ORDER OF THE COURT
18 June 1986 *

In Joined Cases 142 and 156/84

British-American Tobacco Company Ltd, London, represented by PVF Bos, of the Amsterdam Bar, having Chambers in Brussels, instructed by Coudert Brothers, Attorneys-at-Law, New York, having Chambers in Brussels, and with an address for service in Luxembourg at the Chambers of J. Loesch, 2 rue Goethe,

and

R. J. Reynolds Industries Inc., Winston Salem, North Carolina, United States of America, acting through Joseph F. Abely Jr, Vice-Chairman of the Board, represented by J. F. Lever, of the Brussels Bar, and R. Buxton, QC, Gray's Inn Chambers, Gray's Inn, London, instructed by A. Paines and J. Reynolds, of Allen and Overy, London and Brussels, with an address for service in Luxembourg at the Chambers of J. Loesch, 2 rue Goethe,

applicants,

v

Commission of the European Communities, represented by A. McClellan, Legal Adviser, and K. Banks, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

Philip Morris Incorporated, New York, represented by Mario Siragusa, of the Rome Bar, and M. Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of E. Arendt, Centre Louvigny, 34 B rue Philippe-II,

and

Rembrandt Group Limited, Stellenbosch, Republic of South Africa, represented by C. Bellamy and K. B. Parker, Counsel of Gray's Inn Counsel, London, instructed

* Language of the Case: English.

by Malcolm G. C. Nicholson, Solicitor, Slaughter and May, London, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 côte d'Eich,

interveners,

APPLICATION for a declaration that the decision, contained in letter No SG (84) D/3946 of 22 March 1984 from the Commission concerning Cases Nos IV/30/342 and IV/30.926, rejecting the applications made by the applicants pursuant to Article 3 (2) of Regulation No 17/62 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-62, p. 87) and declaring that certain agreements concluded between the interveners do not infringe Articles 85 and 86 of the EEC Treaty, is void,

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, U. Everling, K. Bahlmann and R. Joliet (Presidents of Chambers), G. Bosco, O. Due, Y. Galmot, C. Kakouris, T. F. O'Higgins, F. Schockweiler, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias, Judges,

Advocate General: G. F. Mancini
Registrar: P. Heim

makes the following

ORDER

1 On 4 May 1981 and 20 January 1982, respectively, the two applicants, R. J. Reynolds Industries Inc. and British-American Tobacco Company Ltd, lodged complaints with the Commission under Article 3 (2) of Regulation No 17 of the Council against agreements concluded between Philip Morris Incorporated and Rembrandt Group Ltd. Those agreements (hereinafter referred to as 'the 1981 agreements') provided for those two companies to share, on an equal basis, control of Rothmans Tobacco (Holding) Ltd, which was a wholly-owned subsidiary of Rembrandt Group Ltd and, in turn, controlled Rothmans International plc, a major competitor of Philip Morris on the Community cigarette market. The agreements also referred to planned cooperation between Philip Morris and Rothmans International.

2 The Commission considered that the 1981 agreements infringed both Article 85 and Article 86 of the Treaty and so, on 19 May 1982, it initiated the procedure provided for in Article 3 (1) of Regulation No 17 by serving on Philip Morris and Rembrandt Group a statement of objections, copies of which were sent to the two complainants. Material regarded as qualifying for protection as business secrets had been removed from those copies. After obtaining the views, both oral and written, of the complainants and of the parties to the agreements the Commission conducted negotiations with the latter with regard to the possibility of making the agreements consistent with Community law. Following those negotiations, Philip Morris gave up its interest in Rothmans Tobacco (Holding), withdrew from the clauses concerning cooperation and concluded new agreements with Rembrandt Group whereby it would be given a direct, but minority, shareholding in Rothmans International (the 1984 agreements).

3 Once it had obtained undertakings from the parties to the agreements to the effect that, in particular, Philip Morris would not be represented on the management bodies of Rothmans International, any increase in Philip Morris's holding in that company would be notified immediately and a 'stand-still' would be imposed, whereby the Commission would be granted a period of time to examine any such situation, the Commission considered that the 1984 agreements did not infringe Articles 85 and 86 of the Treaty and, after giving the complainants the opportunity to state their views thereon, it took the contested decision rejecting the applicants' complaints.

4 During the written procedure and by means of a separate document in Case 156/84, the applicants asked the Court to undertake measures of inquiry by ordering the Commission, pursuant to Article 45 of the Rules of Procedure, to produce certain documents or parts of documents with a view to their being examined by the Court and, where appropriate, to their being forwarded to the applicants. The Commission, supported by the interveners, asked the Court to dismiss those applications. It contended that some of those documents were no longer relevant to these proceedings and that some were internal Commission documents that the applicants had no legitimate interest in consulting or in having them consulted by the Court.

5 As regards procedural issues, Article 91 (3) and (4) provides that, unless the Court decides otherwise, the remainder of the proceedings with regard to procedural

issues is to be oral and that, after hearing the Advocate General, the Court is to decide on the application or reserve its decision for the final judgment. After hearing the Advocate General, the Court decided that, in view of the parties' very detailed observations in their written submissions, there was no need to hear their oral arguments and that, with a view to preparing for the oral procedure in these cases, it was appropriate to give separate decisions on the requests.

6 In the first place, the applicants have asked the Court to order the Commission to produce certain parts, in particular, of the 1981 agreements, of the statement of objections, of the replies given by Philips Morris and the Rembrandt Group to that statement and of the minutes of the hearing, these being documents and parts of documents which the Commission regarded as qualifying for protection as business secrets and which it therefore withheld when it transmitted the remainder of the documents to the applicants in their capacity as complainants.

7 In this connection, it should be observed that the actions are brought against the Commission's decision to dismiss the applicants' complaints following the replacement of the 1981 agreements by the 1984 agreements. However, all the documents and parts of documents whose production is requested by the applicants concern the 1981 agreements. Those agreements are not relevant to the cases now before the Court except in so far as they reveal the initial intentions of the parties to the agreements. In the latter respect, however, the documents before the Court already contain sufficient information. In contrast, the details of those agreements and the explanations given by the parties and the position adopted by the Commission with regard to those details have no relevance to the cases now before the Court.

8 Consequently, that first application must be dismissed.

9 Secondly, R. J. Reynolds Industries Inc. has, essentially, requested the Court to call upon the Commission to submit to it all the documents in the Commission's possession which might reveal the reasons for which the Commission proposed to prohibit formally the 1981 agreements and for which it came to the conclusion that the 1984 agreements did not come within the prohibition laid down in Article 85 (1) of the Treaty.

10 In support of that application, the applicant contends, in essence, that, in the light of the legal and factual assessments of the 1981 agreements set out by the

Commission in its statement of objections and not withdrawn in the contested decision, the Commission should also have condemned the 1984 agreements. The Commission has given no valid reasons for this change of assessment either in the statement of the reasons on which the contested decision is based or in the course of the written procedure. The reasons for those two apparently conflicting assessments should therefore be verified. In the applicant's view, there are even grounds for believing that the change was due to reasons extraneous to the cases themselves. In that regard, the applicant contends that 'pressure' had been put on the Commission, in particular at separate meetings held with the parties to the agreements which were attended by a former Vice-President of the Commission in the capacity as adviser to Philip Morris.

11 With regard to that point, it should be said that examination by the Court of the Commission's internal file with a view to verifying whether the Commission's decision was influenced by factors other than those indicated in the statement of the reasons on which the decision is based or stated by the Commission during the proceedings before the Court would constitute an exceptional measure of inquiry. Such a measure would presuppose that the circumstances surrounding the decision in question gave rise to serious doubts as to the real reasons and in particular, to suspicions that those reasons were extraneous to the objectives of Community law and hence amounted to a misuse of powers.

12 It must be observed that none of the applicants has submitted that there has been a misuse of powers. Furthermore, examination of the grounds put forward in the application of R. J. Reynolds Industries Inc. does not disclose any conclusive arguments to that effect.

13 As regards the alleged change of assessment, it is appropriate to point out that, according to a consistent line of decisions of the Court, a statement of objections is a procedural document of a preparatory nature in relation to the decision which brings the procedure to a close. That document delimits the scope of the administrative procedure initiated and thereby prevents the Commission from relying in its decision on other objections, but it does not prevent the Commission from withdrawing its objections and thereby altering its standpoint in favour of the undertakings against which the procedure was initiated. The statement of objections must set forth the essential facts upon which the Commission is relying at that stage of the procedure and the assessments set out by the Commission in that document are therefore purely provisional in character. Subsequently, the adminis-

trative procedure gives the undertakings an opportunity to explain themselves and, where appropriate, to bring the agreements or practices complained of into line with the rules of the Treaty. The Commission must take into account the factors emerging from the administrative procedure in order either to abandon such objections as have been shown to be unfounded or to amend and supplement its arguments, both in fact and in law, in support of the objections which it maintains.

14 It follows therefore from previous decisions of the Court that the statement of objections is a procedural and preparatory document, intended solely for the undertakings against which the procedure is initiated with a view to enabling them to exercise effectively their right to a fair hearing. The factual and legal assessments set forth in that document are purely provisional and the Commission is under a duty to revise them in the light of the explanations provided by those undertakings and of any amendments made to the agreements or practices complained of.

15 The nature of the statement of objections, as described above, is in no way affected by the Commission's forwarding a copy thereof to the complainants. By so doing, the Commission does not in any way become committed, *vis-à-vis* the complainants, to maintaining the factual or legal assessments set forth therein. When the Commission ultimately decides to reject the complaints it must give as its reasons for that decision its final assessments based on the situation existing at the time when the procedure is closed, but it is not under a duty to explain to the complainants any differences with respect to its provisional assessments set forth in the statement of objections.

16 Consequently, the applicant's contention that there is an evident contradiction between the Commission's assessment of the 1981 agreements set out in the statement of objections and its assessment of the 1984 agreements set out in the decision complained of and that the Commission has not given a proper explanation of that contradiction either in the statement of the reasons on which the decision is based or in the course of the written procedure before the Court does not constitute a reason for suspecting the existence of covert reasons extraneous to Community law.

17 Similarly, the mere fact that the Commission held separate meetings with the parties to the agreements, as, moreover, it also did with the complainants, and that a former Vice-President of the Commission participated in those meetings in the

capacity as adviser to Philip Morris does not constitute a sufficient reason for examining the Commission's internal file with a view to verifying the reasons for which it rejected the applicants' complaints.

18 Consequently, that application must also be dismissed.

On those grounds,

THE COURT,

having heard the views of the Advocate General,

hereby orders:

(1) The applications made by the applicants for the production by the Commission of certain documents and parts of documents which the Commission did not communicate to the applicants on the ground that it considered that they qualified for protection as business secrets are dismissed.

(2) The application by the applicant R. J. Reynolds Industries Inc. for the production of certain internal documents of the Commission with a view to their being examined by the Court is dismissed.

(3) The costs are reserved.

Luxembourg, 18 June 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President