The Commission concedes that this method of comparison does not take account of the appreciable differences which may exist from one Member State to another regarding the number of people who go to discothèques, which depends on various factors such as climate, social habits and historical traditions. Nevertheless, if a royalty is many times higher than that charged in other Member States then it is clearly inequitable, and that, the Commission says was the finding indicated by its inquiry.

25 When an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States.

26 Sacem has claimed that certain circumstances justify that difference. It referred to the high prices charged by discothèques in France, the traditionally high level of

protection provided by copyright in France, and the peculiar features of French legislation whereby the playing of recorded musical works is subject not only to a performing right but also to a supplementary mechanical reproduction fee.

27 Circumstances of that kind cannot account for a very appreciable difference between the rates of royalty charged in the various Member States. The high level of prices charged by discothèques in a particular Member State, even if substantiated, may be the result of several factors, one of which might, in turn, be the high level of royalties payable for the use of recorded music. As regards the level of protection assured by national legislation, it must be noted that copyright in musical works includes in general a performing right and a reproduction right, and the fact that a 'supplementary reproduction fee' is payable in some Member States, including France, in the event of public discrimination, does not imply that the level of protection is different. As the Court held in its judgment in Case 402/85 *Basset* v *Sacem* [1987] ECR 1747, the supplementary reproduction fee may be seen, disregarding the concepts used by French legislation and practice, as constituting part of the payment for an author's rights over the public performance of a recorded musical work and therefore fulfils a function equivalent to that of the performing right charged on the same occasion in another Member State.

28 Sacem also contends that the customary methods of collection are different, in that certain copyright-management societies in the Member States tend not to insist on collecting royalties of small amounts from small users spread over the country, such as discothèque operators, dance organizers and café proprietors. The opposite tradition has developed in France, in view of the wish of authors to have their rights fully observed.

29 That argument cannot be accepted. It is apparent from the documents before the Court that one of the most marked differences between the copyright-management societies in the various Member States lies in the level of operating expenses. Where — as appears to be the case here, according to the record of the proceedings before the national court — the staff of a management society is much

larger than that of its counterparts in other Member States and, moreover, the proportion of receipts taken up by collection, administration and distribution expenses rather than by payments to copyright holders is considerably higher, the possibility cannot be ruled out that it is precisely the lack of competition on the market in question that accounts for the heavy burden of administration and hence the high level of royalties.

30 It must therefore be concluded that a comparison with the situation in other Member States may provide useful indications regarding the possible abuse of a dominant position by a national copyright-management society. Accordingly, the answer to the question as formulated by the national courts must be in the affirmative.

31 The arguments presented before the Court by the discothèque operators and Sacem related also to other criteria not mentioned in the question submitted by the national court which might serve to establish the unfairness of the rate of royalty. The discothèque operators drew attention to the difference between the rate applied to discothèques and that applied to other large-scale users of recorded music, such as radio and television stations. However, they did not suggest any basis on which a reliable and consistent comparison could be made, and the Commission and the governments which submitted observations did not express any view on that point. Accordingly, the Court is unable to consider that criterion in the present preliminary-ruling proceedings.

32 The cour d'appel, Poitiers, which initially referred the questions to the Court for a preliminary ruling, expressly stated that the fact that a flat-rate royalty was charged should not be taken into account in deciding whether or not the amount of royalty was fair. Accordingly, it is not for the Court to give a ruling on that matter in the present case.

33 By virtue of the foregoing, it must be stated in reply to the first question that Article 86 of the Treaty must be interpreted as meaning that a national copyright-management society holding a dominant position in a substantial part of the common market imposes unfair trading conditions where the royalties which it charges to discothèques are appreciably higher than those charged in other

Member States, the rates being made on a consistent basis. That would not be the case if the copyright-management society in question were able to justify such a difference by reference to objective and relevant dissimilarities between copyright management in the Member State concerned and copyright management in the other Member States.

Costs

34 The costs incurred by the French, Italian, Greek and Spanish Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in reply to the questions submitted to it by the cour d'appel, Poitiers, by judgment of 3 March 1988, and by the tribunal de grande instance, Poitiers, by two judgments of 6 June 1988, hereby rules:

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

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

to justify such a difference by reference to objective and relevant dissimilarities between copyright management in the Member State concerned and copyright management in the other Member States.

Koopmans Mancini Kakouris

Schockweiler Moitinho de Almeida Díez de Velasco Zuleeg

Delivered in open court in Luxembourg on 13 July 1989.

J.-G. Giraud
Registrar

T. Koopmans
President of Chamber, acting as President