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II

(Acts whose publication is not obligatory)

COUNCIL

COUNCIL DECISION

of 22 March 1982

giving a discharge to the Commission in respect of the implementation of the operations of the Development Fund for the overseas countries and territories (First Fund) for the financial year 1980

(82/199/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to the Implementing Convention of the association of the overseas countries and territories with the Community, annexed to that Treaty,

Having regard to Regulation No 5 laying down detailed provisions relating to the collection and transfer of financial contributions, the budgeting and administration of the resources of the Development Fund for the overseas countries and territories ⁽¹⁾, and in particular Article 16 thereof,

Having regard to Provisional Regulation No 6 relating to the responsibility of authorizing and accounting officers for the resources of the Development Fund for the overseas countries and territories ⁽²⁾,

Having regard to the Council Decision of 30 May 1972 on the transfer and utilization of the unexpended balances of the Development Fund for the overseas countries and territories set up by the Implementing

Convention annexed to the Treaty establishing the European Economic Community,

Having regard to the revenue and expenditure account and the balance sheets relating to the operations of the Development Fund for the overseas countries and territories (First Fund) as at 31 December 1980,

Having regard to the report of the Court of Auditors for the financial year 1980 together with the Commission's replies ⁽³⁾,

Recalling that, in accordance with the provisions applicable to the implementation of the Development Fund for the overseas countries and territories (First Fund), only the Council, acting by a qualified majority, shall give a discharge to the Commission in respect of the financial administration of the Fund;

Whereas the closure of the operations of the First Fund resulted in the transfer, pursuant to the abovementioned Council Decision of 30 May 1972, of an amount of 12 216 927.52 European units of account to the European Development Fund (1963) (Second EDF);

Whereas the overall implementation by the Commission of the operations of the First Development Fund during the financial year 1980 was such as to warrant its being

⁽¹⁾ OJ No 33, 31. 12. 1958, p. 681/58.

⁽²⁾ OJ No 33, 31. 12. 1958, p. 686/58.

⁽³⁾ OJ No C 344, 31. 12. 1981, p. 1.

given a discharge in respect of the implementation of these operations,

HAD DECIDED AS FOLLOWS:

Article 1

The Council shall close the revenue and expenditure account of the Development Fund for the overseas countries and territories (First Fund) as at 31 December 1980 as follows:

- revenue: at the sum of 569 033 072.48 European units of account,
- expenditure (payments): at the sum of 569 033 072.48 European units of account.

Article 2

The Council hereby gives a discharge to the Commission in respect of the implementation of the operations of the Development Fund for the overseas countries and territories (First Fund) for the financial year 1980.

Done at Brussels, 22 March 1982.

For the Council

The President

L. TINDEMANS

COUNCIL DECISION

of 22 March 1982

giving a discharge to the Commission in respect of the implementation of the operations of the European Development Fund (1963) (Second EDF) for the financial year 1980

(82/200/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to the Convention of Association between the European Economic Community and the African States and Madagascar associated with the Community ⁽¹⁾, signed at Yaoundé on 20 July 1963,

Having regard to Council Decision 64/349/EEC of 25 February 1964 relating to the association of the overseas countries and territories with the European Economic Community ⁽²⁾,

Having regard to the Internal Agreement on the financing and administration of Community aid ⁽³⁾, signed at Yaoundé on 20 July 1963, and in particular Article 17 thereof,

Having regard to the Financial Regulation of the European Development Fund set up under the Internal Agreement on the financing and administration of Community aid ⁽⁴⁾, and in particular Articles 7 and 8 thereof,

Having regard to the Council Decisions of 30 May 1972 and 30 October 1978 on the transfer and utilization of the unexpended balances of the First and Second EDFs,

Having regard to the revenue and expenditure account and the balance sheet relating to the operations of the European Development Fund (1963) (Second EDF) as at 31 December 1980,

Having regard to the report of the Court of Auditors for the financial year 1980 together with the Commission's replies ⁽⁵⁾,

Recalling that, in accordance with the provisions applicable to the implementation of the European Development Fund (1963) (Second EDF), only the Council, acting by a qualified majority, shall give a discharge to the Commission in respect of the financial administration of the Fund,

Whereas revenue for the financial year 1980 consisted mainly of the contributions of the Member States, amounting to 730 000 000-00 European units of account, and of miscellaneous revenue of the Fund;

Whereas, pursuant to the abovementioned Council Decision of 30 May 1972, an amount of 12 216 927-52 European units of account was transferred as the unexpended balance from the First EDF to the Second EDF;

Whereas, pursuant to the abovementioned Council Decisions of 30 May 1972 and 30 October 1978, an amount of 8 070 282-94 European units of account was transferred as the unexpended balances of the First and Second EDF to the Third EDF;

Whereas an advance of 13 434 340-17 European units of account was paid to the European Development Fund (1975) (Fourth EDF);

Whereas the overall implementation by the Commission of the operations of the European Development Fund (1963) (Second EDF) during the financial year 1980 was such as to warrant its being given a discharge in respect of the implementation of these operations,

HAS DECIDED AS FOLLOWS:

Article 1

The Council shall close the revenue and expenditure accounts of the European Development Fund (1963) (Second EDF) as at 31 December 1980 as follows:

— revenue: at the sum of 734 231 798-62 European units of account,

⁽¹⁾ OJ No 93, 11. 6. 1964, p. 1431/64.

⁽²⁾ OJ No 93, 11. 6. 1964, p. 1472/64.

⁽³⁾ OJ No 93, 11. 6. 1964, p. 1493/64.

⁽⁴⁾ OJ No 93, 11. 6. 1964, p. 1498/64.

⁽⁵⁾ OJ No C 344, 31. 12. 1981, p. 1.

— expenditure (payments): at the sum of Done at Brussels, 22 March 1982.
728 867 741.39 European units of account.

Article 2

The Council hereby gives a discharge to the Commission in respect of the implementation of the operations of the European Development Fund (1963) (Second EDF) for the financial year 1980.

For the Council

The President

L. TINDEMANS

COUNCIL DECISION

of 22 March 1982

giving a discharge to the Commission in respect of the implementation of the operations of the European Development Fund (1969) (Third EDF) for the financial year 1980

(82/201/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to the Convention of Association between the European Economic Community and the African States and Madagascar associated with the Community ⁽¹⁾, signed at Yaoundé on 29 July 1969,

Having regard to Council Decision 70/549/EEC of 29 September 1970 on the association of the overseas countries and territories with the European Economic Community ⁽²⁾,

Having regard to the Internal Agreement on the financing and administration of Community aid ⁽³⁾, signed at Yaoundé on 29 July 1969, and in particular Article 22 thereof,

Having regard to the Financial Regulation of the European Development Fund (1969) set up under the Internal Agreement on the financing and administration of Community aid ⁽⁴⁾, and in particular Articles 7 and 8 thereof,

Having regard to the revenue and expenditure account and the balance sheet relating to the operations of the European Development Fund (1969) (Third EDF) as at 31 December 1980,

Having regard to the Council Decisions of 30 May 1972 and 30 October 1978 on the transfer and utilization of the unexpended balances of the First and Second EDF,

Having regard to the report of the Court of Auditors for the financial year 1980 together with the Commission's replies ⁽⁵⁾,

Recalling that, in accordance with the provisions applicable to the implementation of the European Development Fund (1969) (Third EDF), only the Council, acting by a qualified majority, shall give a discharge to the Commission in respect of the financial administration of the Fund;

Whereas revenue for the financial year 1980 consisted of the contributions of the Member States, amounting

to 905 000 000 European units of account, and of miscellaneous revenue of the Fund;

Whereas an advance of 79 364 041.50 European units of account has been paid to the European Development Fund (1975) (Fourth EDF);

Whereas, pursuant to the abovementioned Council Decisions of 30 May 1972 and 30 October 1978, an amount of 8 070 282.94 European units of account was transferred as the unexpended balances of the First and Second EDFs to the Third EDF;

Whereas the overall implementation by the Commission of the operations of the European Development Fund (1969) (Third EDF) during the financial year 1980 was such as to warrant its being given a discharge in respect of the implementation of those operations,

HAS DECIDED AS FOLLOWS:

Article 1

The Council shall close the revenue and expenditure accounts of the European Development Fund (1969) (Third EDF) as at 31 December 1980 as follows:

- revenue: at the sum of 913 070 282.94 European units of account,
- expenditure (payments): at the sum of 821 098 828.49 European units of account.

Article 2

The Council hereby gives a discharge to the Commission in respect of the implementation of the operations of the European Development Fund (1969) (Third EDF) for the financial year 1980.

Done at Brussels, 22 March 1982.

For the Council
The President
L. TINDEMANS

⁽¹⁾ OJ No L 282, 28. 12. 1970, p. 2.

⁽²⁾ OJ No L 282, 28. 12. 1970, p. 83.

⁽³⁾ OJ No L 282, 28. 12. 1970, p. 47.

⁽⁴⁾ OJ No L 31, 8. 2. 1971, p. 1.

⁽⁵⁾ OJ No C 344, 31. 12. 1981, p. 1.

COUNCIL RECOMMENDATION**of 22 March 1982****concerning the discharge to be given to the Commission in respect of the implementation of the operations of the European Development Fund (1975) (Fourth EDF) for the financial year 1980**

(82/202/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 206b thereof,

Having regard to the ACP-EEC Convention of Lomé ⁽¹⁾, signed on 28 February 1975,Having regard to Council Decision 76/568/EEC of 29 June 1976 on the association of the overseas countries and territories with the European Economic Community ⁽²⁾,Having regard to the Internal Agreement on the financing and administration of Community aid ⁽³⁾, signed on 11 July 1975, and in particular Article 31 (3) thereof,Having regard to the Financial Regulation of 27 July 1976 applicable to the Fourth European Development Fund ⁽⁴⁾, and in particular Articles 64 to 67 thereof,Having examined the revenue and expenditure account and the balance sheet relating to the operations of the European Development Fund (1975) (Fourth EDF) as at 31 December 1980 and the Court of Auditors' report relating to the financial year 1980 accompanied by the Commission's replies ⁽⁵⁾,

Whereas, pursuant to Article 31 of the Internal Agreement, the discharge for the management of the European Development Fund (1975) (Fourth EDF) must be given to the Commission according to the procedure provided for in Article 206 of the Treaty;

Whereas the overall implementation by the Commission of the operations of the European Development Fund (1975) (Fourth EDF) during the financial year 1980 has been satisfactory,

RECOMMENDS

that the European Parliament give the Commission a discharge in respect of the implementation of the operations of the European Development Fund (1975) (Fourth EDF) for the financial year 1980.

Done at Brussels, 22 March 1982.

*For the Council**The President*

L. TINDEMANS

⁽¹⁾ OJ No L 25, 30. 1. 1976, p. 1.⁽²⁾ OJ No L 176, 1. 7. 1976, p. 8.⁽³⁾ OJ No L 25, 30. 1. 1976, p. 168.⁽⁴⁾ OJ No L 229, 20. 8. 1976, p. 9.⁽⁵⁾ OJ No C 344, 31. 12. 1981, p. 1.

COMMISSION

COMMISSION DECISION

of 27 November 1981

relating to a proceeding under Article 85 of the EEC Treaty (IV/30.188 — Moët et Chandon (London) Ltd)

(Only the French text is authentic)

(82/203/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof,

Having regard to Council Regulation No 17 of 6 February 1962 ⁽¹⁾, and in particular Articles 3 and 15 thereof,

Having regard to the application submitted to the Commission on 15 September 1980 by Central Wine Buyers (South Leicester) Ltd pursuant to Article 3 of Regulation No 17,

Having regard to the Commission Decision of 13 April 1981 to initiate proceedings in this case,

Having heard the undertakings and persons concerned in accordance with Article 19 of Regulation No 17 and with Regulation No 99/63/EEC ⁽²⁾,

Having regard to the opinion delivered on 14 October 1981 by the Advisory Committee on Restrictive Practices and Dominant Positions in accordance with Article 10 of Regulation No 17,

WHEREAS:

1. The present proceedings concern the terms of sale applied by Moët et Chandon (London) Ltd to buyers of

champagne. The contain a clause which is tantamount to a ban on exports from the United Kingdom.

I. THE FACTS

2. Moët et Chandon (London) Ltd ('MC'), which is established in the United Kingdom, is a wholly-owned subsidiary of the French company Moët-Hennessy. MC is engaged primarily in importing into the United Kingdom and distributing there French-produced champagne wines, champagne ratafia and champagne pomace brandies under the brand names Moët et Chandon, Ruinart and Mercier. These products are hereinafter referred to as 'champagne'.

3. The Moët-Hennessy group has more than 40 subsidiaries established in France and in the major countries of the world. In addition to selling champagne under the aforementioned brand names, its main activities are the production and distribution of cognac (Hennessy) and cosmetics (Christian Dior perfumes, Roc products). Within the Moët et Hennessy group, the French company Champagne Moët et Chandon, of Epernay, also a wholly-owned subsidiary of Moët-Hennessy, is responsible for all the group's operations involving the production and distribution of champagne. All the members of the 'conseil d'administration' (board of directors) of Champagne Moët et Chandon also sit on the corresponding board of Moët-Hennessy. One of them is also on the board of MC.

Moët-Hennessy's aggregate turnover in 1980 was FF 2 923 600 000, with sales of champagne totalling about FF 1 000 000 000. About 80 % of these sales

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

were within the Community. MC's total turnover in 1980 was £ 15 287 000, of which £ ... ⁽¹⁾ represents champagne sales net of tax and duty. The group's sales of champagne within the Community amounted to FF ... in 1980, with excise duties having a minimal effect on these turnover figures.

The United Kingdom is the group's largest export market for champagne, accounting for about 13 % of world sales. The group's share of the United Kingdom market for champagne is about 40 %.

4. From at least 1 January 1980 until 21 October 1981, MC's sales of its brands of champagne have been subject to the terms of sale reproduced below and contained in its price lists ('post-budget price list').

'Terms of sale:

The prices quoted in this list are valid only for goods intended for consumption within the United Kingdom or for sale through diplomatic channels, on airlines or as ships' stores. All orders for goods intended for consumption outside the United Kingdom will be handled and invoiced by our Principals in France.'

This is the sole clause appearing in the price lists in question under the heading 'terms of sale'. The expression 'our Principals' is a reference to Champagne Moët et Chandon, Epernay, France.

Moët-Hennessy informed the Commission in a letter dated 23 October 1981 that these terms of sale had been withdrawn and that a circular letter to this effect had been sent by MC to all its clients on 21 October 1981.

5. These terms of sale are the subject of a complaint lodged with the Commission on 15 September 1980 pursuant to Article 3 of Regulation No 17 by Central Wine Buyers (South Leicester) Ltd ('C.W.B.').

C.W.B. is a wine and spirit wholesaler established in the United Kingdom which, in 1980, bought 3 700 cases of champagne on the aforementioned terms of sale. MC claims that some of the cases bought by C.W.B. were subsequently exported. For this reason, C.W.B. was required in August 1980 to give a formal assurance that 738 cases ordered at that time would be sold only on the domestic market and not exported. C.W.B. was thus prevented from selling elsewhere in the Community MC champagne intended for resale.

6. In 1971, following intervention by the Commission, Champagne Moët et Chandon, France, discontinued a ban on purchasers of its champagne which prevented them from exporting the champagne without its prior approval. It had given as justification for the ban the fact that the individual Member States were normally supplied with different types of champagne to suit different consumer tastes. The Commission had then pointed out by letter dated 30 April 1971 that, bearing in mind its experience, Moët et Chandon could always advise its customers to contact it for information on consumer preferences whenever they wished to satisfy orders from abroad.

Submissions by the parties

7. In reply to the statement of objections addressed to it, Moët-Hennessy has adduced the following arguments: the terms of sale at issue are to be seen in the more general context of the sales policy currently being pursued by its subsidiary Champagne Moët et Chandon, France, which is responsible for the group's champagne business; in view of the tight supply conditions that have been a feature of the champagne market for a number of years and in order to satisfy its customers' requirements as best it can, Champagne Moët et Chandon decided to introduce fixed quotas for supplies to each country; faced with this situation, MC then imposed the terms of sale at issue in order to reserve its limited supplies for the UK market, on which it is responsible for marketing products as smoothly as possible. Moët-Hennessy claims that the terms of sale were designed to prevent speculative buying by powerful UK buyers who might be in a position to engage in large purchases with a view to making exports which would have disrupted the market, run counter to the policy introduced by Champagne Moët et Chandon for coping with the tight supply conditions and for sharing out supplies and forced up prices. However, the representatives of Moët-Hennessy state that it was very difficult for them to assess the scale of such speculative buying. The case in point did not, in their submission, involve a routine attempt at re-establishing market compartmentalization within the common market, but measures to minimize the disruptive effects of the structural shortage on the champagne market.

⁽¹⁾ In the published version of the Decision, some figures have hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

8. Moët-Hennessy also submitted that the terms of sale at issue did not prohibit exports but were designed simply as a means of notifying buyers that the products supplied were, in principle, intended to meet UK demand. According to Moët-Hennessy, the incident which prompted the complaint by C.W.B. is the result of possibly unduly stringent application of the terms of sale by anxious management faced with what it saw as a deflection of the quantities intended for its market and as a setback to the quota arrangements introduced to cope with the shortage.

II. LEGAL ASSESSMENT

Applicability of Article 85 (1) of the EEC Treaty

9. Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

10. The terms of sale laid down in MC's price lists form part of the contracts for the sale of MC champagne concluded at least from 1 January 1980 to 21 October 1981 between MC and buyers wishing to resell. These contracts are agreements between undertakings within the meaning of Article 85 (1).

11. As stated in the terms of sale, the list prices apply only to goods intended for consumption in the United Kingdom, orders for export being handled by Champagne Moët et Chandon in France. This clause is tantamount to a ban on the export of all champagne sold by MC on the said terms. Customers of MC can only take it to mean that goods bought subject to those terms may be resold only for consumption in the United Kingdom; the fact that export orders have to be addressed to the parent company in France does not nullify but rather confirms the existence of the export ban at issue. Indeed, it was compliance with an export ban that MC was seeking to achieve by requiring the complainant to undertake not to sell outside the United Kingdom MC champagne bought on those terms.

12. The object and effect of this clause is to restrict competition within the common market. The clause is intended to prevent, and has prevented, MC's customers in the United Kingdom and persons subsequently buying champagne from them from reselling MC champagne in other Community countries and hence from competing with resellers in those countries. As the parties have explained at length, it is with a view to ensuring that the limited quantities supplied to it remain in the United Kingdom that MC has introduced and imposes the terms of sale in question. The reasons adduced by the parties, viz. the group's sales policy and the measures for sharing out supplies between Member States, serve merely to bring into sharper focus the restrictive object and effect of the export ban at issue which was intended to make them effective. The alleged shortage and the measures taken to deal with it cannot justify so as to exclude the application of Article 85 (1) the fact that UK buyers wishing to resell are deprived of the possibility of reselling in the Community countries of their choice products released on to the UK market by MC.

13. The export ban at issue is, by its very nature, liable to affect trade between Member States since it impedes the movement of MC champagne between the United Kingdom and other Community countries. It engenders an artificial partitioning of the common market and hinders the establishment of a single market among the Member States.

14. In view of the volume of sales of MC champagne in the United Kingdom, the clause in question restricts competition and is likely to have an appreciable effect on trade between Member States (see point 3 above).

Applicability of Article 85 (3) of the EEC Treaty

15. As provided in Articles 4 and 5 of Regulation No 17, an agreement must, in order to qualify for exemption under Article 85 (3), have been notified unless it falls into one of the categories of agreement described in Article 4 (2) and (3). The terms of sale at issue, which are set out in MC's price lists, were not exempt from notification pursuant to Article 4 (2) (1), since they relate to exports between Member States, or pursuant to Article 4 (2) (2), since they do not relate solely to prices or conditions of business or to industrial property rights. This type of agreement is not covered by Article 4 (3).

The terms of sale were not notified in accordance with the provisions of Council Regulation No 17 or Commission Regulation No 27 ⁽¹⁾. They do not therefore qualify for exemption under Article 85 (3). The Commission takes the view that, even if the terms of sale had been notified, they would not have qualified for exemption. The advantages which the parties allege would accrue from the ban in question given the allegedly tight supply conditions (see point 7 above) are not seen to offset the serious drawbacks it has for the free movement of goods and for competition or to require the application of such an import ban.

Applicability of Article 3 (1) of Regulation No 17

16. Under Article 3 (1) of Regulation No 17, the Commission may require that any infringement found be brought to an end.

17. The 'terms of sale' contained in MC's price lists at least from 1 January 1980 to 21 October 1981 constitute an infringement of Article 85 (1) and cannot be exempted.

18. The Commission considers that Moët-Hennessy must be required to refrain from applying, itself or through its subsidiaries, any export ban such as that contained in the terms of sale in question and intended to hinder exports from the United Kingdom to other Member States.

Applicability of Article 15 (2) of Regulation No 17

19. Under Article 15 (2) of Regulation No 17, the Commission may impose fines on undertakings where, intentionally or negligently, they commit an infringement of Article 85 (1) of the Treaty. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

20. In fixing the amount of the fine, the Commission has taken account of the following facts:

- (a) The infringement was committed intentionally. MC, Champagne Moët et Chandon and Moët-Hennessy

must have known that export bans such as the one in question constitute a serious infringement of the competition rules laid down in the EEC Treaty. The Court and the Commission have frequently stated their positions on this type of restriction ⁽²⁾. What is more, the Commission has already had occasion so to inform Champagne Moët et Chandon, France, direct when, following the Commission's intervention, that undertaking terminated in 1971 an export ban it had imposed on buyers of its champagne. Champagne Moët et Chandon, as the parent company, must have been and in fact was aware of the substance of the terms of sale at issue since they made it responsible for handling export orders; it is also clear that in 1971 the Commission, when it pointed out that it was always possible to advise buyers wishing to export (see point 6), did not authorize the imposition of an export ban such as that in question.

- (b) The export ban at issue was introduced on 1 January 1980. It was withdrawn on or about 21 October 1981 (point 4). The infringement appears to have lasted a little less than two years.

- (c) In assessing the gravity of the infringement, the following points must be considered.

- (i) The imposition of an export ban constitutes a serious infringement of the provisions of the Treaty. In this case, the infringement is aggravated because the ban was introduced without being notified, although the Commission's and the Court of Justice's positions on this kind of clause had been clearly established ⁽²⁾.

- (ii) The export ban in question prevented the complainant and other United Kingdom buyers in the same position from selling products intended for other common market countries (points 5 and 7).

- (iii) The clause was introduced with the specific intention of preventing exports from the United Kingdom, so as not to counter the policy of quantitative sharing between Member States set up by Champagne Moët et Chandon (point 7).

⁽¹⁾ OJ No 35, 10. 5. 1962, p. 1118/62.

⁽²⁾ See in particular Judgment of the Court of Justice in Joined Cases 56 and 58/64: Grundig/Consten [1966] ECR 299; Judgment in Case 19/77: Miller International Schallplatten GmbH [1978] ECR 131; Commission Decision of 20 December 1978, OJ No L 50, 22. 2. 1978, p. 16 and Judgment of 10 July 1980 in Case 30/78 (The Distillers Company Ltd) [1980] ECR 2229.

- (iv) MC is part of the Moët-Hennessy group, which is a very important business concern, particularly by virtue of its sales of champagne in the EEC. It also has a very substantial share of the United Kingdom market (see point 3).

21. For the above reasons, the Commission considers it necessary to impose a fine corresponding to the sum indicated in Article 3 of this Decision; Moët-Hennessy, to which this Decision is addressed and which is responsible for the activities of its subsidiaries, will be required to pay that fine within three months of notification of this Decision,

HAS ADOPTED THIS DECISION:

Article 1

The 'terms of sale' contained in the price lists applied by Moët et Chandon (London) Ltd, a subsidiary of Moët-Hennessy, and which form part of the contracts concluded at least from 1 January 1980 to 21 October 1981 by Moët et Chandon (London) Ltd with buyers of its champagne constitute an infringement of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

Moët-Hennessy shall refrain from applying, itself or through its subsidiaries, an export ban such as that contained in the said terms of sale and intended to hinder exports from the United Kingdom to other Member States.

Article 3

A fine of 1 100 000 (one million, one hundred thousand) ECU, or £ 624 977.10 (six hundred and twenty-four thousand, nine hundred and seventy-seven pounds sterling and ten pence) or FF 6 801 872 (six million, eight hundred and one thousand, eight hundred and seventy-two French francs) is hereby imposed on Moët-Hennessy. The fine shall be payable to account No 108.63.41 at Lloyds Bank, London, or to account No 5.770.006.5 at La Société Générale, Paris, within three months of the date of notification of this Decision.

Article 4

This Decision is enforceable in the manner provided for in Article 192 of the Treaty establishing the European Economic Community.

Article 5

This Decision is addressed to Moët-Hennessy SA, 30 Avenue Hoche, 75008 Paris, France, in respect of itself and of its subsidiaries.

Done at Brussels, 27 November 1981.

For the Commission

Frans ANDRIESEN

Member of the Commission

COMMISSION DECISION
of 4 December 1981
relating to a proceeding under Article 86 of the EEC Treaty
(IV/29.971 — GEMA statutes)
(Only the German text is authentic)
(82/204/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 86 thereof,

Having regard to Council Regulation No 17 of 6 February 1962 ⁽¹⁾, and in particular Article 2 thereof,

Having regard to the application made on 9 November 1979 by Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA), Berlin, for negative clearance of an amendment to its statutes as at September 1980,

Having regard to the publication of a summary of the notification pursuant to Article 19 (3) of Regulation No 17 in *Official Journal of the European Communities* No C 46 of 5 March 1981,

Having regard to the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions delivered on 10 November 1981 in accordance with Article 10 of Regulation No 17,

WHEREAS:

THE FACTS

I. GEMA's activities

1. Object and membership

- (1) The Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (hereinafter referred to as 'GEMA'), which has its main establishment in Berlin, is an economic association constituted under German law for the purpose of protecting authors and administering their rights. GEMA administers as trustee with a view to exploitation the copyrights in musical

and cinematographic works assigned to it by its members or third parties (hereinafter referred to as 'beneficiaries'). The rights are assigned by means of a special contract (the contract of assignment) which details their scope and the nature of the administration. The assignment is limited to between three and six years and to certain types of exploitation such as the right to reproduce a particular work, to put it into circulation and to communicate it to the public.

- (2) The right of protection and administration assigned to GEMA is exclusive. During the currency of the contract GEMA is entitled to authorize, in its own name, performances, radio and television broadcasts or other exploitation of a work, to supervise the actual exploitation, to collect the royalties agreed with the users, to prohibit exploitation and to avail itself of the rights in its own name in any other way.
- (3) Only composers, librettists and music publishers can be beneficiaries within the meaning of the contract of assignment.
- (4) Music publishers are in a special position with respect to librettists and composers, since they are not authors, i.e. creators of musical works; however, on the basis of the exploitation rights assigned them by the authors, they reproduce and put musical works into circulation. As regards the works therefore the publishers fulfil the role of intermediary, yet their interests may run counter to those of the authors (composers, librettists). In practice this conflict of interests is often detrimental to the authors, who are in a weaker economic position.
- (5) The repertoire administered by GEMA consists not only of works by the beneficiaries. GEMA also administers in the Federal Republic of Germany the repertoire of foreign collecting societies' members. It can therefore offer a virtually worldwide musical repertoire within the Federal Republic.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

2. Administration of rights with respect to users

- (6) In order to administer the rights assigned it, GEMA concludes exploitation contracts with the users (mainly radio and television companies, sound recording manufacturers, theatres, orchestras, discotheques, etc.), thereby authorizing a specifically agreed form of exploitation of the work (broadcasting, performance, reproduction by visual or sound recording, etc.) in return for payment of royalty charges by the user, made either on an individual or flat-rate basis.
- (7) Under Article 11 of the German Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten (Act on the protection of copyright and related rights) (hereinafter referred to as 'Wahrnehmungsgesetz'), GEMA is obliged to grant exploitation rights to any person so requiring. In its relations with the users, GEMA is not allowed, without objective reasons, to depart from these charges. Only in connection with collective contracts with groups of users, such as associations of discotheques, may GEMA agree reductions in the charges.
- (8) The royalties the users have to pay are based on various calculation methods, depending on the type of exploitation.
- (9) In the case of performing or broadcasting rights, i.e. the right to have a work of music heard in public by means of personal performance or to communicate it to the public by means of technical equipment such as screens, loudspeakers, etc. (performing rights), or the right to make a work of music accessible to the public on the air, for example by means of radio and television (broadcasting rights), royalties are paid on a flat-rate basis. The type of music (e.g. serious, light or dance) or which actual protected works are being performed or broadcast has no bearing on the amount to be paid in royalties. The type (performance, radio and television broadcast, etc.) and duration of use are the only decisive factors.
- (10) In the case of rights to mechanical reproduction, i.e. the right to make a sound recording of a piece of music and to manufacture any number of these recordings, the royalties charged are in principle calculated in accordance with the number of copies manufactured and sold. The manufacturer therefore pays no royalty to GEMA for unsold recordings (records, tapes, etc.).

3. Distribution to beneficiaries of royalties collected

- (11) After deducting its costs and any other charges, GEMA distributes royalty payments to the beneficiaries annually. As regards performing and broadcasting rights, the bases used for calculating sums to be paid by GEMA to authors and publishers are the type of music (serious, light or dance), the number of performances (frequency of performance) and the duration of the broadcasts of individual works. The more frequent the performances or the longer the broadcast, the greater the sum paid to the beneficiary. For this purpose GEMA determines as accurately as it can how many times and for how long each beneficiary's individual works have been performed and played.
- (12) Calculation of the sum to be distributed to individual authors or publishers for mechanical reproduction rights is calculated on the basis of sales proceeds.
- (13) GEMA takes the view that frequency of performance, playing time and sales proceeds provide fair yardsticks for the distribution of royalty payments collected. That way in the long run the royalties due depend on the favour the public bestows on a particular work.
- (14) GEMA calculates the share of royalties on works by members of foreign collecting societies in the same way as it does for its own members and transfers the relevant amount to the foreign society for payment to its members. For its part, GEMA receives royalty payments from foreign societies for the use of GEMA members' works in accordance with the calculation method employed by the foreign society.

4. Internal organization of GEMA

- (15) The main features of GEMA's internal organization and the procedure to be followed in calculating and distributing the royalty payments collected (GEMA's revenue) are laid down in its statutes and distribution scheme.
- (16) The statutes lay down GEMA's name, place of establishment, object, the nature of the protection provided, the rights and obligations of the society's management bodies (members' meeting, supervisory board, management board) and the establishment of an arbitration tribunal for disputes between GEMA and its members.

- (17) This arbitration tribunal has jurisdiction in particular in disputes over interpretation of the statutes and distribution scheme and on the legal validity of GEMA's decisions or other measures, above all by the management board. The tribunal is made up of a chairman and four arbitrators, two appointed by each party. These arbitrators may be neither members of the GEMA management board nor members of the GEMA supervisory board nor in a relationship of economic dependence on GEMA. The plaintiff may bring an action before the ordinary courts, instead of the arbitration tribunal.
- (18) GEMA's revenue is distributed in accordance with the distribution scheme outlined at 11 to 14 above; its general principles form part of the statutes.

II. Legal supervision of GEMA

- (19) In the Federal Republic GEMA is the only collecting society which administers copyright in music. In this capacity its activities are monitored by the German Patent Office, which may by agreement with the Federal Cartel Office, in the event of infringement by GEMA of its obligations, withdraw its authority to carry on business. By virtue of its Article 102 (a), the provisions of the German Gesetz gegen Wettbewerbsbeschränkungen (GWB) (Restrictive Trade Practices Act), provisions concerning restrictive agreements or decisions, do not apply to collecting societies, and hence to GEMA, where such agreements and decisions — as in this case — have been notified to the Patent Office. Where a collecting society abuses its position in the market the Federal Cartel Office can take action; it could therefore prohibit measures by GEMA or declare agreements and decisions null and void (supervision of abuse).

III. Amendment of the statute

1. Wording of the additional provision

- (20) GEMA has applied for negative clearance or, failing that, exemption of an additional provision in its statutes, worded as follows:

'Article 3

1. The rights to be administered by the association are assigned to it by conclusion of a special agreement (contract of assignment),

which defines the scope of the rights to be administered.

The contract of assignment must stipulate:

- (a) ... (d)
- (e) that the beneficiary shall refrain from making grants either directly or indirectly of a share of his revenue to parties who have entered into collective agreements with GEMA or with other collecting societies, where said parties, when using the GEMA repertoire, would favour unjustifiably certain works of the beneficiary.

2. ...'

2. Reasons for the additional provision

The main grounds for the amendment to its statutes which GEMA put forward are outlined below.

(a) Initial position

- (21) All collecting societies which distribute the funds they receive on the basis of sales proceeds, frequency of performance and playing time are faced with the problem of finding an effective way of preventing their members from manipulating sales figures, frequency of performance and playing time to the detriment of other members. There have always been authors and publishers who attempt to increase their share of royalties by influencing users and hence disregarding public taste, which in the long run should be the only decisive yardstick for exploitation of a given work.
- (22) It is very difficult to exert this kind of direct influence in the case of mechanical reproduction, for public partiality is reflected in sales figures and the beneficiary receives his share of royalties on the basis of sales proceeds. However, it is very easy to manipulate frequency of performance and playing time, particularly in radio and television broadcasts, but also in the case of direct personal performances. On these occasions public taste has no direct effect on the frequency and duration of the exploitation. A radio or television broadcaster could play certain pieces of music more often and for longer than usual and the public would not and could not do anything about it. Moreover, where frequency of performance and playing time are influenced in such a way, the beneficiary receives a greater share of the amount distributed, to the detriment of other members of GEMA and of other societies, than would be the case if manipulation did not occur.

If this manipulation stems from contacts with a user, for instance a broadcasting company, the broadcasting company itself can virtually determine how much it pays to GEMA. The more frequently it plays the work given preferential treatment, the greater the amount of royalties to be paid by GEMA to its member for the said work and the greater the amount returned to the broadcasting company of the lump sum paid in royalties to GEMA. This is tantamount to the broadcasting company liable for royalties under copyright law 'helping itself' from the funds collected by GEMA.

This practice of 'helping oneself' is detrimental to members of GEMA and of other collecting societies who have not taken up such contacts and whose works are therefore not favoured in this way.

- (23) At the same time collecting societies have to tackle an additional problem: 'commercialization of exploitation potential'.

From the numerous works offered by the collecting societies economically powerful users will select certain works which, in their view, have economic potential. However, they will make the use of such works, i.e. the manufacture of copies (e.g. record manufacturer) or the broadcast of the works by radio or television dependent on payment of compensation by the copyright holder (beneficiary) to the user. In practice the GEMA members' willingness to enter into such an agreement always depends on the user's economic superiority or on the readiness of his access to a form of exploitation which is particularly important to GEMA members (e.g. certain manufacturing processes or broadcasting installations).

(b) Object of the amendment

- (24) The amendment should put a stop to users' preferential exploitation of certain pieces of music, where this preferential treatment depends solely on the direct or indirect share by the users in the amount of royalties paid to the GEMA member or beneficiary.
- (25) The new provision in the statutes should also prevent the users from commercializing exploitation potential; to make the copyright-holder pay a royalty to the user and

not vice versa is to pervert protection of copyright.

- (26) The granting of a share of revenue, which is prohibited by the new provision, enables users to manipulate beneficiaries, which is precisely what happens. By preferential treatment and by associating exploitation and a share in revenue, the user evades the uniform changes established by GEMA and in the long run pays substantially less in copyright royalties than he would otherwise.
- (27) Furthermore, where works are used by broadcasting companies whose broadcasting time is necessarily limited, a preferential selection of certain works limits the access of members of GEMA and of other societies to this potential exploitation, for part of the broadcasting time is already taken up by these favoured works. In so far as the broadcasting company's selection is based on its endeavours to reduce its royalty payments to GEMA instead of objective criteria (such as quality of the work, public taste, etc.), the amendment to the statutes should serve to prevent such occurrences.
- (28) Preferential treatment is therefore only 'unjustified' if the user directly or indirectly, i.e. via an intermediary (e.g. a subsidiary) shares in the GEMA member's royalties for the work used and this share is granted for an action performed by the user for which he is liable to pay royalties directly to GEMA. This connection between use of a work subject to royalty payments and a sharing in the revenue from royalties is the essential feature of 'unjustified preferential treatment'. In addition, the granting of a share of the GEMA member's revenue to parties to collective agreements and the preferential treatment must be linked by a specific objective. A user's share in the beneficiary's revenue pursuant to company law or any other provision and preferential exploitation *per se* fall beyond the scope of the new provision.

The additional provision is to be applied to all parties to collective agreements in the same way without discrimination. It is not directed against specific users (e.g. radio companies) or against a specific undertaking.

IV. Objections from third parties

- (29) Following publication of the notice concerning the GEMA statutes, two undertakings submitted their observations pursuant to Article 19 (3) of Regulation No 17.

The main arguments submitted jointly by the undertakings are outlined below.

- (30) The additional provision limits the beneficiaries' freedom to exploit musical works. The beneficiaries are interested in their works being promoted by music-publishing houses associated with broadcasting companies. The joint publishing agreements are the expression of a decision freely taken by the beneficiaries in the face of competition from other potential forms of exploitation.
- (31) The new provision hampers the user in his economic activities, since it restricts the commercial broadcasting companies' potential publicity, upon which, as private-sector undertakings, they depend. Nowadays publicity for music mainly takes the form of broadcasting by radio and television. This broadcasting serves another purpose, in that it could be decisive for up-and-coming artists.
- (32) While this type of programme exploits works on which royalties are due, it also provides publicity for which the broadcaster is entitled to a fee. In joint publishing agreements this fee is provided by a share in the success of the work. Success is also reflected in GEMA's distribution of royalty revenue to the beneficiaries.
- (33) Although GEMA charges for all music users are uniform, GEMA should not prevent its individual members, who are competing with other members (particularly publishers), from promoting exploitation of their works by means of discounts, contributions towards expenses, etc.

LEGAL ASSESSMENT

- (34) Under Article 2 of Regulation No 17, upon application by the undertakings or the associations of undertakings concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article 85 (1) or Article 86 of the Treaty for

action on its part in respect of an agreement, decision or practice.

A. Applicability of Article 86

- (35) Article 86 of the EEC Treaty prohibits as incompatible with the common market any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it in so far as it may affect trade between Member States.

Under Article 86 (a) of the Treaty such abuse would be presumed in particular if GEMA, which is an undertaking occupying a dominant market position, by means of the amendment to its statutes, were to impose, directly or indirectly, unfair trading conditions on its members or third parties.

1. *Case law of the Court of Justice on statutes of collecting societies*

- (36) In its judgment of 27 March 1974 in Case 127/73 (BRT II ECR 1974 316), with reference to an appraisal of 'unfairness' in collecting societies' statutes, the Court of Justice of the European Communities ruled that it is necessary to investigate whether the collecting society, through its statutes, takes account of all the relevant interests in such a way that a balance is ensured between maximum freedom for librettists, composers and publishers to dispose of their works (hereinafter referred to as 'freedom to dispose') and effective management of their rights by the collecting society (hereinafter referred to as 'operational interest').

In this case the Court also stated that in determining whether in these circumstances statutes constitute abuse within the meaning of Article 86 account must also be taken of the fact that a collecting society is an association whose object is to protect the rights and interests of individual members against in particular major exploiters and distributors of musical material, such as radio broadcasting bodies and record manufacturers.

For these reasons, in its BRT II judgment, the Court recognized that a collecting society must enjoy a position of influence and operate on the scale required to protect effectively copyright holder's rights and interests. It may also be

inferred from the BRT II case that, in an examination of a collecting society's statutes in the light of the Treaty competition rules, the decisive factor is whether they exceed the limits absolutely necessary for effective protection (indispensability test) and whether they limit the individual copyright holder's freedom to dispose of his work no more than need be (equity).

2. *Reconciling GEMA's operational interest and the collecting society's freedom to dispose*

(a) Operational interest

- (37) On account of the conflict of interests between the copyright holders (beneficiaries) and the users, the former, who are in a weaker economic position, have to form collecting societies. This was pointed out by Mr Advocate-General Mayras in his opinion of 12 February 1974 on the BRT II case (ECR (1974) 324): 'some exploiters of musical material (record manufacturers, public authorities and private companies concerned with radio and television broadcasting) occupy such a strong position on the market that it enables them completely to control authors and composers by requiring the assignment of some of their works, especially those who are very successful and whose exploitation is particularly profitable'.

He went on to refer to 'the danger in this situation' against which a collecting society ensures 'the necessary protection'.

In its Decision of 22 June 1971 relating to GEMA (OJ No L 134, 20. 6. 1971), the Commission also recognized the need for joint copyright protection by collecting societies to counterbalance the users' market strength. Collecting society membership is above all necessary in relation to communication to the public and broadcasting rights, where copyright holders are up against powerful users of music and the demand side, i.e. the listener, can exert only a very limited influence on these users. Only through the collecting societies therefore can the copyright holders obtain the fair compensation due for their intellectual labour.

- (38) The basis for any effective activity on the part of GEMA is the collective administration of

copyright for the purpose of joint exploitation with respect to users. It is indispensable that GEMA have joint, uniform control of the rights assigned it. This collective, uniform approach to the administration of rights is of particular importance in connection with the exploitation charges which are laid down by GEMA but supervised by the State. GEMA has to ensure that these charges are applied uniformly and evaded neither by the beneficiaries nor by the users. This joint implementation of exploitation terms is of particular importance to GEMA, since its membership also includes users of music in the guise of publishers, whose interests often coincide with those of manufacturers and broadcasting companies, but not with those of authors. On account of their dual role as 'beneficiaries' and 'initial users' of music, publishers are rather inclined to undermine GEMA's joint approach to third parties.

- (39) It is therefore particularly important to GEMA that it should not be influenced in its activities by parties representing the users' interests or persons economically dependent on them. This principle of independence with respect to other parties is particularly significant in relation to the determination of exploitation charges.

In its Decision of 2 June 1971 relating to GEMA (OJ No L 134, 20. 6. 1971), the Commission pointed to the conflict of interests between users of musical works and authors and stated that sanctions imposed by the society to prevent tying arrangements (between GEMA members and users of music) was an appropriate means of eliminating the dangers of vertical integration, as for example in the case where a record manufacturer subjects the use of certain works to the condition that these works be published by the publishing house he controls.

(b) Freedom to dispose

- (40) In these circumstances the beneficiaries' interest in an independent legal position with respect to users as regards compensation for exploitation has to take second place.

- (41) The beneficiaries have assigned their copyright and royalty claims to a large extent to GEMA for the purpose of joint uniform exploitation on a

trust basis. This forgoing of an individual contractual relationship with the users should in fact restore the balance between beneficiaries and users, thereby fulfilling the objective need to preclude, as far as possible, agreements between beneficiaries on an individual basis, which could affect GEMA's charges.

- (42) On this account any contractual share on the part of a user in a GEMA member's revenue from royalties can create problems for GEMA if it is also connected with the royalty due on the work played by this user. The granting of such a share invalidates and reduces, to the benefit of the user, the charges set by GEMA. The user does pay GEMA the full amount due, but on account of his share in the author's revenue a substantial proportion of this amount is automatically paid back to him. This inevitably depresses GEMA's charges and impairs the consistency of GEMA's approach to third parties. Moreover, this share in revenue provides an incentive for all kinds of manipulation as described at 22 above.

- (43) However, whether GEMA could prevent any grant at all to users of a share in the beneficiaries' revenue without infringing the rules of competition in the Treaty can remain an open question. The new provision prohibits only the grant of such a share where the object is to favour works unjustifiably. Where this object is lacking, the provision is not applicable. Despite GEMA's acknowledged interest in the uniform determination of charges the new provision would therefore constitute abuse within the meaning of Article 86, if, in its current form, it was 'not indispensable' or 'excessive', i.e. inequitable.

3. *Indispensability and equity*

- (44) Scrutiny of the practices that GEMA is endeavouring to prevent is crucial to the question of whether the new provision exceeds the bounds of what is indispensable to effective administration of copyright or is excessive. It is therefore necessary to explain the concept of 'favour unjustifiably' to which the new provision refers.
- (45) GEMA would exceed the bounds of necessity if it wanted to induce the users to withhold all preferential treatment of its individual members' works or to treat them all the same. This would

be completely inconsistent with the users' need to select only certain music works out of the numerous works offered them. Similarly GEMA is not entitled to prevent the beneficiaries from paying the users for publicity, distinguished as such, to promote the sale of copies of certain works (paid advertising).

According to GEMA's concept of 'favour unjustifiably' such treatment only occurs where a user influences the frequency of performance or the length of playing time in order to reduce the amount of royalties he actually pays to GEMA (manipulation) or where he makes exploitation of the work subject to reception of a share in the beneficiary's royalties on the work (commercialization of exploitation potential).

(a) *Manipulation*

- (46) On account of the copyright holder's joining GEMA and the resulting assignment of rights on a trustee basis, in law the beneficiary no longer has the opportunity of authorizing exploitation of his work at a higher or lower fee than the rate agreed by GEMA with the users. It is therefore impossible in law for the individual beneficiary to exert direct influence on the compensation paid for the use of his work. Under the *Wahrnehmungsgesetz*, as a collecting society, GEMA is even obliged to ensure that similar cases are dealt with in the same way, that all users pay the same amount of royalties for playing similar works of music and that all beneficiaries receive a share of royalty revenues proportionate to the exploitation of their works.

- (47) The new provision precludes manipulation of broadcasting time and frequency of performance. In particular, it places restrictions, under the conditions at 28 above, on the grant of a share of royalties which GEMA distributes to the beneficiaries. This makes it impossible for the user to end up paying less for exploiting the GEMA repertoire than agreed with GEMA. The additional provision therefore prevents evasion of the user contract concluded in the interests of all GEMA members. Any such evasion is particularly detrimental to the beneficiaries who have not agreed with the users on any unjustifiable preferential treatment of their works. Since the revenue from the flat-rate

royalties paid by the users is distributed to the beneficiaries on the basis of broadcasting time and frequency of performance in accordance with the distribution scheme, unjustified preferential treatment of individual works causes an appreciable loss in earnings for the other beneficiaries. The new provision, which prevents this consequence, therefore does not exceed the bounds of what is indispensable to the protection of all beneficiaries' interests.

(b) Commercialization of exploitation potential

(48) A principle common to copyright law in all Member States is that the user has to pay a royalty to the copyright holder for exploitation of his work; the royalty payment represents the author's 'salary' for his intellectual creative labour.

(49) However, in commercializing exploitation potential the user makes the copyright holder pay for exploitation liable for royalty.

(50) Whether such a perversion of the payment rationale under copyright law in the case of an arrangement based on an individual contract between a user and a copyright holder who has not assigned his rights to a collecting society is admissible can remain an open question in this context. At any rate, it cannot be regarded as inequitable for a collecting society to prevent such perversion of copyright law on behalf of its members who no longer have any opportunity in law of influencing the amount of royalty payments. The additional provision therefore merely safeguards the spirit of copyright law.

(51) Moreover, no objection can be raised that the new provision impedes (lawful) paid advertising of a work. So long as publicity is recognized as such and is paid for by the beneficiary, publicity by means of exploitation is not caught by the new provision. It covers only those cases where a user exploits a work and makes the beneficiary grant him a share of his royalties for doing so, although it is not generally apparent that such exploitation is in fact advertising.

(c) Prohibition of abuse

(52) The new provision does not infringe the prohibition of abuse.

By the new provision GEMA restricts itself to prohibiting the beneficiaries from granting shares of royalty revenue to users, only where the purpose is to favour certain works of said beneficiaries. In such cases the granting of the share and the preferential treatment must be directly linked by a specific objective.

The mere fact of participation pursuant to company law or the existence of joint publishing agreements between beneficiaries and parties to collective agreements are not in themselves caught by the new provision. GEMA only wishes to prevent those contacts whereby the users seek, by exploiting certain works frequently and taking no account of public taste and qualitative criteria, to share in the royalties collected by GEMA, helping themselves, as it were, without any restrictions. In this way GEMA protects its membership as a whole.

(53) The new provision provides a means, which is not excessive but is effective, of preventing the practices described above. There is therefore no abuse of a dominant position within the meaning of Article 86.

B. Applicability of Article 85 (1)

(54) The question whether the agreement concerning the statutes is caught by the prohibition in Article 85 (1) of the EEC Treaty and could, if appropriate, be exempted under Article 85 (3), is not decided here. So far as individual cases are concerned, the additional provision to the statutes has no object or effect beyond the normal activities and purposes of a copyright collecting society. The agreement concerning the statutes merely ensures the proper enforcement of copyright by GEMA, in that it prevents indirect influence on the use of their works by particular beneficiaries. This proceeding is not concerned with judging the amendments to the statutes globally with the other agreements concerning the statutes and internal rules of GEMA.

C. Supervision of GEMA's conduct

(55) All beneficiaries may appeal to an arbitration tribunal or the ordinary civil courts in respect of application or interpretation of the new provisions. The German Patent Office monitors

GEMA's activities and the Federal Cartel Office is responsible for supervision of abuse. Moreover, any misapplication of the new provision would also lead to proceedings before the Commission under the Treaty competition rules. It therefore seems sufficiently certain that the new provision, which in view of its wording and GEMA's own interpretation is not caught by Articles 85 and 86 of the EEC Treaty, will be lawfully applied without discrimination,

Community in respect of Article 3 (e) of the statutes of the Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte of September 1980.

Article 2

This Decision is addressed to Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA), D-1000 Berlin 30, Bayreuther Straße 37—38.

HAS ADOPTED THIS DECISION:

Done at Brussels, 4 December 1981.

Article 1

On the basis of the facts in its possession, the Commission has no grounds for action under Article 86 of the Treaty establishing the European Economic

For the Commission

Frans ANDRIESEN

Member of the Commission
