JUDGMENT OF THE COURT (Sixth Chamber)
17 November 1987 *

In Joined Cases 142 and 156/84

British American Tobacco Company Ltd, London, represented by P. V. F. Bos, formerly of the Amsterdam bar, subsequently of the Rotterdam bar, Nolst Trenité, 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, QC, and R. J. Buxton, QC, of Gray's Inn Chambers, Gray's Inn, London, instructed by A. J. C. Paines and M. 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 its Legal Adviser A. McClellan and by 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 M. 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, 34B rue Philippe II,

and

* Language of the Case: English.

Rembrandt Group Limited, Stellenbosch, Republic of South Africa, represented by C. Bellamy and K. B. Parker, Gray's Inn, London, instructed 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 the Commission's letter No SG(84) D/3946 of 22 March 1984 concerning Cases No IV/30.342 and No 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 (Sixth Chamber)

composed of: O. Due, President of Chamber, G. C. Rodríguez Iglesias, T. Koopmans, K. Bahlmann and C. Kakouris, Judges,

Advocate General: G. F. Mancini
Registrar: B. Pastor, Administrator

having regard to the Report for the Hearing as supplemented further to the hearing on 12 November 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 17 March 1987,

gives the following

Judgment

1 By applications lodged at the Court Registry on 4 and 20 June 1984 respectively, British American Tobacco Company Ltd, whose head office is in London, and R. J. Reynolds Industries Inc., Winston Salem, North Carolina, United States of America, brought two actions pursuant to the second paragraph of Article 173 of the EEC Treaty for the annulment of the decision contained in the Commission's letters No SG(84) D/3946 of 22 March 1984 concerning Cases No IV/30.342 and No 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 Philip Morris Incorporated (hereinafter referred to as Philip Morris), New York, and Rembrandt Group Limited (hereinafter referred to as Rembrandt), Stellenbosch, Republic of South Africa, do not infringe Articles 85 and 86 of the EEC Treaty. The applicants also ask the Court to order the Commission to alter its position with regard to those applications in order to comply with the judgment of the Court.

2 By orders of 28 November 1984 the Court granted Philip Morris and Rembrandt leave to intervene in support of the Commission's conclusions. By an order of 26 September 1984 the Court joined the cases for the purposes of the oral procedure and of the judgment.

3 The applications submitted by the applicants pursuant to Article 3 (2) of Regulation No 17/62 were directed against agreements between Philip Morris and Rembrandt under which Philip Morris bought from Rembrandt, for USD 350 million, 50% of the shares in Rothmans Tobacco (Holdings) Ltd (hereinafter referred to as Rothmans Holdings), a holding company wholly owned by Rembrandt which held a sufficiently large shareholding in Rothmans International plc (hereinafter referred to as Rothmans International) to control the latter company, an important manufacturer of cigarettes on the Community market, especially in the Benelux countries. Under those agreements Philip Morris acquired an indirect share of 21.9% in the profits of its competitor Rothmans International.

4 Those agreements (hereinafter referred to as the '1981 agreements') also contained conditions intended to maintain a balance between the parties with regard to their direct or indirect shareholdings in Rothmans International and gave each of the parties a 'right of first refusal' in the event of the disposal by the other party of its shareholding in Rothmans Holdings.

5 With regard to management, the 1981 agreements gave the two parties the right to appoint an equal number of members to the board of directors of Rothmans Holdings. They provided that Rembrandt was to retain the management functions which it had exercised until then in relation to the commercial activities of Rothmans International, and that information of a competitive nature was not to be made available to Philip Morris, but they also contained provisions for cooperation between Philip Morris and Rothmans International in sectors such as joint distribution and manufacture, technical know-how and research, and so forth.

6 Following complaints lodged by the applicants, among others, the Commission issued a statement of objections to Philip Morris and Rembrandt to the effect that the 1981 agreements infringed both Articles 85 and 86 of the Treaty. After negotiations with the Commission, Philip Morris and Rembrandt finally replaced those agreements with new agreements intended to remove the cause for the Commission's objections. It is those agreements (hereinafter referred to as the '1984 agreements') which are the subject-matter of the contested Commission decisions; the Commission did not consider it necessary to adopt a decision concerning the original 1981 agreements, since they had been rescinded and replaced by the 1984 agreements.

7 Under the 1984 agreements, Philip Morris abandoned its shareholding in Rothmans Holdings in exchange for a direct shareholding in Rothmans International. That holding is 30.8%, but represents only 24.9% of the votes, whereas Rembrandt's holding, also 30.8%, represents 43.6% of the votes.

8 Like the 1981 agreements, the new agreements give each party a right of first refusal if the other disposes of its shareholding. Furthermore, in the case of a

disposal to third parties a party must dispose of the whole of its shareholding, and may transfer it only to a single independent purchaser or to 10 or more independent purchasers. If Rembrandt disposes of its shareholding to a single purchaser, that purchaser must make an identical offer for Philip Morris's shareholding. Finally, where one or other of the parties disposes of its shareholding, the agreements provide for the possibility of an equal division of voting rights in Rothmans International.

9 The 1984 agreements were accompanied by a number of undertakings given by the parties to the Commission. Those undertakings are intended in particular to ensure that Philip Morris is not represented in the management of Rothmans International and that information concerning the Rothmans International group which might influence the behaviour of the Philip Morris group in the competitive relationship between the two groups within the Community is not made available to Philip Morris. Furthermore, Philip Morris undertook to inform the Commission of any amendment to the agreements and of any increase in its shareholding in Rothmans International or any circumstances in which it would obtain 25% or more of the voting rights in Rothmans International. In the two latter cases the Commission may require a 'hold separate' arrangement with regard to the respective interests of Rothmans International and Philip Morris so as to ensure maintenance of the status quo for a period of three months, during which the Commission may determine what further measures, if any, are appropriate.

10 Reference is made to the Report for the Hearing for a more complete account of the facts, the procedure and the submissions and arguments submitted by the applicants, the Commission and the interveners, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

I — Admissibility

11 One of the interveners, Rembrandt, submits that the actions are inadmissible on the ground that the Commission's letters of 22 March 1984 did not constitute decisions for the purposes of the second paragraph of Article 173 of the Treaty and that the applicants are not directly and individually concerned within the meaning of that article. The Commission, for its part, argues that in so far as the applicants claim that the Court should order the Commission to take a specific decision the actions should be dismissed as inadmissible.

12 With regard to the claims for annulment, it must be pointed out that the Commission, on the application of the applicants, drew up and addressed its letters to them of 22 March 1984 in the form of a 'decision'. Furthermore, those letters have the content and effect of a decision, inasmuch as they close the investigation, contain an assessment of the agreements in question and prevent the applicants from requiring the reopening of the investigation unless they put forward new evidence. It is not necessary to decide whether an intervener is entitled to raise an objection of inadmissibility; those observations are sufficient for the Commission's letters of 22 March 1984 to be regarded as decisions addressed to the applicants within the meaning of the second paragraph of Article 173 of the Treaty, and the objections raised in that regard may therefore be dismissed.

13 The actions are inadmissible, however, in so far as they request the Court to order the Commission to adopt a measure replacing the contested measure, since the Court has no power to make such an order in proceedings under Article 173 for the review of the legality of a decision.

II — Substance

14 The submissions of the applicants concern the administrative procedure, the Commission's assessment of the agreements and the statement of the reasons for its decisions.

A — *Administrative procedure*

15 The applicants argue in particular that in their capacity as persons having submitted applications under Article 3 (2) of Regulation No 17/62 they were not sufficiently involved in the Commission's investigation of the agreements in question.

16 It appears from the documents before the Court that, with the exception of passages which Philip Morris and Rembrandt considered to contain business secrets, the Commission provided the applicants with copies of its statement of objections of 19 May 1982 in which it stated that the 1981 agreements were contrary to Articles 85 and 86 of the Treaty. The applicants also had the opportunity of commenting on the replies of Philip Morris and Rembrandt to the statement of objections and they took part in the hearing on 5 to 7 October 1982. Subsequently, the applicants received copies of the minutes of the hearing and they

had the opportunity to comment on the additional observations submitted by Philip Morris in writing after the hearing.

17 In May 1983 the Commission informed the applicants that Philip Morris and Rembrandt had made a number of changes in the 1981 agreements, and there was an exchange of letters in that regard, followed by meetings between the applicants and the Commission. After Philip Morris and Rembrandt had finally decided to replace the 1981 agreements with the new 1984 agreements, the applicants were informed by letters of 16 December 1983, pursuant to Article 6 of Regulation No 99/63 of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-64, p. 47), that in the Commission's view there were no longer sufficient grounds for granting their applications, and they were invited to submit any further observations. The applicants were, accordingly, informed of the content of the new agreements and of the undertakings entered into by Philip Morris and Rembrandt. It was only after receiving the applicants' observations on the new agreements and on those undertakings that the Commission adopted the decisions at issue.

18 The applicants admit that until the negotiations concerning the amendments to be made to the original agreements they were closely involved in the Commission's investigation, but they argue that in failing to make available to them certain documents and parts of documents the Commission gave too wide an interpretation to the concept of 'business secrecy'. They also argue that they should have been allowed to take part in those negotiations or that they should at least have been sent minutes of the meetings and thus kept informed of the progress made. The applicants consider that on those points the Commission was guilty of procedural irregularities amounting to a breach of their right to a fair hearing as defined in the case-law of the Court.

19 The cases relied on by the applicants concern the right to a fair hearing of companies in respect of which the Commission carries out an investigation. Such an investigation, however, does not constitute adversary proceedings between the companies concerned; it is a procedure commenced by the Commission, upon its own initiative or upon application, in fulfilment of its duty to ensure that the rules on competition are observed. It follows that the companies which are the object of the investigation and the companies which have submitted an application under

Article 3 of Regulation No 17/62, having shown that they have a legitimate interest in seeking an end to the alleged infringement, are not in the same procedural situation and the latter cannot invoke the right to a fair hearing as defined in the cases relied on.

20 As is clear in particular from the judgment of 28 March 1985 in Case 298/83 *CICCE* v *Commission* [1985] ECR 1105, the complainants must, on the other hand, be given the opportunity to defend their legitimate interests in the course of the administrative proceedings, and the Commission must consider all the matters of fact and of law which they bring to its attention. However, the procedural rights of the complainants are not as far-reaching as the right to a fair hearing of the companies which are the object of the Commission's investigation. In any event, the limits of such rights are reached where they begin to interfere with those companies' right to a fair hearing.

21 In its judgment of 24 June 1986 in Case 53/85 *AKZO Chemie BV and AKZO Chemie UK Ltd* v *Commission* [1986] ECR 1965, the Court held that the obligation of professional secrecy laid down in Article 214 of the Treaty and Article 20 (2) of Regulation No 17/62 is mitigated in regard to complainants, and that the Commission may communicate to them certain information covered by the obligation of professional secrecy in so far as it is necessary to do so for the proper conduct of the investigation. The Court emphasized in that judgment, however, that a complainant may not in any circumstances be provided with documents containing business secrets, and set out the manner in which the company under investigation may act to prevent such disclosure.

22 In these proceedings, the applicants have not demonstrated that the Commission failed to provide them with documents which it could make available to them without disclosing business secrets. It follows that the first part of this submission must be rejected.

23 With regard to the claim concerning the negotiations between Philip Morris and Rembrandt on the one hand and the Commission on the other for the amendment of the original agreements, it should be recalled that the administrative procedure provides, among other things, an opportunity for the companies concerned to bring the agreements or practices complained of into conformity with the rules laid down in the Treaty. For such a possibility to be a real one the companies and the

Commission must be entitled to enter into confidential negotiations in order to determine what alterations will remove the cause for the Commission's objections.

24 Such a right would be imperilled if the complainants were to attend the negotiations or be kept informed of the progress made in order to submit their observations on the proposals put forward by one party or the other. The legitimate interests of the complainants are fully protected where they are informed of the outcome of the negotiations in the light of which the Commission proposes to close the proceedings. The applicants received all the relevant information together with the Commission's letters to them pursuant to Article 6 of Regulation No 99/63. It follows that the second part of this submission must also be rejected.

25 The applicants go on to assert that during the negotiations between Philip Morris and the Commission pressure was placed on the Commission, in particular by one of its former members. It is sufficient to point out in that regard that the applicants have presented no evidence in support of that assertion.

26 Finally, the applicants complain that in the decisions at issue the Commission added new arguments which were not contained in the letters sent pursuant to Article 6 of Regulation No 99/63 and on which the applicants did not have the opportunity of commenting beforehand.

27 This argument must also be rejected. In their capacity as complainants the applicants had the opportunity of stating their position on the arguments set out in those letters. The fact that the applicants' observations prompted further reflection on the part of the Commission and that the Commission therefore thought it appropriate to include additional arguments in its final decisions does not put the Commission under an obligation to give them a further hearing before adopting those decisions.

28 It follows from all the foregoing considerations that the submission regarding the administrative procedure must be rejected as unfounded in its entirety.

B — *The Commission's assessment of the agreements*

29 The applicants argue that in the decisions at issue the Commission applied Articles 85 and 86 of the Treaty incorrectly and was guilty of manifest error inasmuch as it considered that the undertakings entered into by Philip Morris and Rembrandt were sufficient in order to avoid an infringement of those articles.

30 It must be pointed out first of all that the decisions at issue concern only the 1984 agreements and not the 1981 agreements, which are relevant only in so far as they reveal the original intentions of the parties. The main issue in these cases is whether and in what circumstances the acquisition of a minority shareholding in a competing company may constitute an infringement of Articles 85 and 86 of the Treaty.

31 Since the acquisition of shares in Rothmans International was the subject-matter of agreements entered into by companies which have remained independent after the entry into force of the agreements, the issue must be examined first of all from the point of view of Article 85.

The application of Article 85

32 The applicants argue in substance that where a company acquires a substantial shareholding, albeit a minority one, in a competing company it must be presumed that there will be a restrictive effect on competition. The acquisition of such a shareholding inevitably has an influence on the commercial behaviour of the companies concerned, particularly in a stagnant and highly oligopolistic market such as that for cigarettes, where any attempt to increase the market share of one company will be at the expense of its competitors. The establishment of links between two of the largest firms on the market for cigarettes will destroy the competitive balance.

33 According to the applicants, the transaction in question not only has the effect of restricting competition but was intended to do so. That is clear from the relationship between the agreements in issue and the original 1981 agreements which provided for commercial cooperation between the parties. It was by means

of the rights which it obtained under the original agreements that Philip Morris was able to acquire a direct shareholding in Rothmans International, and there is no indication that the idea of commercial cooperation was abandoned, especially since the price paid by Philip Morris remained the same. The intention of Philip Morris and Rothmans International to cooperate on the Community market is confirmed, moreover, by the fact that they have agreements to cooperate in Indonesia, Malaysia and the Philippines.

34 The applicants also submit that the anti-competitive effect and intention of the agreements at issue are reinforced by the clauses providing for a right of first refusal in the event that one of the parties should wish to dispose of its shareholding in Rothmans International. Those clauses are intended to preserve for Philip Morris the possibility of acquiring control of Rothmans International, and show that its acquisition of an equity interest is not a simple passive investment. The fact that the exercise of the rights granted by those clauses would be contrary to Article 85 is sufficient in itself to justify a finding that the object of the agreements is to restrict competition.

35 Finally, the undertakings required by the Commission are, according to the applicants, in no way sufficient to rid the agreements of their anti-competitive nature. First of all, the undertakings regarding the existing management of Rothmans International do not prevent Philip Morris from exerting informal influence in its capacity as a substantial shareholder in Rothmans International. Furthermore, the undertakings regarding the separation of the interests of Philip Morris and Rothmans International should Philip Morris exercise its right of first refusal concern the period following an infringement of Article 85 and would not even apply if Philip Morris gained effective control of Rothmans International on the sale of Rembrandt's shareholding to at least 10 purchasers independent of each other and of Philip Morris.

36 It should be recalled that the agreements prohibited by Article 85 are those which have as their object or effect the prevention, restriction or distortion of competition within the common market.

37 Although the acquisition by one company of an equity interest in a competitor does not in itself constitute conduct restricting competition, such an acquisition may nevertheless serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business.

38 That will be true in particular where, by the acquisition of a shareholding or through subsidiary clauses in the agreement, the investing company obtains legal or *de facto* control of the commercial conduct of the other company or where the agreement provides for commercial cooperation between the companies or creates a structure likely to be used for such cooperation.

39 That may also be the case where the agreement gives the investing company the possibility of reinforcing its position at a later stage and taking effective control of the other company. Account must be taken not only of the immediate effects of the agreement but also of its potential effects and of the possibility that the agreement may be part of a long-term plan.

40 Finally, every agreement must be assessed in its economic context and in particular in the light of the situation on the relevant market. Moreover, where the companies concerned are multinational corporations which carry on business on a world-wide scale, their relationships outside the Community cannot be ignored. It is necessary in particular to consider the possibility that the agreement in question may be part of a policy of global cooperation between the companies which are party to it.

41 It is in the light of all those considerations that it must be determined whether the Commission, in examining the 1984 agreements, was wrong to hold that there was no proof of anti-competitive object or effect.

42 With regard to the situation on the market for cigarettes, the Commission pointed out in its statement of objections concerning the 1981 agreements that that market

was stagnant in volume terms from 1976 to 1980, the period considered by it. It also stated that with the exception of the French and Italian markets, where there are state monopolies, the Community market is dominated by six groups of companies, among them the applicants and interveners in this case.

43 The Commission considers that on the market for cigarettes, which is stagnant and oligopolistic and on which there is no real competition on prices or in research, advertising and corporate acquisition are the principal means of increasing market share. Furthermore, since the market is dominated by large companies with considerable resources and expertise, and advertising is of great importance, barriers to entry are very high.

44 In the market situation described by the Commission, a description which was not disputed in any substantial respect by the other parties to the proceedings, any company wishing to increase its market share will be strongly tempted, where the opportunity arises, to take control of a competitor. In such circumstances, any attempted take-over and any agreement likely to promote commercial cooperation between two or more of those dominant companies is liable to result in restriction of competition.

45 In such a market situation the Commission must display particular vigilance. It must consider in particular whether an agreement which at first sight provides only for a passive investment in a competitor is not in fact intended to result in a take-over of that company, perhaps at a later stage, or to establish cooperation between the companies with a view to sharing the market. Nevertheless, in order for the Commission to hold that an infringement of Article 85 has been committed, it must be able to show that the agreement has the object or effect of influencing the competitive behaviour of the companies on the relevant market.

46 The 1984 agreements and the undertakings given by Philip Morris and Rembrandt to the Commission prevent Philip Morris from having any representative on the board of directors or any other management body of Rothmans International and

limit its shareholding to less than 25% of the voting rights. Rembrandt's shareholding, on the other hand, represents 43.6% of the votes, which, because of the widespread distribution of the rest of the votes and in view of Rembrandt's representation in the management of Rothmans International, allows Rembrandt to continue to determine Rothmans International's commercial policy on the cigarette market.

47 Furthermore, unlike the 1981 agreements, the 1984 agreements do not contain any provisions regarding commercial cooperation or create a structure likely to be used for such cooperation between Philip Morris and Rothmans International, and the companies have undertaken not to exchange information which might influence their competitive behaviour. Subject to the provisions on the possible disposal by one or other of the parties of its shareholding in Rothmans International, which will be considered below, the 1984 agreements, supplemented by the undertakings given to the Commission, are therefore not sufficient to support the conclusion that the agreements have the object or effect of allowing one of the companies to influence the commercial behaviour of the other.

48 However, it must also be considered whether, in the circumstances of this case, Philip Morris's shareholding in Rothmans International requires the companies involved to take into consideration the other party's interest when determining their commercial policy, as the applicants argue.

49 The Commission submits that Rembrandt retains its interest in deriving the greatest possible profit from its investment in Rothmans International and that through its voting rights and its traditional management links with Rothmans International it is in practice able to control Rothmans International's commercial policy without taking into account Philip Morris's interests. Although Philip Morris has sufficient votes to block certain special resolutions, that possibility is too hypothetical to amount to a real threat which might have an influence on Rembrandt in the management of Rothmans International. There is no reason to suppose that the management and employees of Rothmans International do not have an interest in making that company as profitable as possible.

50 Although Philip Morris, because of its share in the profits of Rothmans International, has an interest in the success of that company, its first preoccupation must, according to the Commission, remain that of increasing the market share and turnover of its own companies. Philip Morris thus retains a considerable interest in limiting any increase in Rothmans International's market share by its own industrial and commercial efforts. The Commission therefore considers that the acquisition by Philip Morris of a minority shareholding in Rothmans International does not in itself result in any change in the competitive position on the Community cigarette market.

51 There is nothing in the evidence before the Court to invalidate that assessment by the Commission. In particular, there is no ground for the conclusion that the acquisition of a shareholding might result in a sharing of the market on the basis that Philip Morris, without itself losing market share, could concentrate on one specific sector of the market, thus allowing Rothmans International to increase its activities in another sector of the market.

52 Nor are there sufficient grounds for the conclusion that Philip Morris and Rothmans International cooperate outside the Community market in such a way as to affect their relationship on that market. The applicants argue only that there is such cooperation on markets in certain parts of the world, and the interveners assert that that cooperation concerns only agreements on the use of certain brand names belonging to the other party, which in their contention are entirely normal arrangements in the sector in question and are in fact used by the applicants. In those circumstances, it cannot be concluded that the agreements at issue are part of a policy of global cooperation between two multinational corporations on the world market for cigarettes.

53 The fact that the agreements at issue contain provisions on the possible sale of shares in Rothmans International by one or the other party and that those provisions envisage a possibility which might, if the surrounding circumstances remained unaltered, be contrary to Article 85 is not in itself sufficient to show that the object of the agreements is to restrict competition. It is true that the 1984 agreements replace agreements providing for shared control of Rothmans Holdings, which, in turn, had effective control over Rothmans International's

commercial policy, and that their substitution for those agreements did not result in any lowering of the price paid by Philip Morris, but it must be borne in mind that Philip Morris retained other benefits, in particular that of being able to prevent any competing company from taking control of Rothmans International, and obtained a considerable increase in its share of Rothmans International's profits. Although the background to the agreements at issue shows that Philip Morris contemplated a transaction going much further than a passive investment, the provisions of those agreements referring to a purely hypothetical situation do not permit the conclusion that the acquisition of a minority shareholding was the first stage of a plan intended to give it control of Rothmans International.

54 It must, however, be considered whether those provisions give rise to immediate anti-competitive effects and whether the Commission also took sufficient account of their potential effects.

55 The Commission does not consider that those provisions have any present influence on the competitive behaviour of the parties. Should it have in mind the possible disposal at some time of its shareholding in Rothmans International, Rembrandt has every interest in increasing the value of its investment by ensuring that Rothmans International competes effectively. Philip Morris, on the other hand, has an interest in limiting the price which Rembrandt might obtain for its shares in Rothmans International and thus has no reason to restrict its own efforts to obtain additional market share. Moreover, the possibility that employees of Rothmans International might subsequently be employed by Philip Morris is likely to encourage them to display their professional ability. Nor does the Commission think that Philip Morris's ability to place difficulties in the way of any disposal by Rembrandt of its shares in Rothmans International constitutes a real threat which might influence the normal management of Rembrandt and Rothmans International.

56 There is nothing in the evidence to lead the Court to disagree with the Commission's assessment. Moreover, the fact that the provisions in question create

obstacles to the purchase of an interest in Rothmans International by a third company cannot be regarded as a present restriction of competition on the market for cigarettes contrary to Article 85. First of all, as the interveners have submitted, provisions of this kind may be justified by the legitimate interest of the contracting parties in protecting their substantial investment. Secondly, in the circumstances of this case the fact that Philip Morris, without itself gaining control of Rothmans International, is now in a position to prevent any other competing company from gaining control cannot in itself amount to a restriction of competition.

57 With regard to the potential effects of the provisions in question, it is clear that the Commission has taken measures intended to prevent any such effects contrary to Article 85 of the Treaty. Philip Morris has undertaken to inform the Commission of any amendment, modification or supplement to the agreements and to notify the Commission within 48 hours if it should increase its shareholding in Rothmans International or in any way obtain 25% or more of the total voting rights in Rothmans International. Philip Morris has also undertaken, should the Commission so request following such notification, to put into effect a 'hold separate' arrangement regarding the interests of Philip Morris and Rothmans International in the Community tobacco market so as to ensure maintenance of the status quo for a period of three months, during which the Commission may examine the new situation from the point of view of Articles 85 and 86 of the Treaty.

58 It is true, as the applicants have emphasized, that those undertakings will not apply should Philip Morris obtain effective control of Rothmans International without increasing its voting rights, in particular in the event of the disposal by Rembrandt of its shares to at least 10 independent purchasers. In such a case (which seems the least likely hypothesis with regard to the disposal of Rembrandt's interest and assumes that Philip Morris would have failed to exercise its rights under those provisions), Philip Morris's control would be extremely tenuous inasmuch as it would not be able to prevent any subsequent concentration of the voting rights in the hands of another company. It must therefore be accepted that by means of the undertakings entered into by Philip Morris and Rembrandt the Commission has

reinforced its general powers of surveillance and control in such a manner as to prevent the provisions of the agreements concerning the subsequent disposal of the parties' shares in Rothmans International from having effects contrary to Article 85.

59 It thus follows from the foregoing considerations that examination of the applicants' complaints regarding the appraisal of the provisions of the agreements at issue has not shown that the Commission was wrong to hold that no anti-competitive object or effect had been established.

60 However, the applicants also submit that even in the event that the various elements of the agreements in question, viewed separately, should not be regarded as contrary to Article 85 (1), it is also necessary to consider whether those elements in combination produce anti-competitive effects.

61 Any examination of the effects of the agreements must indeed be based on an assessment of the agreements as a whole. The applicants do not assert that the Commission failed to make such an assessment but challenge the conclusion which the Commission arrived at on that point.

62 That involves an appraisal of complex economic matters, and it should be recalled that in its judgment of 11 July 1985 in Case 42/84 *Remia* v *Commission* [1985] ECR 2566 the Court held that although as a general rule it undertakes a comprehensive review of the question whether or not the conditions for the application of Article 85 (1) are met, its review of such appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers.

63 In the view of the Court, the evidence before it does not disclose any manifest error with regard to the circumstances existing when the contested decisions were adopted. As for the appraisal of the potential effects of the agreements at issue, it must be emphasized that the Commission has stated that it intends to follow closely any developments in the competitive situation between the parties and,

furthermore, that the applicants may at any time call for further scrutiny of the agreements when they are able to submit new evidence.

64 Consequently, the argument based on the alleged incorrect assessment of the agreements as a whole cannot be upheld. The submission regarding the application of Article 85 must therefore be rejected.

The application of Article 86

65 With regard to Article 86 of the Treaty, it is no longer necessary, in the light of the findings set out above, to consider to what extent Rothmans International occupies a dominant position in a substantial part of the common market. An abuse of such a position can only arise where the shareholding in question results in effective control of the other company or at least in some influence on its commercial policy. As appears from the discussion concerning the application of Article 85, it has not been established that the 1984 agreements have any such effect. The submission based on Article 86 must therefore also be rejected.

C — *The statement of reasons for the decisions at issue*

66 The applicants argue that the decisions at issue are invalid because the Commission did not state precisely how it arrived at its conclusion. They submit that the decisions go much further than previous decisions of the Commission and lay down new principles, so that the Commission was under an obligation to explain its reasoning in a full and complete manner.

67 The applicants add that the Commission had a particular obligation to give a full and complete account of its reasoning with regard to those elements of the 1984 agreements which are taken over from the 1981 agreements, since in the contested decisions it altered its previous position on the 1981 agreements as set out in the statement of objections.

68 Finally, the applicants argue that although the decisions added new arguments which were not contained in the letters sent pursuant to Article 6 of Regulation

No 99/63, they did not answer certain of the observations submitted by the applicants in reply to those letters.

69 As the Court has consistently held, the extent of the duty to provide a statement of reasons prescribed in Article 190 of the Treaty depends on the nature of the measure in question and on the circumstances in which it was adopted.

70 In the case of a measure rejecting an application pursuant to Article 3 of Regulation No 17/62, it is sufficient that the Commission should state the reasons for which it did not consider it possible to hold that an infringement of the rules on competition had occurred. In particular, the Commission is not obliged to explain any differences in relation to the statement of objections, since that is a preparatory document containing assessments which are purely provisional in nature and are intended to define the scope of the administrative proceedings with regard to the companies against which they are brought.

71 It is true that in its judgment of 26 November 1975 in Case 73/74 *Papier peints* v *Commission* [1975] ECR 1491 the Court held that where, in a well-established line of decisions, one decision goes appreciably further than the previous ones, the Commission must give an account of its reasoning. In this case the contested decisions concern agreements of a type which had not been dealt with in the previous administrative practice of the Commission; they do not lay down new principles but are limited essentially to an examination of the special features of the agreements in question.

72 With regard to the complaint concerning the alleged failure to reply to the applicants' arguments, it should be recalled that in its judgment of 17 January 1984 in Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, the Court emphasized that although under Article 190 of the Treaty the Commission is required to set out the circumstances justifying the adoption of a decision and the legal considerations which have led the Commission to adopt it, that article does not require the Commission to discuss all the matters of fact and of law which may have been dealt with during the administrative proceedings.

73 In this case, therefore, it is sufficient that the Commission should indicate the circumstances and the legal considerations on the basis of which it found it

impossible to hold that the 1984 agreements constituted an infringement of the competition rules. Viewed in that light, the statement of the reasons for the contested decisions cannot be regarded as insufficient.

74 This last submission must therefore be rejected, and the applications must accordingly be dismissed in their entirety.

Costs

75 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicants have failed in their submissions, they must be ordered jointly and severally to pay the costs, including the costs of the interveners.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

(1) Dismisses the applications;

(2) Orders the applicants jointly and severally to pay the costs, including the costs of the interveners.

Due Rodríguez Iglesias

Koopmans Bahlmann Kakouris

Delivered in open court in Luxembourg on 17 November 1987.

P. Heim
Registrar

O. Due
President of the Sixth Chamber