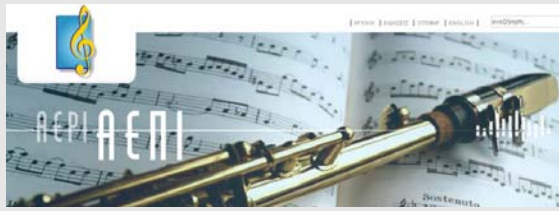


**European Court of Justice, 23 April 2009, AEPI v Commission**



**COMPETITION LAW**

**Court stayed within the bounds of its discretion**

- It cannot be alleged that the Court of First Instance did not examine whether the Commission stayed, in the contested decision, within the bounds of its discretion when handling complaints lodged with it. The judgment under appeal is not, therefore, vitiated by failure to state the grounds in that regard.

**Jurisdiction**

- Court of First Instance has exclusive jurisdiction to find the facts, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts.

Consequently, it is not possible to uphold the arguments put forward by the appellant, in particular in the context of its fourth ground of appeal, which seek to show that trade between Member States is affected, namely the fact that it collects royalties in Greece relating to the use of music not only of Greek authors, but also of authors established in other Member States of the European Union, and the fact that it pays the royalties collected, on the basis of reciprocal representation agreements, to equivalent bodies established in other Member States, which are responsible, like AEPI, for the collective management of copyright in musical works.

**Scope of Community competition law**

- The effect on trade between Member States thus serves as a criterion to define the scope of Community competition law.

As regards the first concepts, it is apparent from the wording of Article 81 EC and 82 EC that those Articles are applicable to agreements restricting competition and abuse of a dominant position only if those agreements and that abuse may affect intra-Community trade. The effect on trade between Member States thus serves as a criterion to define the scope of Community competition law, in particular Articles 81 EC and 82 EC, as against that of national competition law. If it is established that the alleged infringement is not capable of affecting intra-Community trade or of affecting it only in an insignificant manner (see, to that effect, Case C-238/05 *Asnef-Equifax et Administración del Estado* [2006] ECR I-11125, paragraph 34 and the case-law cited, and Case C-407/04 *P Dalmine v Commission* [2007] ECR I-829, paragraph 90 and the case-law

cited), then Community competition law, and more specifically Articles 81 EC and 82 EC, do not apply.

**Serious impediments to the proper functioning of the common market**

- As for the concept of serious impediments to the proper functioning of the common market, it may constitute one of the criteria for evaluating whether there is sufficient Community interest to necessitate the investigation of a complaint by the Commission.

Therefore, when the Commission determines the order of priority for dealing with the complaints brought before it, it may legitimately refer to the Community interest. In this context, it is required to assess in each case how serious the alleged interferences with competition are and how persistent their consequences are. That obligation 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 European Community (*Ufex and Others*, paragraph 93). (...).

It is apparent *inter alia* from a combined reading of paragraphs 49, 50 and 54 of the judgment under appeal that the operative part of that judgment appears to be based on grounds which can be summarised by the finding made by the Court of First Instance in paragraph 54 of the judgment that the applicant had not adduced any specific evidence to establish the actual or potential existence of serious impediments to the proper functioning of the common market. It follows from that that, irrespective of the considerations in the judgment under appeal relating to the issue of the effect on intra-Community trade for the purposes of Articles 81 EC and 82 EC, the Court of First Instance dismissed the action on the basis that there was no specific evidence to establish the actual or potential existence of serious impediments to the proper functioning of the common market as a criterion for evaluating whether there is sufficient Community interest to necessitate the investigation of a complaint by the Commission.

- Even if the practices complained of potentially affect intra-Community trade for the purposes of Articles 81 EC and 82 EC, as the appellant claims, such an effect does not in itself entail the potential existence of serious impediments to the proper functioning of the common market.

In its fifth ground of appeal, the appellant criticises the Court of First Instance's finding, in paragraph 54 of the judgment under appeal, that it did not adduce any specific evidence to establish the actual or potential existence of serious impediments to the proper functioning of the common market, but confined itself to attempting to show that the practices complained of potentially affect intra-Community trade for the purposes of Articles 81 EC and 82 EC.

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**European Court of Justice, 23 April 2009**

(A. Rosas, A. Ó Caoimh, J. Klučka, U. Löhmus and A. Arabadjiev)

JUDGMENT OF THE COURT (Third Chamber)

23 April 2009 (\*)

*(Appeal – Competition – Commission rejecting a complaint – Serious impediments to the proper functioning of the common market – Lack of Community interest)*

In Case C-425/07 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 14 September 2007,

AEPI Elliniki Etaireia pros Prostasian tis Pnevmatikis Idioktiasias AE, established in Maroussi (Greece), represented by T. Asprogerakas Grivas, dikigoros, appellant,

the other party to the proceedings being:

Commission of the European Communities, represented by F. Castillo de la Torre and T. Christoforou, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh, J. Klučka, U. Löhmus and A. Arabadjiev (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 15 October 2008,

after hearing the [Opinion of the Advocate General at the sitting on 27 November 2008](#),

gives the following

### **Judgment**

1 By its appeal, AEPI Elliniki Etaireia pros Prostasian tis Pnevmatikis Idioktiasias AE ('AEPI') seeks to have 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 ('the judgment under appeal') which dismissed as unfounded its action for annulment of Commission Decision SG-Greffe (2005) D/201832 of 18 April 2005 rejecting the complaint submitted by the appellant concerning an alleged infringement of Articles 81 EC and/or 82 EC by the Greek bodies Erato, Apollon and Grammo which collectively manage rights related to copyright in the field of music ('the contested decision').

### **Background to the dispute**

2 It is apparent from paragraphs 1 to 12 of the judgment under appeal that the facts underlying the dispute may be summarised as follows.

3 The appellant is a limited company governed by Greek law which carries out its activities in the sector for the protection of intellectual property rights in the field of music in Greece.

4 On 3 March 1993, the Hellenic Republic adopted Law 2121/1993 on copyright, related rights and cultural issues (FEK A' 25/4.3.1993) ('Law 2121/1993'). Under Article 54 of that law, authors may entrust the management or protection of their intellectual rights to collective management bodies, whose activities are conditional on an authorisation issued by the Greek Ministry of Culture. Article 58 of that law states that

the provisions of Article 54 are applicable by analogy to the management and protection of related rights.

5 The applicant requested an authorisation for all the copyright and related rights in the field of music. However, the Greek Ministry of Culture granted it an authorisation which was limited to the collective management of copyright in musical works.

6 Three Greek bodies for the collective management of related rights, namely Erato, Apollon and Grammo ('the three bodies'), obtained authorisation in respect of the collective management of the related rights, respectively, of singers, performance musicians and producers in the recording and/or film industry.

7 On 22 March 2001, the applicant sent to the Commission of the European Communities a complaint relating to the Hellenic Republic and the three bodies. It maintained, first, that the three bodies were infringing Articles 81 EC and 82 EC in so far as they were abusing their dominant position and creating agreements and concerted practices (taken together, 'the practices complained of'), and requested, secondly, that the Hellenic Republic be brought before the Court for infringement of Article 81 EC on the ground that Law 2121/1993 permitted those bodies to engage in the practices complained of.

8 In its complaint, the applicant maintained that the remuneration for the related rights had been set at too high a level, which went up to 5% of the gross income of Greek radio and television broadcasters. That conduct constitutes an infringement of Articles 81 and 82 EC, which causes it serious and irreparable damage inasmuch as the undertakings concerned are not in a position to pay those excessive amounts, thus depriving the applicant of the royalties it seeks in respect of the copyright.

9 By letter of 7 December 2004, the Commission split the complaint into two parts for legal and procedural reasons with one part relating to the Hellenic Republic and the other to the three bodies.

10 On 18 April 2005, after having taken into account the applicant's arguments, the Commission rejected the complaint relating to the three bodies by means of the contested decision on the ground of lack of Community interest.

11 The relevant considerations on which the contested decision is based are worded as follows:

'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, that the three ... bodies 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 of 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 ... bodies are empowered to act only in respect of the pro-

tection 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, given that, on the one hand, Greek law (in accordance with Directive 92/100/EEC [of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61)]) 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 ... bodies make a collective demand to the user for payment of that remuneration, the Commission 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 ... bodies held a collective dominant position [but also], according to the judgments of the Court in [Case 395/87] *Tournier* [[1989] ECR 2521] and [Joined Cases 110/88, 241/88 and 242/88] *Lucazeau* [and Others [1989] ECR 2811], 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 authority. On account of its in-depth knowledge of the conditions prevailing in the national market[,] the Greek competition authority is 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 ... Commission.

It must therefore be concluded that the extent and complexity of the measures of investigation necessary in order to determine whether the conduct of the three ... bodies ... complies with the Community competition rules are disproportionate in relation to the very 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.'

12 Lastly, on 20 April 2005, the Commission decided to take no further action on the part of the complaint relating to the Hellenic Republic's alleged failure to fulfil its obligations. The action brought by AEPI against that decision was dismissed by the order of the Court of First Instance of 5 September 2006 in Case T-242/05 *AEPI v Commission*, the appeal against

which was itself dismissed by the order of the Court of Justice of 10 July 2007 in Case C-461/06 P *AEPI v Commission*.

#### **The proceedings before the Court of First Instance and the judgment under appeal**

13 In its action for annulment of the contested decision before the Court of First Instance the appellant relied on two pleas in law alleging a manifest error of assessment of the Community interest of the practices complained of and infringement of the obligation to state reasons.

14 As regards the first plea, the Court held, in paragraph 38 of the judgment under appeal, that, as regards the Commission's powers in handling complaints, the assessment of the Community interest raised by a complaint concerning competition 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. The Court added that the Commission is responsible, in the context of its task of ensuring the application of the principles laid down in Articles 81 EC and 82 EC, 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 those complaints.

15 The Court pointed out, in paragraph 40 of the judgment under appeal, that, in order to assess the Community interest, the Commission must strike a balance between the effects of the alleged infringement on the functioning of the common market, the likelihood of its being able to establish the existence of such an infringement and the extent of the investigative measures necessary to fulfil, to the best of its ability, the task of ensuring the observance of Articles 81 EC and 82 EC.

16 In this case, the Court stated, in paragraphs 45 and 46 of the judgment under appeal, that, in the contested decision, the Commission had decided on the basis of three grounds that the practices complained of lacked Community interest, namely that they were incapable of seriously impeding the proper functioning of the common market, that the Commission would be required to undertake a complex investigation into market conditions in order to establish that the alleged infringement had occurred and that the competent national authorities could ensure that the applicant's rights and interests were protected. The Court pointed out that, in its action for annulment of the contested decision, the applicant had challenged only the first of those grounds.

17 The Court then examined the first plea in the following words:

'47 Consequently, the Court's analysis must be restricted to the arguments by which the applicant disputes the contention that there were no adverse effects on trade between Member States, maintaining that the imposition of excessively high fees in respect of related rights is 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.



48 In that connection the Commission took the view, first, that all the parties involved in the case were established and pursued their activities in Greece, secondly, that it was unlikely that the activities of the three ... bodies could be extended to other countries and, thirdly, that the music users were Greek nationals and that the powers of the three ... bodies were confined to Greek territory.

49 It must be stated at the outset that the points of fact and law put forward by the appellant are not capable of establishing that the practices complained of affected the pattern of trade between Member States in a manner which might harm the attainment of the objectives of a single market. The applicant does no more than refer to the financial difficulties suffered by companies managing copyright and music users in Greece and in all the Member States, but fails to substantiate its own claims or even to adduce suitable evidence for that purpose.

50 As regards the applicant's argument that the fact that the royalties of Greek and foreign authors are paid over to companies established in the European Union has the effect of seriously impeding the proper functioning of the common market, it is clear that the powers of the three ... bodies 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 complained of.

51 As regards the arguments that the Court has already held that infringements confined to the territory of one Member State may constitute infringement of the rules of competition, it must be pointed out that, in the cases which gave rise to those decisions, the effect on trade between Member States stemmed from either concerted action by national copyright-management societies, with the effect that they systematically refused to grant direct access to their repertoires to foreign users (Lucazeau and Others, paragraph 17, and Tournier, paragraph 23), or the exclusion of all potential competitors on the geographical market consisting of one Member State (Joined Cases C-241/91 P and C-242/91 P RTE and ITP v Commission [1995] ECR I-743, paragraph 70). Consequently, the cases relied on do not have aspects in common with the present case.

52 As regards the alleged requirement of uniformity and proportionality between the Member States as far as concerns royalties, which was set out in the judgment in SENA [Case C-245/00 Stichting ter Exploitatie van Naburige Rechten (SENA) [2003] ECR I-1251], it must be pointed out that, in that judgment (paragraph 34) the Court, on the contrary, made a ruling to the effect that there was no Community definition of equitable remuneration and that there were no objective reasons to justify the laying down by the Community judicature of methods for determining what constitutes such remuneration.

53 Lastly, as regards the argument that the Commission acknowledged that there had been infringement of Articles 81 EC and 82 EC, it is clear from the letter of 10 December 2004 and from the contested decision

that it is unfounded since the Commission did not acknowledge that such infringement had occurred.

54 In the light of the foregoing, the applicant has not adduced any specific evidence to establish 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 that the applicant 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.

56 Consequently, the first plea must be rejected as unfounded.'

18 As regards the second plea, and in particular the head of claim that the Commission did not express a view on the documents and arguments submitted as a whole, the Court of First Instance held that the Commission was only required to set out the legal considerations which were of fundamental importance for the taking of the decision. According to the Court of First Instance, the Commission had set out the specific grounds for the rejection of the complaint with the clarity required (paragraphs 62 and 63 of the judgment under appeal).

19 Accordingly, the Court of First Instance rejected the action in its entirety.

#### **Forms of order sought**

20 AEPI claims that the Court should:

- set aside the judgment under appeal;
- rule on the merits in accordance with the form of order sought by the applicant in the first instance case or refer the case back to the Court of First Instance for a new ruling, and;
- order the Commission to pay the costs in their entirety.

21 The Commission contends that the appeal should be dismissed and that the applicant should be ordered to pay the costs.

#### **The appeal**

##### **Admissibility**

22 The Commission disputes the admissibility of the appeal and submits that all the grounds of appeal in essence repeat the arguments and evidence that the appellant submitted at first instance without specifically identifying the errors of law which vitiate the judgment under appeal.

23 In that regard, it must be borne in mind that, under the second subparagraph of Article 225(1) EC and the first paragraph of Article 58 of the Statute of the Court of Justice, an appeal is limited to points of law and must lie on the grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant or the infringement of Community law by the Court of First Instance.

24 It is also apparent from the case-law that, provided that the appellant challenges the interpretation or application of Community law by the Court of First In-

stance, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the Court of First Instance, an appeal would be deprived of part of its purpose (see Case C-240/03 P *Comunità montana della Valnerina v Commission* [2006] ECR I-731, paragraph 107, and, inter alia, the orders in Case C-488/01 P *Martinez v Parliament* [2003] ECR I-13355, paragraph 39, and Case C-338/05 P *Front National and Others v Parliament and Council* [2006], paragraph 23, summary published at ECR I-88).

25 Furthermore, an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (see *Comunità montana della Valnerina v Commission*, paragraph 105, and, inter alia, the orders in *Martinez v Parliament*, paragraph 40, and *Front National and Others v Parliament and Council*, paragraph 24).

26 It must be stated in that regard that the appellant identified certain paragraphs of the judgment under appeal, in particular, paragraphs 38, 41 to 43, 44 and 54 against which it set out legal arguments seeking to show that the Court of First Instance had erred in law.

27 The plea of inadmissibility must therefore be rejected.

#### **Substance**

28 In support of its appeal, the appellant relies on five grounds of appeal. By its first ground of appeal, it alleges failure to state the grounds of the judgment under appeal as regards the Commission's discretion when examining complaints lodged with it. By its second to fourth grounds of appeal, the appellant submits in essence that the judgment of the Court of First Instance is unfounded and contains no statement of grounds as regards the finding that trade between Member States is unaffected. Lastly, by its fifth ground of appeal, the appellant submits that the judgment under appeal contains an error of law inasmuch as even a potential effect on trade between Member States is sufficient for Articles 81 EC and 82 EC to apply.

#### **The first ground of appeal**

##### **– Arguments of the parties**

29 The appellant claims that there was failure to state the grounds in paragraph 38 of the judgment under appeal in so far as the Court of First Instance did not examine whether the Commission stayed, in the contested decision, within the bounds of its discretion in handling competition complaints lodged with it. The fact that the Commission is accorded such a discretion in that connection does not justify the dismissal of the action because the discretion in question may not be exercised in an arbitrary manner.

30 The Commission contends that the Court of First Instance stated specific and full grounds for its assessment according to which the Commission stayed, in the contested decision, within the bounds of its discretion.

##### **– Findings of the Court**

31 The Court of First Instance was right to hold, in paragraph 38 of the judgment under appeal, that the Commission is responsible for defining and implementing Community competition policy and for that purpose has a discretion as to how it deals with complaints lodged with it (see to that effect Case C-119/97 P *Ufex and Others v Commission* [1999] ECR I-1341, paragraphs 88 and 89).

32 However, it cannot be deduced from that that the Court of First Instance failed to examine whether the Commission had exercised that discretion within the limits established by the case-law.

33 After pointing out, in paragraph 39 of the judgment under appeal, that, according to settled case-law, when the Commission decides upon certain priorities in examining complaints brought before it, it may decide on the order in which those complaints will be examined and refer to the Community interest residing in a particular case as being the predominant criterion, the Court of First Instance stated, in the next paragraph of that judgment, that, in order to assess the Community interest, the Commission must take into account the circumstances of the particular case and, in particular, the matters of fact and of law which are submitted to it in the complaint brought before it, by weighing up 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.

34 In that regard, the Court of First Instance pointed out that it is for it to determine, inter alia, whether it is apparent from the contested decision that the Commission weighed up those factors (paragraph 41 of the judgment under appeal).

35 In the paragraphs of the judgment under appeal that followed, the Court of First Instance carried out precisely such an investigation.

36 In particular, the Court of First Instance examined, in paragraphs 46 et seq. of that judgment, whether the Commission was right to find that the practices complained of were unlikely seriously to impede the proper functioning of the common market in order to conclude that there was a lack of any sufficient Community interest to necessitate the investigation of a complaint by the Commission.

37 In so doing, the Court of First Instance subjected the conditions under which the Commission exercised its discretion to judicial review.

38 In those circumstances, it cannot be alleged that the Court of First Instance did not examine whether the Commission stayed, in the contested decision, within the bounds of its discretion when handling complaints lodged with it. The judgment under appeal is not, therefore, vitiated by failure to state the grounds in that regard.

39 Accordingly, the first ground of appeal must be rejected as unfounded.

#### **The second to fourth grounds of appeal**

##### **– Arguments of the parties**

40 The appellant's second to fourth grounds of appeal, which it is appropriate to examine together, relate

to the Court of First Instance's findings that, where the effects of an infringement are felt only in the territory of one Member State, the Commission is entitled to reject a complaint for lack of Community interest on the ground that that infringement does not affect intra-Community trade.

41 By its second and third grounds of appeal, the appellant claims, in particular, that there were errors of assessment or failure to state the grounds in paragraphs 41 to 43 of the judgment under appeal. Furthermore, the appellant alleges that the Court of First Instance based its finding, in paragraph 44 of that judgment, on case-law which is not concerned with copyright, without taking into consideration a series of relevant judgments which show that intra-Community trade may be affected even where the infringement occurs exclusively in the territory of one Member State.

42 In its fourth ground of appeal, the appellant submits that Articles 81 EC and 82 EC do not automatically preclude intra-Community trade from being affected if the infringement takes place in the territory of one Member State. Furthermore, it disputes the finding in paragraphs 49 and 50 of the judgment under appeal that it failed to adduce evidence capable of establishing, first, that the practices complained of have 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 is not suffered essentially by music users in Greek territory and Greek authors. It relies, in that regard, inter alia, on the following evidence:

– around 4 500 undertakings which used music and regularly paid royalties ceased to broadcast music on account of the prices imposed by the three bodies in respect of the related rights (5% for the related rights, a percentage which must be compared with the 2.2% requested by the appellant in respect of the copyright). Furthermore, as the *Monomeles Protodikeio Athinon* (Court of First Instance (single judge), Athens) stated in its judgment No 5144/2005, the appellant received a sum of EUR 5 522 per annum in respect of the royalties payable for the music broadcast in *Olympiaki Aeroporia's* aeroplanes, whereas the three bodies asked that airline company for a sum of EUR 627 563 per annum in respect of the related rights payable for that music, and

– the conduct described above affects intra-Community trade in the field of copyright and related rights because around 50% of the music broadcast in Greece is foreign music. Furthermore, authors of foreign music which is broadcast in Greece are all represented in that Member State by the appellant which collects their royalties for them there. They are thus deprived of significant revenue on account of the exorbitant prices imposed by the three bodies.

43 According to the Commission, it is apparent from the detailed statement of grounds in the judgment under appeal that, contrary to what the appellant claims, the scope of the activities of the three bodies and their

practices did not give rise to the slightest suspicion that those activities have a perceptible effect on intra-Community trade.

– **Findings of the Court**

44 It must be borne in mind at the outset that, according to settled case-law, the Court of First Instance has exclusive jurisdiction to find the facts, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts. That appraisal thus does not, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice (see Case C 390/95 P *Antillean Rice Mills and Others v Commission* [1999] ECR I-769, paragraph 29, and Case C-237/98 P *Dorsch Consult v Council and Commission* [2000] ECR I-4549, paragraph 35).

45 Consequently, it is not possible to uphold the arguments put forward by the appellant, in particular in the context of its fourth ground of appeal, which seek to show that trade between Member States is affected, namely the fact that it collects royalties in Greece relating to the use of music not only of Greek authors, but also of authors established in other Member States of the European Union, and the fact that it pays the royalties collected, on the basis of reciprocal representation agreements, to equivalent bodies established in other Member States, which are responsible, like AEPI, for the collective management of copyright in musical works.

46 First, those arguments are all of a purely factual nature and cannot, therefore, be examined by the Court on appeal.

47 Secondly, the appellant has not claimed that the Court of First Instance distorted the clear sense of some of the evidence.

48 Thirdly, the appellant confines itself to disputing the Court of First Instance's finding that it did not establish that the practices complained of are capable of affecting intra-Community trade. However, the submissions relied on are in any event irrelevant given that such an effect does not in itself give rise to serious impediments to the proper functioning of the common market. It is important to point out in that regard that the Court of First Instance rejected the appellant's first plea in support of its action for annulment and found that it had not adduced any specific evidence to establish the actual or potential existence of serious impediments to the proper functioning of the common market.

49 It must be pointed out in that regard that the concepts of, first, an effect on intra-Community trade and, secondly, of serious impediments to the proper functioning of the common market are two separate concepts.

50 As regards the first concepts, it is apparent from the wording of Article 81 EC and 82 EC that those Articles are applicable to agreements restricting competition and abuse of a dominant position only if those agreements and that abuse may affect intra-Community trade. The effect on trade between Member

States thus serves as a criterion to define the scope of Community competition law, in particular Articles 81 EC and 82 EC, as against that of national competition law. If it is established that the alleged infringement is not capable of affecting intra-Community trade or of affecting it only in an insignificant manner (see, to that effect, Case C-238/05 *Asnef-Equifax et Administración del Estado* [2006] ECR I-11125, paragraph 34 and the case-law cited, and Case C-407/04 P *Dalmine v Commission* [2007] ECR I-829, paragraph 90 and the case-law cited), then Community competition law, and more specifically Articles 81 EC and 82 EC, do not apply.

51 Furthermore, it is apparent from settled case-law that, if an agreement between undertakings is to be capable of affecting 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 has an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in a manner which might harm the attainment of the objectives of a single market between Member States (see to that effect, *inter alia*, *Dalmine*, paragraph 90).

52 As for the concept of serious impediments to the proper functioning of the common market, it may constitute one of the criteria for evaluating whether there is sufficient Community interest to necessitate the investigation of a complaint by the Commission.

53 Therefore, when the Commission determines the order of priority for dealing with the complaints brought before it, it may legitimately refer to the Community interest. In this context, it is required to assess in each case how serious the alleged interferences with competition are and how persistent their consequences are. That obligation 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 European Community (*Ufex and Others*, paragraph 93).

54 Consequently, in a situation where intra-Community trade is found to be affected, a complaint relating to infringement of Articles 81 EC and 82 EC will be investigated by the Commission rather than by the national competition authorities if there is sufficient Community interest. That may *inter alia* apply where the infringement complained of is capable of giving rise to serious impediments to the proper functioning of the common market.

55 Although it is true, in that regard, that, in the judgment under appeal, the Court of First Instance did not draw a clear and specific distinction between those two concepts but confused them, as the Advocate General pointed out in paragraphs 40 to 45 of his Opinion, that finding cannot give rise to the annulment of that judgment if the operative part of the judgment is shown to be well founded for other legal reasons (see to that effect, *inter alia*, Case C-30/91 P *Lestelle v Commission* [1992] ECR I-3755, paragraph 28, and Case C-210/98 P *Salzgitter v Commission* [2000] ECR I-5843, paragraph 58).

56 It is apparent *inter alia* from a combined reading of paragraphs 49, 50 and 54 of the judgment under appeal that the operative part of that judgment appears to be based on grounds which can be summarised by the finding made by the Court of First Instance in paragraph 54 of the judgment that the applicant had not adduced any specific evidence to establish the actual or potential existence of serious impediments to the proper functioning of the common market.

57 It follows from that that, irrespective of the considerations in the judgment under appeal relating to the issue of the effect on intra-Community trade for the purposes of Articles 81 EC and 82 EC, the Court of First Instance dismissed the action on the basis that there was no specific evidence to establish the actual or potential existence of serious impediments to the proper functioning of the common market as a criterion for evaluating whether there is sufficient Community interest to necessitate the investigation of a complaint by the Commission.

58 Therefore, it cannot be claimed that the confusion characterising the judgment under appeal, which was not, moreover, raised by the appellant in its appeal, is such as to preclude an understanding of the grounds underlying that judgment with a view to challenging its validity or a review by the Court.

59 Likewise, while it is true that the Court of First Instance found, in paragraph 55 of the judgment under appeal, that the applicant had failed to establish that, in the contested decision, the Commission had made a manifest error of assessment by considering that the effects of the practices complained of were unlikely to affect trade between Member States within the meaning of Articles 81 EC and 82 EC, although the Commission did not, in fact, take a view on that issue, the fact none the less remains that that finding does not concern the concept of serious impediments to the proper functioning of the common market.

60 Furthermore, having regard to the fact that the Commission did not handle the issue of the effect on trade between Member States in the contested decision, it is important to point out that that finding of the Court of First Instance does not preclude the competent national authorities from applying Articles 81 EC and 82 EC in the present case.

61 As regards the argument the appellant put forward on the basis of the Court's case-law in the context of its second and third grounds of appeal, which is mentioned in paragraph 41 of the present judgment, it is clear that the case-law thus relied on is not relevant to the present case.

62 The judgments to which the appellant refers, namely those in Case 22/78 *Hugin Kassaregister and Hugin Cash Registers v Commission* [1979] ECR 1869; *Tournier*; *Lucazeau and Others*; Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889; Case C-18/93 *Corsica Ferries* [1994] ECR I-1783; and *RTE and ITP v Commission*, all deal with the concept of the effect on trade between Member States for the purposes of Articles 81 EC and 82 EC.



63 The only judgment cited by the appellant which deals with the concept of serious impediments to the proper functioning of the common market, namely the judgment in Case T-5/93 Tremblay and Others v Commission [1995] ECR II-185, is likewise not relevant to the present case. It is apparent from paragraph 40 of that judgment that the Court of First Instance annulled a decision of the Commission on the ground of failure to state reasons in so far as that decision rejected complaints about an alleged partitioning of the domestic market as a result of the reciprocal representation contracts concluded between the copyright-management societies in the various Member States. Those are not the circumstances of the present case.

64 Accordingly, the second to fourth grounds of appeal must be rejected.

#### **The fifth ground of appeal**

##### **– Arguments of the parties**

65 The appellant disputes the finding in paragraph 54 of the judgment under appeal that it did not adduce any specific evidence to establish the actual or potential existence of serious impediments to the proper functioning of the common market. According to the appellant, Articles 81 EC and 82 EC do not require the actual existence of an impediment as a potential impediment is sufficient. In that regard it submits, relying on certain evidence most of which has already been adduced in the context of the fourth ground of appeal, that the potential effect on intra-Community trade is clear. Consequently, the Court of First Instance erred in its interpretation of Articles 81 EC and 82 EC.

66 The Commission contends that the appellant is misreading paragraphs 42, 48 to 50, 54 and 55 of the judgment under appeal, as the reference which the Court of First Instance made to the ‘actual or potential’ existence of serious impediments to the proper functioning of the common market must be assessed in the light of the evidence adduced by the appellant.

##### **– Findings of the Court**

67 In its fifth ground of appeal, the appellant criticises the Court of First Instance’s finding, in paragraph 54 of the judgment under appeal, that it did not adduce any specific evidence to establish the actual or potential existence of serious impediments to the proper functioning of the common market, but confined itself to attempting to show that the practices complained of potentially affect intra-Community trade for the purposes of Articles 81 EC and 82 EC.

68 As is apparent from paragraph 48 of the present judgment, even if the practices complained of potentially affect intra-Community trade for the purposes of Articles 81 EC and 82 EC, as the appellant claims, such an effect does not in itself entail the potential existence of serious impediments to the proper functioning of the common market.

69 Consequently, the fifth ground of appeal must be rejected as irrelevant.

70 Having regard to the foregoing, the appeal must be dismissed in its entirety.

#### **Costs**

71 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party’s pleadings. Since the Commission has applied for costs and the appellant has been unsuccessful, it must be ordered to pay the costs.

#### **On those grounds, the Court (Third Chamber) hereby:**

1. Dismisses the appeal.
2. Orders AEPI Elliniki Etaireia pros Prostasian tis Pnevmatikis Idioktiasias AE to pay the costs.

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#### **OPINION OF ADVOCATE GENERAL MENGOZZI**

delivered on 27 November 2008 I(1)

Case C-425/07 P

AEPI

Elliniki Etaireia pros Prostasian tis Pnevmatikis Idioktiasias AE

v

Commission of the European Communities

(Appeal against a judgment of the Court of First Instance – Competition – Rejection by the Commission of a complaint on the ground of lack of Community interest)

#### **Background, procedure and forms of order sought by the parties**

1. On 22 March 2001, AEPI Elliniki Etaireia pros Prostasian tis Pnevmatikis Idioktiasias 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)



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 Commission 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 investigation 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 Instance (5) 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)

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).

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' (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).

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 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)

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 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.

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.

##### **– 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.

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)

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 interest (20) 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.

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 ques-



tion 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 constitutes 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 administration 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 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.

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.

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.

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

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)

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.

#### **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 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 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 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.

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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.

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

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.

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.

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.

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.

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.

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 Chimioterapico 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.

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.

22 – Emphasis added.

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

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.

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.



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.

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

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