II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 29 October 1981

relating to a proceeding under Article 86 of the EEC Treaty
(IV/29.839 — GVL)

(Only the German text is authentic)

(81/1030/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 3 thereof,

Having regard to the applications made to the Commission pursuant to Article 3 of Regulation No 17 by Interpar on 9 April 1979 and by the performing artists Avory, Bennett, R. Davies, D. Davies, Marvin, Webb, Welch, Scarano and Skorsky on 12 September 1980 in respect of the conduct of the Gesellschaft zur Verwertung von Leistungsschutzrechten, Hamburg, Federal Republic of Germany,

Having regard to the Commission Decision of 25 August 1980 to initiate a proceeding in this case,

Having heard the Gesellschaft zur Verwertung von Leistungsschutzrechten mbH in accordance with Article 19 of Regulation No 17 and with Commission Regulation No 99 of 25 July 1963 ([2]),

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

Whereas:

THE FACTS

This Decision concerns the conduct of the Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (hereinafter called 'GVL') towards performing artists who are neither of German nationality nor resident in the Federal Republic of Germany (hereinafter called 'Germany').

I. Organization of GVL

1. GVL, which has its registered office in Hamburg, is a German collecting society set up to manage rights and claims which are vested pursuant to the German 'Gesetz über Urheberrechte und verwandte Schutzrechte' (Law on copyright and related rights, hereinafter called 'Urheberrechtsgesetz' — abbreviated to UrhG) in performing artists, film artists (hereinafter called 'artists'), visual and sound recording manufacturers and promoters or which are assigned to manufacturers and promoters.

   GVL is responsible for the exploitation in Germany of 'performers' rights', i.e. rights which

([1]) OJ No 13, 21. 2. 1962, p. 204/62.
([2]) OJ No 127, 20. 8. 1963, p. 2268/63.

arise out of the reproduction of the author's creative work. The activities of such collecting societies are governed by the German 'Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten' (Law on the management of copyright and related rights, hereinafter called 'Wahrnehmungsgesetz' — abbreviated to 'WahrnG').

2. GVL was created jointly by the 'Deutsche Orchestervereinigung eV', Hamburg, which represents the interests of performing artists — principally musicians — and the 'Deutsche Landesgruppe der IFPI eV' (International Federation of Producers of Phonograms and Videograms), Hamburg, which represents the interests of sound and visual recording manufacturers. The Deutsche Orchestervereinigung eV and the Deutsche Landesgruppe der IFPI eV are the sole members of GVL, which is a limited liability company.

II. The rights of artists and manufacturers under German copyright law

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

4. Articles 76 (2) and 77 UrhG confer on artists, moreover, a statutory right to payment of royalties where a performance which has been recorded on a visual or sound recording with their consent is subsequently broadcast or otherwise made public (secondary exploitation). Artists are also entitled pursuant to Article 53 (5) UrhG to claim payment of a fee from manufacturers of reproduction equipment (royalty in respect of equipment).

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

6. Pursuant to Article 86 UrhG, manufacturers of sound recordings, hereinafter called 'manufacturers', have, for their part, with regard to the artist's right to payment of a royalty in respect of secondary exploitation, a claim against the artist for a reasonable share of such royalty.

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

III. The rights of artists and manufacturers in other Member States and under the Rome Convention

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

8. In Denmark and Italy, sound recording manufacturers and artists have a statutory right to payment of a royalty for public performances and broadcasts. In the United Kingdom and Ireland, only sound recording manufacturers have a statutory right to prohibit unauthorized public reproduction. Artists share in the income earned by sound recording manufacturers from public reproduction by concluding collective agreements with them. In Greece, so far only artists and not sound recording manufacturers have a statutory right at present to payment of a royalty. In the Netherlands, Belgium, Luxembourg and France, no legislation has yet been passed concerning the payment of royalties for secondary exploitation. In practice, however, in Belgium and the Netherlands agreements concerning the payment of royalties for secondary exploitation have been concluded between Belgian or Dutch sound recording manufacturers and the respective broadcasting authorities, and in France such agreements have been concluded with at least some broadcasting companies. The respective artists' associations receive their share of the royalties through collective agreements with the sound recording manufacturers.

9. Under Article 12 of the International Convention on the protection of performers, producers of phonograms and broadcasting organizations of

26 October 1961 (Rome Convention), Contracting States must ensure that users of published sound recordings pay the sound recording manufacturer or the artist, or both, a single, equitable remuneration in respect of broadcasting or any communication to the public.

10. The Rome Convention, however, has not yet been ratified by all Member States. When ratifying the Convention, Germany expressed a reservation to the effect that, in the case of sound recordings manufactured by a national of another Contracting State, the extent and duration of the protection afforded to manufacturers and artists were to be limited to the extent and duration of the protection granted by that State to sound recordings which were first made by a German national.

11. The performers' rights described above (points 3 to 6) are also in principle vested in artists having a foreign nationality irrespective of their place of residence. Where the artist concerned is not a national of a country which has ratified the Rome Convention, Article 125 of the UrhG confers on him the same rights as on German artists if his performance takes place in Germany or — where it has been recorded with his consent on visual or sound recordings — if such recordings have been published in Germany. Such foreign artists also enjoy the same rights as German nationals in respect of broadcasts where the latter are transmitted in Germany.

IV. The rules contained in the Wahrnehmungsgesetz

12. Under Article 1 WahrnG, any person who exploits rights of use, rights of consent or rights to payment of royalties pursuant to the Urheberrechtsgesetz on behalf of several copyright holders or owners of similar rights for their collective benefit requires official authorization, irrespective of whether he acts in his own name or on behalf of another person.

    There is a legal right to such authorization where certain basic pre-conditions relating to the pursuit of this activity are satisfied.

13. The Wahrnehmungsgesetz does not confer a legal monopoly on collecting societies. The establishment of 'competing' associations is perfectly possible in law.

14. Collecting societies authorized under the Wahrnehmungsgesetz must apportion the income earned from their activities in accordance with strict rules.

15. Under Article 11 WahrnG, collecting societies must, on the basis of the rights which they exploit, grant any individual on request rights of use or consent on reasonable terms (obligation to contract).

16. Under Article 6 WahrnG, however, collecting societies must manage the rights and claims falling within their field of activity on reasonable terms at the request of their proprietors where the latter are German nationals within the meaning of the basic law or are resident in the area in which the Wahrnehmungsgesetz is in force and where the rights or claims cannot otherwise be effectively exploited (obligation to manage).

17. Compliance with these statutory obligations and the activities of collecting societies are monitored by the German Patent Office (Article 18 *et seq.* WahrnG).

V. The legal position of GVL in Germany

18. GVL is the only collecting society engaged in Germany in the exploitation of performers' rights. The other collecting societies in Germany exploit other rights.

19. Under the Urheberrechtsgesetz, certain rights vested in copyright holders, artists or manufacturers may be asserted only through collecting societies. This is true, for example, of the abovementioned (point 4) claim to payment of royalties against manufacturers of reproduction equipment pursuant to Article 53 (5) UrhG (royalty in respect of equipment).

20. For legal reasons, as far as the royalty in respect of equipment is concerned, and also for practical reasons in the case of claims for payment of royalties in respect of secondary exploitation, it is practically impossible for artists themselves effectively to assert such rights. Any attempt to do so is bound to fail because the individual artist is not able to verify and prove in individual cases whether, when, by whom and how often his performance has been broadcast or otherwise made public. He would, moreover, as an individual in an economically weak position,

have to enter into contractual relations with a multitude of economically strong users (e.g. broadcasting companies), from whom he is entitled to claim only the payment of a reasonable royalty, and whom he may not prohibit from using his performance.

VI. The management of secondary exploitation rights by GVL

1. *Management agreements*

21. To manage rights arising out of secondary exploitation, GVL concludes so-called 'management agreements' with manufacturers and artists. Pursuant to Article 1 of the management agreement with artists, the person entitled assigns to GVL for management in its own name for the duration of the agreement all his present and future rights of performance and all claims to termination, suppression and damages vested in him.

22. This assignment of rights covers, in particular, the right to payment of a royalty where published visual or sound recordings are broadcast or otherwise made public, as well as the right to royalties in respect of equipment.

23. In return, GVL undertakes to pay to the person entitled the royalties collected, the interest due on sums invested pending their distribution and any other proceeds according to a scale drawn up by itself, less essential administrative expenses, which amount to between 5 and 10 % of the sums received by GVL.

24. In practice, it is often not the individual artist who assigns his rights to GVL in the case of performances on sound recordings. As a rule, the sound recording manufacturer himself ensures that all the necessary rights, including the artist's secondary exploitation rights, are secured. He then transfers the rights assigned to him by the artist to GVL. Under this agreement between manufacturers and GVL, artists have a direct claim for payment against GVL (agreement for the benefit of third parties). Artists who conclude a management agreement with GVL without assigning their performer's rights to the manufacturer (e. g. in the case of a broadcasting company's own productions in Germany) receive their royalties direct from GVL.

25. Where foreign sound recording manufacturers have rights of use in respect of Germany for disposal, they assign their rights to their domestic representatives or licensees; the latter, as offerors of rights in respect of secondary exploitation, are then placed by GVL on the same footing as domestic sound recording manufacturers.

2. *Agreements relating to use*

26. GVL has concluded agreements with users of sound recordings, who are obliged under the copyright law to pay royalties (broadcasting authorities, commercial broadcasting companies, theatres, discotheques, hotel and restaurant associations, etc.), entitling them to use sound recordings the brands of which have been indicated to GVL by the manufacturers and which are on sale in Germany. GVL gives notice of the brands and manufacturers which it represents and indemnifies the other parties to the agreements in respect of all claims relating to performer's rights which might be asserted by artists, manufacturers and promoters on grounds of use of sound recordings whose brands GVL represents (cf. Article 5 of the sound recording broadcasting agreement).

27. Since either artists and/or manufacturers or the domestic licensees of foreign manufacturers (e.g. importers, marketing companies, etc.) have concluded management agreements with GVL, GVL is able to offer users of sound recordings practically the entire 'world repertoire' of performances recorded on sound recordings, in so far as they have been published in Germany. These also include a large number of performances by foreign artists.

28. For the use of such sound recordings users pay, in discharge of their obligations under Articles 76 (2) and 77 UrhG, an annual flat-rate fee to GVL according to a scale worked out by the latter in detail.

3. *Income from royalties in respect of equipment*

29. Royalties in respect of reproduction for personal use — royalties in respect of equipment — are

collected by the Zentralstelle für Private Überspielungsrechte (ZPÜ), which is entrusted with this task by GVL and in which GVL holds a financial interest, from manufacturers or importers of reproduction equipment. GVL receives from the amount thus collected, which may not exceed 5 % of the net profit made by manufacturers (importers) from the sale of such equipment — less ZPÜ's administrative expenses — a share of 42 %. This sum is included in the amount to be distributed by GVL among artists and manufacturers.

4. *The distribution of GVL's income*

30. GVL's income is distributed according to a scheme drawn up annually. In principle, royalties are shared equally between artists and manufacturers.

31. Prior to the 1979 accounting year, the distribution was made among individual artists in proportion to the fees received by them in the respective calendar year in Germany in respect of the primary exploitation of the performance. An artist who was entitled to make a claim had to specify on a form the amount of fees he had received in Germany for an artistic activity in the field of broadcasting and recording in the calendar year in question and provide documentary proof thereof. The higher the fees received by an artist from primary exploitation in Germany, the greater was his share of the royalties distributed by GVL in respect of secondary exploitation, though the ratio of royalties to fees decreased as the fees rose.

32. GVL has concluded management agreements with approximately 20 000 holders of rights. Nevertheless, since not all those entitled to claim receive fees each year in respect of primary exploitation, nor do they always notify GVL each year of their claims, GVL distributes the royalties collected on average only to about 10 000 claimants a year. According to data supplied by GVL, in 1980 it collected a total of around DM ....

VII. GVL's conduct towards foreign artists

33. Prior to 21 November 1980, GVL refused to conclude management agreements with foreign artists having no residence in Germany — irrespective of whether they were artists from Member States of the European Economic Community — or otherwise to manage their performer's rights in Germany. GVL does not deny that foreign artists are entitled to payment of royalties in respect of secondary exploitation in Germany. GVL used to point out, however, to foreign artists who sought to conclude a management agreement with it that it concluded management agreements only with holders of rights who were German nationals or resident in Germany.

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

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

36. This amended basis of calculation presupposes, if it is to give a balanced result, that the person liable to pay the fee for the primary exploitation, i.e. as a rule the manufacturer, is accurately informed as to the manner of distribution of the sound recordings. Only if he is aware of the extent to which sound recordings produced abroad have reached Germany is the person liable to pay the fee in a position to determine the proportion of the fee payable in respect of Germany. When calculating the share of royalties, therefore, sound recordings which

reach Germany through distribution channels other than those of which the manufacturer is aware are disregarded.

VIII. The position adopted by GVL

37. GVL has always acknowledged that it is not prevented by law from acting on behalf of foreigners having no residence in Germany, but it has persistently maintained that it is not legally obliged to do so.

38. Such an obligation cannot be derived from Community Law, because the restriction of the activity of providing management facilities to artists having German nationality or a residence in Germany (domestic connection) is in keeping with the non-uniform and complex legal position with regard to the recognition of performers' rights. The domestic connection provides an objectively justifiable pre-condition for the management of rights. Since German artists are at present still unable to exploit their performers' rights abroad, it is only right that foreigners with no connection with Germany should be prevented from sharing in the income from royalties.

39. Moreover, GVL should be regarded as an undertaking providing services of general economic interest. Its monopoly with regard to the management of rights is comparable to an administrative monopoly within the meaning of Article 90 (2) of the EEC Treaty, and the performance of its tasks would be obstructed *de facto* by an obligation to act for foreigners not resident in Germany.

40. Furthermore, pursuant to Article 222 of the EEC Treaty, the rules in Member States governing the system of property ownership are in no way prejudiced, and the specific nature of German performers' rights and of the German system of management of those rights form part of the system of property ownership in Germany.

41. GVL acknowledges that to apportion royalties on the basis of numbers of broadcasts and of the duration of broadcasts and reproduction of the performance would be a means of complying most fully with the principle of a reasonable royalty within the meaning of the German copyright law. For practical reasons, however, GVL considers itself unable to apply such a method of calculation. Broadcasting companies would not make the necessary information available to it. Moreover, for reasons of cost and efficiency GVL cannot be expected, with a total amount to be distributed of more than DM .... and about 20 000 potential claimants, to ascertain the amount of broadcasting time devoted annually in Germany to performances by particular artists. In addition, it often happens that several artists who are entitled to claim are involved in a performance in various capacities (e. g. orchestra, conductor and other artistic collaborators), with the result that, although it would be desirable, calculation of the royalty according to broadcasting time is impracticable in GVL's case. Only about 60 % of GVL's income consists of broadcasting royalties, i. e. that provided by broadcasting companies. The remainder is composed of earnings from public reproduction in restaurants, hotels, discotheques, etc. and from royalties on equipment. The 'frequency of reproduction' or 'duration of reproduction' cannot be determined at all in the case of the latter part.

LEGAL ASSESSMENT

APPLICABILITY OF ARTICLE 86 OF THE EEC TREATY

42. Article 86 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.

A. Conduct prior to 21 November 1980

1. *GVL as an undertaking*

43. GVL is an undertaking within the meaning of Article 86. By offering in return for financial reward the performances of performing artists transferred onto sound recordings to broadcasting companies, theatres, restaurants, hotels, discotheques and other music users and by managing the performers' rights and claims vested in artists and manufacturers, it exercises an entrepreneurial activity consisting in providing services both to those in whom the performers' rights are vested and to users of sound recordings who are liable for the payment of royalties. GVL therefore participates in the commercial exchange of services and is hence subject to Article 86.

44. The lack of a profit motive is irrelevant to the concept of undertaking within the meaning of Article 86. 'Non-profit' undertakings are also covered by the prohibition of abuses contained in Article 86.

The Court of Justice of the European Communities confirmed this in its judgment of 27 March 1974 in Case 127/74 (BRT II/1974/ECR 313 *et seq.).*

2. *The dominant position of GVL*

45. The market in services relating to the management of secondary exploitation rights vested in performing artists and manufacturers in Germany, which can be precisely differentiated from the activities of other associations engaged in the exploitation of rights, is to be regarded as the materially and geographically relevant market in which GVL is active.

GVL is the only company dealing in Germany with the management of such secondary exploitation rights. It has no competitors. GVL's monopoly in Germany, which constitutes a substantial part of the common market, is due not to legal factors but to factual circumstances.

3. *Abuse of a dominant position on the market within the meaning of the first paragraph of Article 86*

46. The prohibition of abuses contained in the first paragraph of Article 86 must, as the judgments of the Court of Justice show, be viewed in the light of, and having due regard to, the general principles laid down in the EEC Treaty. One of these principles is embodied in Article 7 of the EEC Treaty, which provides that any discrimination on grounds of nationality shall be prohibited. As a rule, therefore, discriminatory treatment by a dominant undertaking on grounds of nationality must be regarded automatically as an infringement of Article 86 (cf. also judgment of the Court of Justice of 30 April 1974, Case 155/73, Sacchi/1974/ECR 409).

47. The refusal by GVL as a *de facto* monopoly undertaking to conclude management agreements with foreign artists having no residence in Germany constitutes discrimination on grounds of nationality and hence an abuse within the meaning of Article 86. This applies *a fortiori* since such foreign artists were entirely dependent on the services of GVL, being denied access to other collecting societies, and since this refusal meant that they were placed at a financial disadvantage compared with German and domestic artists and led to their being unable to assert their rights.

4. *Discrimination within the meaning of Article 86 (c)*

48. GVL's conduct also falls under the special prohibition of discrimination contained in Article 86 (c), since GVL has discriminated against certain trading partners on grounds unrelated to the transaction involved.

(a) Foreign artists as trading partners

49. Artists generally take part in German economic life by having their performances transferred onto sound recordings, broadcast or otherwise presented in public in Germany and by receiving fees and royalties therefor. The transaction ('trade') within the meaning of Article 86 (c) between artists and GVL consists in the fact that GVL's service, namely affording management of rights is provided only in return for valuable consideration, i.e. GVL's administrative share of the royalties collected. The sole decisive factor is the fact that GVL's activity, namely the provision of services, corresponds to a material consideration moving from the artist. Artists are thus the 'natural' trading partners of GVL.

50. Conversely, GVL is the 'natural' trading partner of artists, since claims by artists for the payment of royalties can be met in practice by GVL alone. Both GVL and artists are entirely dependent on each other. The business aim of GVL is to safeguard the rights of artists to the payment of royalties and, without GVL, artists are unable to assert their secondary exploitation rights.

The argument that foreign artists were not trading partners of GVL because the latter had not concluded management agreements with them cannot be accepted.

51. A dominant undertaking cannot counter the accusation of discrimination by maintaining that

the 'trading partner' criterion is lacking, when it prevents some of its natural trading partners from becoming actual trading partners by imposing an additional requirement.

Foreign artists could, by their conduct, namely by taking up residence in Germany, have made themselves actual trading partners of GVL. This shows that foreign artists were also 'trading parties' within the meaning of Article 86 (c) and that they were prevented from becoming actual trading partners of GVL only by the additional requirement of residence in Germany imposed by GVL on this category in general.

(b) The discriminatory treatment

52. Prior to 21 November 1980, GVL also discriminated against foreign artists as compared with German artists in that it imposed on foreign artists seeking management services an additional requirement, namely residence in Germany, which it did not impose on German nationals. GVL's conduct therefore consisted, not in a specific refusal to act on behalf of individual foreign artists, but in the imposition of an additional, general requirement on foreign artists. If foreign artists fulfilled this requirement, GVL was prepared to conclude management agreements with them. To this extent, GVL applied generally dissimilar conditions to its trading partners.

(c) Equivalent transaction

53. The prohibition of discrimination contained in Article 86 (c) presupposes, moreover, the existence of equivalent transactions with the trading partners concerned. Foreign artists, like German and domestic artists, transfer their performers' rights in Germany to GVL for exploitation. The transaction effected by the foreign artists, namely assignment of their performers' rights in Germany to GVL, is the same as that effected by German and domestic artists. It may, of course, be that it is more difficult for foreign artists to furnish proof of their rights in Germany than it is for German and domestic artists. But this does not alter the substantive transaction effected by foreign artists, which, where the existence of performers' rights in Germany is proved, does not differ in any respect from that effected by German and domestic artists.

The transaction proposed by foreign artists to GVL is therefore 'equivalent' within the meaning of Article 86 (c).

5. *The placing of foreign artists at a competitive disadvantage*

54. Competition takes place among artists in respect of their performances, both on the German market and on that of the other Member States. Every artist has a special interest in ensuring that his performance is broadcast or otherwise reproduced in public as often as possible and that the sound recordings of his performance are sold in large numbers.

55. Because of the discriminatory conduct on the part of GVL, foreign artists not resident in Germany were placed at a disadvantage in this competition among artists. Foreign artists, who received no royalties in respect of the secondary exploitation of their performances in Germany despite the fact that the right to payment thereof was vested in them, incurred financial losses as compared with German or domestic artists. These categories of beneficiary, which enjoyed preferential treatment as a result of GVL's conduct, were, on the other hand placed in a stronger economic position. They thus had an economic advantage over foreign artists, which was capable of affecting competition with the latter. For, in the case of artists as well, even slight financial disadvantages have a considerable impact on their trading position on the market.

6. *Absence of justification*

56. The sole circumstance in which the application by GVL of different conditions to equivalent transactions by foreign artists does not constitute an abuse is if it can be justified on objective grounds (cf. Commission Decision of 17 December 1975 (Chiquita) (OJ No L 95, 9. 4. 1976, p. 1.))

57. The main objections raised by GVL to an obligation to manage the rights of foreign artists and the arguments put forward to justify its conduct — even after the changes made to its practice relating to management — consist in the

non-uniform and complex legal position with regard to the recognition of performing rights within the Community.

58. The Commission is aware of the difficulties facing artists, collecting societies and other associations which collect royalties for artists and manufacturers in respect of secondary exploitation, as a result of differences in the legal position within the Community. It is aware that at present a statutory right on the part of manufacturers and artists to receive royalties is granted only in certain Member States and that the remaining Member States grant similar statutory rights either only to artists or only to manufacturers or not at all. In the countries without statutory performing rights there are nevertheless as a rule contractual agreements, with the result that in almost all Member States, in the final analysis, artists and manufacturers do receive royalty payments in respect of secondary exploitation.

59. However desirable it may be to achieve a uniform legal position with regard to secondary exploitation within the Community, this differing legal position cannot justify conduct which deprives artists of an opportunity to assert their rights in another Member State. GVL has, by its refusal, placed an obstacle in the way of artists wishing to receive royalties for the secondary exploitation of their performances.

60. GVL's contention that an obligation to protect foreign artists would discriminate against German artists, who have no right to payment of royalties abroad, must also be rejected. An obligation to manage rights based on the competition rules follows from the right vested in foreign artists to payment of royalties in respect of secondary exploitation in Germany.

Such an obligation to manage rights applies also to comparable dominant undertakings in other Member States, in so far as German artists possess rights to royalties in those Member States or in so far as they suffer discrimination on the part of such undertakings in comparison with other artists because of their nationality.

An obligation to manage the rights of foreign artists imposed on GVL would, therefore, not discriminate against German artists but would bring about equal treatment for all artists whose performances have been made public in Germany.

7. *Effect on trade between Member States*

61. GVL's abuse of its dominant position also affects trade between Member States.

62. Trade within the meaning of the competition rules consists of all commercial and business activities, including the provision of services (cf. judgment of the Court of Justice in 155/73, Sacchi). The sole criterion is whether GVL's conduct was likely directly or indirectly, actually or potentially, to restrict freedom of trade in goods or services in a manner which ran counter to the attainment of the objectives of a single market between States (cf. judgment of the Court of Justice of 13 July 1966, Costen and Grundig v. Commission/1966/ECR 299).

63. GVL's refusal to assume responsibility for exploitation of the rights in Germany of foreigners not resident in Germany but resident in one of the Member States hindered the creation of a uniform market for services in the Community. Unlike Germans, such foreigners could not avail themselves of GVL's services. The cross-frontier movement of services which would have developed had it not been for GVL's refusal was thus hindered within the Community. This restriction of the movement of services was appreciable, moreover, since a multitude of foreign holders of rights were prevented from exploiting their rights.

It is irrelevant that GVL restricted its activity to the territory of one Member State. As the Commission has stated in several Decisions, an agreement or conduct which relates to only one Member State may lead to a restriction of trade where trading partners in other Member States are excluded from the agreement or from the advantages of the conduct (Decision of 29 December 1970 — Keramische Fliesen (OJ No L 10, 13. 1. 1971, p. 15) and Decision of 23 July 1974 — Papiers peints de Belgique (OJ No L 237, 29. 8. 1974, p. 3)). In the present case, there can be no doubt as to the direct restriction of trade caused by the discrimination against foreign artists resident in another Member State. The discrimination had the effect of erecting artificial barriers to the provision of services between GVL, as provider of the services in

Germany, and foreign artists, as recipients of the services in another Member State, i.e. to economic relations between Member States.

64. The economic discrimination suffered by foreign artists also affected their cross-frontier competitive position. This discrimination was likely to place foreign artists in a less favourable position than favoured German and domestic artists, with whose performances they were in competition within the Community, and hence to affect trade between Member States.

INAPPLICABILITY OF ARTICLE 90 OF THE TREATY

65. Pursuant to Article 90 (2), undertakings entrusted with the operation of services of general economic interest shall be subject to the rules contained in the Treaty, and in particular to the rules on competition, only in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. Private undertakings may also come under that provision where they are entrusted with the operation of services of general economic interest by an act of the public authority (cf. judgment of the Court of Justice in BRT II). Since Article 90 (2) permits, in certain circumstances, an arrangement which derogates from the Treaty, the concept of an undertaking which may rely on this provision must, however, be interpreted strictly.

66. GVL is not entrusted, either by an official Act or otherwise, by the public authority with the operation of services. Admittedly, it carries on its activities subject to official authorization, but no specific task is assigned as a result of this 'precondition of authorization'. Official authorization is granted subject merely to a check as to whether the company requesting the authorization satisfies the preconditions relating to associations for the exploitation of performers' rights laid down in the Wahrnehmungsgesetz.

Such granting of authorization is, therefore, by its very nature not an assignment of particular tasks, but only a permission to carry on certain activities. Authorization, which merely overrides a statutory prohibition, has a completely different legal content from the entrusting of a task, whereby specific responsibilities and hence specific obligations are officially conferred upon an undertaking. The necessarily strict interpretation of the concept 'undertaking' contained in Article 90 (2), therefore, shows that GVL does not fall under that provision.

67. Even if it were accepted, however, that GVL had been 'entrusted' with the operation of services, such services must be 'of general economic interest'.

68. GVL protects only the private interests of artists. The Court of Justice of the European Communities held in its judgment in BRT II that such a general interest is not protected where an undertaking manages private interests, including property rights protected by law. This also applies to GVL.

INAPPLICABILITY OF ARTICLE 222 OF THE TREATY

69. GVL's argument that, pursuant to Article 222 of the EEC Treaty, the German statutory rules governing performers' rights and the activities of collecting societies can be in no way prejudiced by the competition rules is unfounded.

70. First, the German legislative authority has not prohibited collecting societies from acting on behalf of foreigners not resident in Germany, but has left this question open. Secondly, an interpretation of Article 222 such as that proposed by GVL would completely undermine the application of the provisions of the EEC Treaty in the field of industrial property rights. Furthermore, an obligation on the part of GVL to manage foreigners' rights merely enables the latter to avail themselves of 'their property', i.e. their substantive claims to the payment of royalties in Germany. The legal existence of claims by German artists and foreigners resident in Germany is not thereby affected, nor is the German system of property ownership as such.

B. **Conduct after 21 November 1980**

71. By amending its articles of association and standard management agreement, GVL ended its discrimination against artists not having German nationality in so far as it affected Member States' nationals or artists resident in one of the Member

States. The present apportionment procedure applies equally to German and to such foreign artists.

72. The present apportionment procedure is by no means perfect, because artists share in the income from royalties in Germany only in proportion to the fee for primary exploitation paid to them by manufacturers in relation to Germany. Thus, for example, sound recordings which reach Germany through marketing channels other than those predetermined by the person liable for payment of the fee are left out of account by the method of assessment, since for them such person pays no fee 'in relation to Germany'.

73. In the light of the information currently available, however, this cannot be regarded as an abuse. In view of the great practical difficulty referred to by GVL of apportioning royalties fairly, the manner of settlement chosen by GVL based on the fees received by the artist in relation to the German market is, under the circumstances, a method which satisfies the requirement of an equitable and cost-effective apportionment.

APPLICABILITY OF ARTICLE 3 OF REGULATION No 17

74. GVL committed an infringement until 21 November 1980. Even now, it still considers itself justified, in view of the uncertain legal position, in excluding artists not having German nationality or a residence in Germany from availing themselves of its management services. A Decision is therefore needed to clarify the legal position, both for the benefit of the complainants and in order to prevent identical or similar infringements in future. This should above all make it clear that differences in Member States' laws do not justify discrimination by dominant undertakings,

HAS ADOPTED THIS DECISION:

Article 1

GVL's conduct prior to 21 November 1980, characterized by its failure to conclude management agreements with foreign artists where the latter were not resident in Germany, or otherwise to manage performers' rights vested in such artists in Germany, constituted, in so far as such artists possessed the nationality of a Member State of the European Communities or were resident in a Member State, an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty.

Article 2

This Decision is addressed to the Gesellschaft zur Verwertung von Leistungsschutzrechten, Esplanade 36a, Hamburg.

Done at Brussels, 29 October 1981.

For the Commission

Frans ANDRIESSEN

Member of the Commission