REPORT FOR THE HEARING
delivered in Joined Cases 142 and 156/84 *

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I — The parties

1. *Rembrandt Group Limited* (hereinafter referred to as 'Rembrandt') is a South African investment company. The group's principal sources of income are its holdings in the tobacco and liquor industries on a worldwide basis. About half Rembrandt's income comes from those industries. Rembrandt does not sell tobacco products within the EEC. The group also has interests in many other sectors.

2. *Rothmans Tobacco (Holdings) Ltd* (hereinafter referred to as 'Rothmans Holdings') is a wholly owned subsidiary of Rembrandt and its registered office is in the United Kingdom. Its principal activity is that of an investment company, and it has a very substantial holding in Rothmans International plc.

3. *Rothmans International plc* (hereinafter referred to as 'Rothmans International') is a public limited company whose registered office is in the United Kingdom. It forms, with its subsidiaries, a group whose principal activities are the manufacture and sale of cigarettes and other tobacco products. The group's sales revenue in 1981 was around UKL 2 400 million, 90% of which was attributable to tobacco; half the group sales were in the EEC. Rothmans International's share in the EEC cigarette market is 12-15%, but in the Benelux countries its market share is nearly 50%.

4. *Philip Morris Incorporated* (hereinafter referred to as 'Philip Morris') is an American company which produces mainly cigarettes, beer and soft drinks. Its revenues from tobacco products account for some 65% of its total revenues. Philip Morris's share of the EEC cigarette market is between 11 and 14% (a little smaller in the Benelux market).

5. *R. J. Reynolds Industries Inc.* (hereinafter referred to as 'RJR') is an American company. It manufactures cigarettes but is also involved in a wide range of other activities, including Kentucky Fried Chicken and Del Monte preserved fruit and vegetables. Its share in the EEC cigarette market is small, around 3-4%, but its market share is about 10% in the Netherlands and in the Federal Republic of Germany.

6. *British American Tobacco Company Ltd* (hereinafter referred to as 'BAT'), the largest tobacco manufacturer in the western world, is a company established in the United Kingdom. It also engages in a range of commercial activities and insurance business. Its share in the cigarette market in the EEC as a whole is around 10%; in Belgium and Luxembourg it is 10%, and in Germany and the Netherlands it is about 25%.

II — The facts

Prior to the events involved in this case, Rembrandt owned all the capital of Rothmans Holdings, which in turn owned 43.8% of the subscribed capital of Rothmans International. The shares held by Rothmans Holdings gave it 58.3% of the voting rights in Rothmans International, but its voting right was limited by the articles of association of Rothmans International to half the votes less one. The Rothmans International shares not held by Rothmans Holdings were widely held by the public and Rothmans Holdings effectively exercised control over Rothmans International. Moreover, it held all the cumulative preference shares in Rothmans International, which gave it predominant voting

rights with respect to resolutions of exceptional importance.

1. *The 1981 agreements*

After the failure of negotiations with the applicants concerning the sale of a holding of Rothmans International shares, Rembrandt concluded with Philip Morris in April and May 1981 certain agreements whereby Philip Morris became the owner of half the shares issued by Rothmans Holdings and half the convertible Rothmans International bonds held by Rembrandt, and obtained certain trade-mark rights in the Americas and South Africa. The rest of the shares issued by Rothmans Holdings remained in Rembrandt's hands. In consideration of the rights deriving from the agreements, Philip Morris paid Rembrandt USD 350 million.

Each party also granted the other a 'right of first refusal' which could be exercised in the event of either party proposing in good faith to assign to a third party, under normal market conditions, all or part of its interest in Rothmans Holdings or its Rothmans International shares or bonds. In the event of further acquisitions of Rothmans International shares or bonds by either of the parties, that party was obliged to arrange for the other party to make an equal acquisition.

In addition, the agreements entitled Rembrandt and Philip Morris each to appoint three members to Rothmans Holdings's six-man board of directors, the chairman thereof being nominated and elected by mutual agreement of the parties and having no casting vote.

The agreements provided that since the Rothmans International and Philip Morris groups would continue to compete in certain key markets and both parties would respect the rights of all shareholders, the information regarding Rothmans International's affairs made available to Philip Morris would exclude information of a competitive nature.

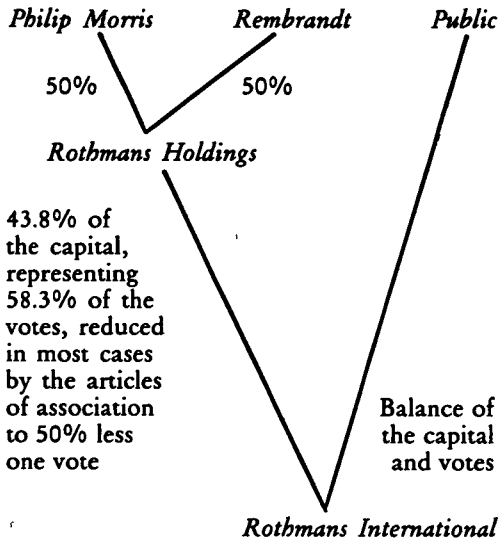
Moreover, Rembrandt retained the management functions which it had exercised until then, in so far as they related to the commercial activities of Rothmans International.

However, the agreements indicated an intent on the part of Philip Morris and Rothmans International to cooperate, which was to be found in the following clause:

'The parties will endeavour to exploit the potential benefits which would be derived from cooperation in areas such as joint distribution, joint manufacture, technical know-how and research, etc. The seller will cause Rothmans International to join such efforts of cooperation.'

That intent was also reflected in a separate 'partnership' agreement, which was in force between September 1981 and April 1983.

Thus, following those agreements, Philip Morris acquired an indirect share of 21.9% of the profits of its competitor Rothmans International, and the holdings of Rembrandt and Philip Morris in the capital of Rothmans International were as follows:



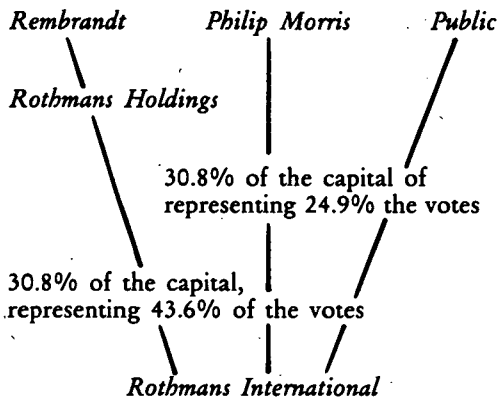
2. *The 1984 agreements*

Following complaints lodged by the applicants, amongst 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 EEC Treaty.

After the Commission suggested that Philip Morris and Rembrandt should submit amendments to remove the cause for its objections, they agreed to amend their 1981 agreements.

Under the new agreements, which were finally concluded in 1984, Philip Morris abandoned its half interest in Rothmans Holdings in exchange for a direct shareholding in Rothmans International. That holding is 30.8%, representing 24.9% of the votes, whilst Rembrandt's interest, held on its behalf by Rothmans Holdings, now also constitutes, after the conversion of certain bonds, 30.8%, but it represents 43.6% of the votes.

Moreover, Philip Morris, which still holds certain convertible bonds, has agreed not to increase its shareholding in Rothmans International in such a way that its voting power would reach 25% or more. Thus, the distribution of Rothmans International shares and votes is as follows:



The agreements also contain the following clauses, giving each of the parties a right of first refusal if either of them assigns its shareholding:

(i) Rembrandt may dispose of its holdings only in their entirety and after giving Philip Morris first refusal and detailed information about the prospective purchaser. If Philip Morris does not take up this offer, Rembrandt may dispose of its holdings only to one independent purchaser or to 10 or more purchasers independent of each other and of Rembrandt, provided that no such purchaser would thereby

acquire more than 10% of the voting rights in Rothmans International.

(ii) If Rembrandt is to dispose of its holdings to a single purchaser, Rembrandt must cause that purchaser to make an identical offer for Philip Morris's holdings.

(iii) Prior to any disposal by Rembrandt of its holdings, Rembrandt must offer to exchange with Philip Morris one half of its (Rembrandt's) ordinary (four votes) shares for an equal number of 'B' ordinary (one vote) shares. Alternatively, at Philip Morris's request, Rembrandt must seek to cause Rothmans International to convert all the four-vote shares into one-vote shares.

(iv) Philip Morris may dispose of its holdings only in their entirety and after giving Rembrandt first refusal and detailed information about the prospective purchaser and purchase. If Rembrandt does not take up this offer, Philip Morris may dispose of its holdings only (a) to one independent purchaser, or (b) to 10 or more purchasers independent of each other and of Philip Morris, provided that no such purchaser could thereby acquire more than 10% of voting rights in Rothmans International.

(v) If Rembrandt does not exercise its right of first refusal in the event of a disposal by Philip Morris, Philip Morris may designate a person buying a number of one-vote shares in Rothmans International equal at least to one-half of the number of Rembrandt's four-vote shares, who will have the right to direct the exercise of three-quarters of the votes attaching to one-half of Rembrandt's four-vote shares, except as regards the appointment or removal of any director of Rothmans International. That person and his successors in title will succeed to Philip Morris's rights set out above.

At the same time, Philip Morris and Rembrandt gave the following undertakings to the Commission:

(i) Philip Morris undertakes to inform the Commission about and provide a copy of any amendment, modification or supplement made to the agreements promptly after such amendment, modification or supplement becomes effective.

(ii) Philip Morris also undertakes to notify the Commission within 48 hours if it or its subsidiaries should at any time increase their holdings of shares in Rothmans International or otherwise obtain voting rights in any way such that their total holding carries 25% or more of the total voting rights attaching to the shares in Rothmans International, to enable the Commission to review, if it deems this to be necessary, the competitive situation in the tobacco industry in the European Community as existing as a result of that situation and to determine what concerns, if any, the Commission might have. If requested by the Commission following such notice, Philip Morris will put into effect, for three months following such increase, an appropriate 'hold separate' agreement with regard to Rothmans International's and Philip Morris's respective tobacco interests in the European Community that will assure

maintenance of the *status quo*, during which period the Commission can determine what further measures, if any, are appropriate.

(iii) Philip Morris undertakes not to have any representative on the board or any management body of Rothmans International or any member of the Rothmans International group having an interest in tobacco operations in the European Communities.

(iv) Philip Morris also undertakes neither to seek nor accept from Rothmans International or Rembrandt any information regarding the Rothmans International group that might influence the competitive behaviour of any Philip Morris group company within the European Community or which might otherwise affect the Philip Morris group's competitive activities towards the Rothmans International group or the competitive relationship between the Philip Morris and Rothmans International groups within the European Community.

(v) Philip Morris may at any time — but no more frequently than once a year — call upon the Commission to review the situation in order to determine, within 90 days, whether the undertakings are still required to ensure the maintenance of competition in the tobacco industry in the EEC. In any event, the sale or other disposal by Philip Morris and its subsidiaries of their total holding of Rothmans International shares will terminate those undertakings.

(vi) Rembrandt undertakes not to induce Rothmans International to make available to Philip Morris any information which Philip Morris is obliged by its undertaking not to seek or accept from Rothmans International.

The 'hold separate' arrangement which Philip Morris undertook to put into effect in certain circumstances displays the following characteristics:

(i) The agreement must last for three months as from the date of increase of the voting rights referred to above.

(ii) During that period, Philip Morris will not merge, or take steps in preparation to merge, its tobacco interests in the European Community with the tobacco interests of the Rothmans International group in the European Community.

(iii) During that period, Philip Morris will take no action, directly or indirectly, tending to reduce the Rothmans International group's ability to compete effectively as a viable and independent business in the European Economic Community tobacco market.

(iv) During that period, Philip Morris will preserve and protect all assets used by the Rothmans International group in the European Community tobacco market, will refrain from any action that would diminish their value and will not dispose of such assets in the ordinary course of business.

(v) During that period, the tobacco marketing operations of the Rothmans International group in the European Community will be kept separate from those of the Philip Morris Group. In particular, sales organizations will not be merged, and all marketing departments will be kept separate; advertising budgets will not be combined and existing arrangements with advertising agencies will continue.

(vi) During that period, Philip Morris will not seek to introduce policy changes in regard to any aspect of marketing tobacco products in the European Community by the Rothmans International group.

(vii) During that period, Philip Morris will not replace any director or executive of any Rothmans International company marketing tobacco products in the European Community.

(viii) During that period, Philip Morris will not participate directly or indirectly in the deliberations or decisions of the Rothmans International board or any other Rothmans International management body relating to the conduct of Rothmans International's tobacco operations in the European Community.

(ix) During that period, Philip Morris will refrain from any exchange of competitive information concerning or affecting the EEC tobacco market between the Rothmans International group's and the Philip Morris group's management in charge of tobacco operations in the European Community.

3. *The administrative procedure*

On 4 May 1981, RJR filed a complaint with the Commission against the 1981 agreements, alleging that they had been concluded between Philip Morris and Rembrandt in breach of both Article 85 and Article 86 of the Treaty.

On 20 January 1982, BAT filed a similar complaint.

On 26 May 1981, the 1981 agreements between Philip Morris and Rembrandt were notified to the Commission with a view to obtaining a negative clearance or an exemption.

On 19 May 1982 the Commission, considering that the 1981 agreements infringed both Article 85 and Article 86 of the Treaty, initiated the procedure under Article 3 (1) of Regulation No 17, issuing a statement of objections to Philip Morris and Rembrandt, a copy of which was sent to the applicants after the deletion of the parts in respect of which Philip Morris and Rembrandt claimed confidentiality. *The main content of the statement of objections was as follows:*

The Commission made the preliminary observation that the acquisition by Philip Morris of shares and bonds in Rothmans International placed Philip Morris in a position of absolute parity with Rembrandt. It then stated that from 1976 to 1980 the Community cigarette market was stagnant in volume terms and oligopolistic, and in the absence of significant price competition or research breakthroughs, advertising and corporate acquisition came to be seen as the principal means of increasing market share. Several studies carried out in recent years showed that advertising, rather than

increasing overall cigarette sales and consumption, served to maintain or increase market share. Furthermore, since the market was dominated by large undertakings with considerable resources and expertise, and advertising was of paramount importance, barriers to entry were very high.

As regards the acquisition of shares in Rothmans Holdings by Philip Morris, the Commission considered that the agreement had the effect of restricting competition within the meaning of *Article 85 (1)* of the Treaty. The Philip Morris and Rothmans International groups of companies were normal competitors in the Community cigarette market prior to the events giving rise to the proceedings. When, as a result of an agreement, two actual or potential competitors together owned a subsidiary which sold its products on the same market, the fact that it was contrary to the economic interests of each of the parent companies to compete with their subsidiary (and therefore *pro tanto* with each other) was an effect of the agreement on competition within the meaning of Article 85 (1).

Moreover, Rothmans Holdings's holding, representing 43.8% of the issued equity capital of Rothmans International and 58.3% of the voting rights in Rothmans International, gave it, despite the special rule purporting to deny it an automatic majority, effective control over the affairs of Rothmans International.

According to the Commission, Rothmans International's conduct on the market was affected by the agreements giving rise to the proceedings and Philip Morris no longer had any interest in competing against Rothmans International's interests. Rembrandt had no interest in competing against Rothmans International and, as a direct result of the agreement, had ensured that Philip Morris, previously an important competitor, would not do so either. Thus, by virtue of the relationships created between the companies involved, their conduct on the Community tobacco market was unlikely to be as it was before the acquisition of shares or as it would have been had that acquisition not taken place.

The Commission stated that Philip Morris and Rothmans International would have innumerable opportunities and inducements to coordinate their market conduct. By virtue of their new relationship, they would be acting against their common and their separate interests if they did not cooperate in the planning and execution of market strategies concerning the launching of new brands, advertising campaigns or expansion or retrenchment in a given area, or in the coordination of pricing and marketing policies leading to market allocation. In any case, even unilateral action by one undertaking would take account of the interests and plans of the other. The clearly foreseeable result of this coordination would be to restrict competition.

Even in the absence of the other features of the overall transaction dealt with below, the acquisition by an undertaking of a large stake in the holding company controlling a competing undertaking was likely to restrict competition. Where the undertakings which formerly engaged in normal competition still operated in the market, they would no

longer compete in so thoroughgoing a manner as deliberately to harm each other's interests.

Thus, an undertaking which had made a major direct or indirect investment in another undertaking would be certain to refrain from any action which might harm it, lest the value of the investment should be endangered. Moreover, the undertaking making the investment would acquire an influence in the management and conduct of the undertaking in which it had invested, enabling it to ensure that its own business interests were not injured by the activities of the latter undertaking. Similarly, an undertaking in which such an investment had been made could not but adapt its conduct and plans to take account of the interests of the investor and the former controlling shareholder in that undertaking could not exercise its remaining rights and powers without regard to the interests and policies of the acquirer.

As a result of its 50% holding in Rothmans Holdings, which in turn controlled Rothmans International, Philip Morris was bound to coordinate its business activities on the Community tobacco market to an appreciable extent with those of Rothmans International. Even if Philip Morris's share acquisition was intended to be a passive investment, the fact remained that its effect was inevitably restrictive of competition.

The Commission also stated that Philip Morris's and Rembrandt's joint control of Rothmans Holdings was reinforced by the agreement concerning the appointment of members of the board of directors and that the lack of a chairman's casting vote ensured that no board decision might be taken without the consent of both of them. In the light of Rothmans Holdings's control of Rothmans International, the power to appoint directors served to strengthen the anti-competitive effect of the share acquisition. The provisions granting rights of first refusal or designed to maintain the parity of interest on the part of Philip Morris and Rembrandt in Rothmans Holdings ensured that no major uncoordinated manoeuvres were possible.

The Commission inferred from the provisions relating to the share acquisition that Philip Morris, Rembrandt and Rothmans International were bound to coordinate their conduct on the Community cigarette market and that each of them was bound in its own individual interest to take account unilaterally of the concerns and activities of the others. That inevitably had a restrictive effect on competition which was reasonably foreseeable by the parties and the conclusion might therefore be drawn that the provisions had as their object the restriction of competition.

As regards the partnership agreement between Philip Morris and Rembrandt, the Commission stated that, in the continued performance of its management role in Rothmans International, Rembrandt would not fail, in the light of its contractual relations with Philip Morris, to take account of Philip Morris's interests. The relations between Philip Morris and Rothmans International were such that they must, in their own interests, take account of each other's views and intentions. Similarly, if many specific clauses of the partnership agreement

were to have the meaning normally ascribed to the words in which they are couched, information about Rothmans International likely to be of interest to a competitor would necessarily be made known to Philip Morris.

The Commission concluded, referring also to the clause concerning the exploitation of the potential benefits of cooperation between the parties, that the partnership agreement was clearly intended to bring about a coordination of the activities of two competing undertakings in the Community cigarette market. Its object was therefore to restrict competition and to buttress the restrictions mentioned above.

Finally, the Commission stated that several subsidiaries of Philip Morris and Rothmans International carried on business in the common market, and that business would therefore be appreciably affected by the agreements.

As regards *Article 85 (3)* of the Treaty, the Commission saw no grounds for a finding that the agreements contributed to the improvement of production or distribution of cigarettes, promoted technical or economic progress or made available to consumers a fair share of any possible benefit.

Thus, the Commission stated that at present there were no grounds for the grant of an exemption under Article 85 (3) in respect of either of the restrictions established, which, individually and collectively, were in breach of Article 85.

As regards *Article 86*, the Commission was of the opinion that Rothmans International, whose 1980 market share was 47.8% in Belgium and Luxembourg and 49% in the Netherlands, had a dominant position in two substantial parts of the common market.

In view of the fact that the Rothmans International group's market shares in the Benelux countries were coupled with the back-up resources and strength of the group, whose market share in the common market as a whole was greater than that of its competitors, the group was able to act with an appreciable degree of independence of its competitors and customers.

The Commission stated that, prior to the conclusion of the agreements in question, Rembrandt controlled Rothmans International through Rothmans Holdings. Rothmans International's dominant positions might therefore be imputed to Rembrandt. The latter abused its dominant position by concluding the agreements in question with Philip Morris, which brought about an intensification of Rothmans International's dominance. Rembrandt ensured that Philip Morris, which held market shares in 1980 of 8.7% in Belgium and Luxembourg and 7% in the Netherlands, would be bound to coordinate its business activities with those of Rothmans International to an appreciable extent. Rembrandt thus caused the emasculation of Philip Morris as a competitive force *vis-à-vis* Rothmans International. By way of example, the Commission referred to the judgments of 21 February 1973 in Case 6/72 *Commission* v *Europemballage and Continental Can*, [1973] ECR 215 and of 13 February 1979 in Case 85/76 *Commission* v *Hoffmann-La Roche* [1979] ECR 461, in which the Court held that an undertaking abuses its dominant position if it strengthens it in such a way as to reach a degree of dominance which substantially fetters competition or impairs the effective competitive structure of the common

market. In this case, Rothmans International's dominant position on the two relevant markets and its reinforcement, in coordination with the strength and resources of Philip Morris, substantially fettered residual competition. The competitive structure of two substantial parts of the common market was thus further weakened.

The joint force of those two undertakings committed to anti-competitive coordination enabled them to act with an appreciable degree of independence of competitors and customers. Philip Morris and Rembrandt were therefore jointly dominant in two substantial parts of the common market. Philip Morris abused its dominant position by buying Rothmans International shares, thereby triggering the cooperation agreement and intensifying its policy of coordination with Rothmans International in the relevant markets. The strengthening of joint dominance thus brought about substantially fettered competition.

The abuse by the two parties to the agreements affected trade between Member States and was therefore incompatible with the common market.

In the letter accompanying the statement of objections, the Commission informed Rembrandt and Philip Morris that there might thus be grounds for finding that they had infringed the provisions of Articles 85 and 86 of the Treaty and that it proposed, subject to any arguments which they might submit, to issue a decision calling upon them to bring the infringements to an end in accordance with Article 3 of Regulation No 17.

Pursuant to Article 3 of Regulation No 99/63/EEC 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), the Commission gave Rembrandt and Philip Morris an opportunity to submit their views in writing on the objections raised against them and also gave them an opportunity to express their views orally pursuant to Article 7 of Regulation No 99/63.

In September 1982, Philip Morris and Rembrandt replied in writing to the statement of objections. After receiving the written observations of RJR on the replies of Philip Morris and Rembrandt, the Commission arranged for a hearing on 5 and 6 October 1982, attended by the applicants.

After the hearing, RJR submitted an *aide-mémoire* to the Commission on 28 October 1982. In November, a document was received from Philip Morris containing observations on the matters discussed at the hearing and, in December, a second *aide-mémoire* from RJR was received by the Commission.

In May 1983, the Commission notified the applicants that Philip Morris and Rembrandt had amended the 1981 agreements. In the belief that Philip Morris was bringing political pressure to bear upon the Commission, BAT sent several letters of protest to the Commission. At the request of RJR, a meeting was held in July 1983, followed by a second meeting on 15 September 1983.

Pursuant to Article 6 of Regulation No 99/63, the Commission, by letter of 16 December 1983, informed the applicants that there were no longer sufficient grounds for granting their applications and it invited them to submit any further observations in writing. Referring to earlier correspondence and the hearing in October 1982, the

Commission informed the applicants that Philip Morris and Rembrandt had abandoned or substantially modified the agreements. It added that under the new agreements which Philip Morris proposed to conclude with Rembrandt, and of which copies were enclosed, Philip Morris would own shares in Rothmans International carrying with them 24.9% of the votes in shareholders' meetings.

After explaining the content of the new agreements, the Commission stated that Philip Morris and Rembrandt no longer had machinery to coordinate their activities in respect of the Rothmans International group and that Philip Morris's position as a minority shareholder in Rothmans International, unaffiliated with any other shareholder, did not seem to give rise to apprehension of any appreciable anti-competitive impact on its or Rothmans International's behaviour in the Community cigarette market. In particular, Philip Morris and Rembrandt had abandoned their partnership agreement and the instrument of corporate control which gave Philip Morris influence in Rothmans International. There was therefore no longer any restriction of competition within the meaning of Article 85 of the Treaty or any abuse of dominant positions within the meaning of Article 86.

The Commission also stated that the agreements to be concluded contained provisions relating to disposal and acquisition of Rothmans International shares, but that it had informed Philip Morris that implementation of those clauses was, under the then foreseeable circumstances, incompatible with the competition rules. It stated that the parties had given undertakings enabling the Commission to take appropriate measures urgently, if the need arose, in the event of any future change in the structure of ownership of Rothmans International.

In response to the Commission's Article 6 letter, the applicants stated that the Commission's failure properly to set out its reasons for rejecting their complaints constituted a ground for annulling that letter and/or a breach of an important procedural safeguard which, as such, would vitiate any subsequent decision by the Commission to maintain the conclusion contained in that letter.

The Commission's opinion was incompatible with the views expressed in its statement of objections, since the matters regarded as objectionable by the Commission in the initial agreements remained in the new agreements.

In the first place, the applicants were of the opinion that the substitution of Rothmans International shares for Philip Morris's Rothmans Holdings shares was open to the same objections as those raised by the Commission against the original agreements. Philip Morris's indirect 22% interest in Rothmans International would thereafter become a direct interest of 30.8%. Any objection arising from Philip Morris's having an interest in the profits of one of its competitors had, therefore, to exist *a fortiori* in respect of the new agreements. The acquisition by an undertaking of a large stake in a competing undertaking was likely in itself to restrict competition. Where the undertakings which formerly engaged in

normal competition still operated in the market, they would no longer compete in so thoroughgoing a manner as deliberately to harm each other's interests.

In the second place, the applicants observed that the Commission had not shown that Philip Morris's and Rothmans International's intention to cooperate had disappeared. On the contrary, that cooperation was already growing in numerous areas outside the EEC. Management personnel were frequently transferred from one country to another in the course of their careers and it was illusory to expect that the habits of cooperation acquired over the years in locations outside the EEC would suddenly be transformed into competition and refusal to inform one another of dealings once the same persons were posted to the EEC.

In the third place, the pre-emptive rights and other special arrangements in relation to future dealings in shares and convertible bonds agreed between Rembrandt and Philip Morris confirmed the mutuality of control and severely restricted Rembrandt's freedom. In particular, an agreement which gave Philip Morris an opportunity unlawfully to acquire further Rothmans International shares at a later stage was in breach of Articles 85 and 86 of the Treaty.

Lastly, the applicants claimed that the undertakings obtained by the Commission were inadequate: they could not prevent an infringement of Community law because they applied only after an unlawful act such as, for example, an increase by Philip Morris of its shareholding in Rothmans International.

By letters dated 22 March 1984, which purported to be 'decisions', the Commission, referring to its Article 6 letters and the applicants' replies to those letters, informed the applicants that their complaints under Article 3 (2) of Regulation No 17 had been rejected and that it was closing the files relating thereto. The Commission also stated:

'*Article 85*

21. It has not proved possible to establish that the agreements, when analysed in their legal and factual contexts and economic framework, have as their object or effect the distortion of competition within the common market.

22. Whereas the original agreements gave Philip Morris a power of veto over an effective majority of shares in Rothmans International by means of the institutional mechanism of the holding company, Philip Morris is, under the new agreements, no more than a minority shareholder.

23. Several provisions of the new agreements are designed to enable Philip Morris either (i) to take eventual control of Rothmans International, or (ii) to re-establish itself in a position of parity with Rembrandt in the event of a sale by Rembrandt to one or more third parties, or (iii) to sell to a designated third party shares worth 34.5% of the votes in Rothmans International.

24. While these provisions give Philip Morris a possibility of modifying in the future its status as a minority shareholder in order to obtain control of Rothmans Inter-

national, their existence does not at present have the effect of distorting competition within the meaning of Article 85.

25. Rembrandt will, under the new arrangements, be able to vote its considerable holding in Rothmans International without considering Philip Morris's view and is, in practice, able to control Rothmans International through its 43.6% share of the votes and traditional management links with the company. There is no reason to believe that it is not in Rembrandt's interest to seek to make Rothmans International as successful and profitable a company as possible.

26. While Philip Morris would not normally wish to endanger the value of its present investment in Rothmans International, in the specific circumstances of this case, it retains a considerable interest in checking by its own industrial and commercial efforts any advance in Rothmans International's market share in the common market. This is notably because Philip Morris will want to be in the best possible financial position to exercise its option to buy additional shares in Rothmans International should the Commission in the future raise no objections against the exercise of this option in the context of a changed market situation.

27. Furthermore, the Commission has obtained undertakings regarding future conduct which are set out below in paragraph 30 and will enable it to take any appropriate action should infringements of Community law occur through the implementation of the provisions concerned. Thus the Commission having already taken proceedings and sent the abovementioned statement of objections to the parties, it is clear that were the parties to return to a position similar to that objected to in the statement of objections, the Commission will take the necessary steps to ensure that the parties bring any infringements to an end.

28. In these circumstances, the conclusion is not warranted that the new agreements give rise to an infringement of the competition rules.

Article 86

29. An abuse of a dominant position within the meaning of Article 86 cannot be said to have taken place where the investing company is unable to exercise control over the conduct of the company in which it has invested. In this case, for the reasons given above, Philip Morris is not, under the new arrangements, in a position to control Rothmans International's affairs and accordingly there is no infringement of Article 86.'

The undertakings

'30. . . . .'

Conclusion

'31. As the Court of Justice has stated recently in its judgment of 17 January 1984 in Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission* ECR 19, paragraph 52, the Commission's administrative procedure gives the undertakings concerned an opportunity to bring their agreements and practices into line with the competition rules of the EEC Treaty.

32. In the case at hand, Philip Morris and Rembrandt have agreed to modify substantially their previous arrangements and to remove the mechanism enabling Philip Morris to exercise decisive influence over Rothmans International. Philip Morris becomes no more than an independent minority shareholder in Rothmans International.

33. In the circumstances of this case and for the reasons set out above, the Commission has determined that the new agreements do not infringe Article 85 or Article 86 of the EEC Treaty. Moreover, it is not considered appropriate to reach a decision on their original agreements which have been substantially modified.

. . . '.

III — Procedure before the Court

On 4 June 1984, BAT brought an action against the Commission's decision of 22 March 1984 (Case 142/84).

On 20 June 1984, RJR brought an action against the same decision (Case 156/84).

Since Cases 142/84 and 156/84 were related, on 26 September 1984 the Court, pursuant to Article 43 of the Rules of Procedure and at the request of the Commission, ordered that the cases should be joined for the purposes of the oral procedure and judgment.

By orders of 28 November 1984, the Court allowed Rembrandt and Philip Morris to intervene in support of the Commission.

By order of 18 June 1986, the Court dismissed an application by the applicants for an order that the Commission should produce certain documents and parts of documents which it considered to be covered by business secrecy and which it deleted when notifying the remainder of the documents to the applicants.

The Court considered all the documents and parts of documents of which the applicant sought production as concerning the 1981 agreements. In the Court's view, those agreements were relevant only in so far as they indicated the initial intentions of the parties to the agreements and the documents before the Court already contained sufficient information in that regard.

By the same order, the Court also dismissed the application by RJR requesting, in essence, that the Commission should be called upon to submit to the Court all documents in its possession which were likely to reveal the reasons for which it decided formally to prohibit the 1981 agreements and for which it arrived at the conclusion that the 1984 agreements did not fall within the prohibition contained in Article 85 (1) of the Treaty.

In dismissing the application, the Court stated that such an examination constituted an exceptional measure of inquiry and that the application for it presupposed 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.

The Court pointed out that neither of the applicants had submitted that there had been a misuse of powers. Furthermore, examination of the grounds put forward in the application of RJR disclosed no conclusive arguments to that effect. Moreover, according to the previous decisions of the Court, the statement of objections was a procedural document of a preparatory nature intended only for the undertakings against which the procedure was initiated with a view to enabling them to exercise effectively their right to a fair hearing. For that reason, the applicants' contention that there was 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 had not given a proper explanation of that contradiction in the statement of the reasons on which the decision was based, did not constitute a ground for suspecting the existence of covert reasons extraneous to Community law. The mere fact that the Commission held separate meetings with the parties to the agreements likewise did 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.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

By decision of 18 June 1986 the Court assigned the cases to the Sixth Chamber.

IV — Conclusions of the parties

1. In *Case 142/84, the applicant, BAT,* claims that the Court should:

(a) declare the application admissible;

(b) declare void the Commission decision of 22 March 1984;

(c) order the Commission to take a new position with respect to the applicant's complaint taking into account the decision of the Court of Justice;

(d) order the Commission to pay the costs.

2. In *Case 156/84, the applicant, RJR,* claims that the Court should:

(a) declare void the Commission decision of 22 March 1984;

(b) order the Commission to take the necessary measures to comply with the judgment of the Court;

(c) order the Commission to pay the costs;

(d) in any event, adopt such other measures and such other orders, if any, as may to the Court seem just or necessary.

3. The *Commission* contends that the Court should:

(a) dismiss the applications;

(b) order the applicants to pay the costs.

4. *Rembrandt,* intervening in support of the Commission, contends that the Court should:

(a) declare the applications inadmissible;

(b) in the alternative, dismiss the applications;

(c) order the applicants to pay the costs.

5. *Philip Morris*, also intervening in support of the Commission, contends that the Court should:

(a) dismiss the applications;

(b) order the applicants to bear the costs incurred by Philip Morris as intervener.

V — Submissions and arguments of the parties

A — *Admissibility*

(a) *Rembrandt* maintains that it is entitled to raise the question of admissibility (see judgment of 22 March 1961 in Joined Cases 42 and 49/59 *Snupat* v *High Authority* [1961] ECR 53). It claims that the applications are inadmissible in both cases. In the alternative, it requests that the Court consider the question of admissibility of its own motion.

Rembrandt states that the letter of 22 March 1984, although addressed to the applicants, does not, as far as they are concerned, constitute a decision under the second paragraph of Article 173 of the Treaty because it has no legal effects on the applicants and brings about no change in their legal position. It challenges the view that an applicant acquires *locus standi* under the second paragraph of Article 173 of the Treaty merely because the Commission has sent him a final letter of rejection, irrespective of the form that letter takes. The 'legitimate interest', a term employed by the Court in its judgments of 25 October 1977 in Case 26/76 *Metro* v *Commission* [1977] ECR 1875, of 11 October 1983 in Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045 and of 4 October 1983 in Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, should therefore be the same as the concept of 'direct and individual concern' under the second paragraph of Article 173 of the Treaty and the applicant in question should establish that he is directly and individually concerned by the Commission's decision to close the file in the administrative procedure. However, neither BAT nor RJR has established that Philip Morris's minority shareholding in Rothmans International, even though accompanied by a right of first refusal, is of direct and individual concern to them, and that situation is clearly distinct from a refusal to supply the complainant, as in the *Metro* and *Demo-Studio Schmidt* cases mentioned above. The mere existence of competition between two undertakings is insufficient to establish 'direct and individual concern' (see judgment of 10 December 1969 in Joined Cases 10 and 18/68 *Eridania* v *Commission* [1969] ECR 459).

The rules on admissibility should not be relaxed because: RJR has admitted that it is no worse off and BAT's situation is no different; the Commission has the power to reopen the file in the event of a new complaint; settlements should be facilitated and the interveners are entitled to judicial protection.

(b) The *Commission* acknowledges that it wrote the letter of 22 March 1984 in the form of a 'final decision' on the applicants' complaints. It does not oppose the applicants' bringing the matter before the Court, but points out that the judgment of 18 October 1979 in Case 125/78 *GEMA* v

Commission [1979] ECR 3173 established that Article 3 of Regulation No 17 does not entitle a complainant to require the Commission to take a final decision on the existence or otherwise of an alleged infringement.

It does not follow, as a result of the procedure chosen, that the applicants are entitled to seek to oblige the Commission to reach a specifically defined and different decision. To the extent to which the objective of the application is to ask the Court to order the Commission to adopt a decision which would suit their interests better, the applications must be dismissed as inadmissible.

(c) *BAT*, which maintains that it is a direct competitor, within the Community, of Philip Morris and Rothmans International, points out that the letter purporting to be a 'decision' was sent to it in response to a complaint submitted pursuant to Article 3 (2) of Regulation No 17, in which BAT asks the Commission to apply to the present case the same procedure as that adopted in the *Demo-Studio Schmidt* case cited above and that the decision to be given should be open to appeal. The legal effect of the Commission's decision was to deprive BAT of the right conferred upon it by Regulation No 17 to submit its objections to the agreements concluded between Philip Morris and Rembrandt.

Even if the Court were to find that the letter of 22 March 1984 was not a 'decision addressed to' BAT but was intended for Philip Morris and Rembrandt with respect to the closing by the Commission of the file on the complaints, that decision is of direct and individual concern to the applicants within the meaning of Article 173 of the Treaty.

The considerations set out in the judgment of 15 July 1963 in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95 could be directly transposed to the present case, BAT and RJR being the two 'others' among the four most important competitors on a narrowly oligopolistic market and those to whom the shares in question had been offered prior to the sale to Philip Morris. BAT considers that its interests are not sufficiently protected by the Commission's power to reopen the file. That claim is not in conformity with the reasons for which Rembrandt is willing to find a decision addressed to Philip Morris and to itself, namely the 'estoppel' effect of the letter of 22 March 1984.

According to BAT, the Commission's submission as to the admissibility of applications other than those made with a view to obtaining a declaration of nullity should be rejected, since such applications are fully in accordance with the meaning of Article 3 of Regulation No 17 and the reasoning of the Court in the judgment of 18 October 1979 (*GEMA, supra*). BAT in no way seeks a 'specifically defined and different decision', but asks the Court to order the Commission to adopt a new position taking into account the decision of the Court.

(d) *RJR* shares BAT's view. Moreover, as regards the Commission's statement to the effect that the applicants are not entitled to obtain a specifically defined and different decision, RJR points out that the Commission has not indicated what, if anything, in the relief sought by RJR is in the Commission's view inadmissible.

RJR adds that the Commission set out its definitive view in the form of a reasoned decision as it did in the case of *Demo-Studio Schmidt*, referred to above. In those circumstances, since the applicants are the only

addressees of the decision in question, the applications are undeniably admissible. In that connection, RJR refers to the judgment of 25 October 1977 (*Metro, supra*).

RJR requests that, in relation to the issue of admissibility, Rembrandt should be ordered to pay its costs in any event.

B — *Substance*

Preliminary observations

BAT, the applicant in Case 142/84, sets out its arguments in the form of six separate submissions and the following summary adopts the same pattern. Since the arguments of both applicants are practically identical, the points made by RJR, the applicant in Case 156/84, are added only where they serve to explain them in greater detail.

The views of Rembrandt and Philip Morris, the interveners in support of the Commission, are for the most part identical to those of the Commission. Consequently, Rembrandt's and Philip Morris's views are set out only where they raise fresh points.

The submissions relied upon by BAT are the following:

(1) Infringement of Article 85 (1) of the Treaty, in so far as the Commission declared that the 1984 agreements did not contravene that provision, even though the conditions for its application were satisfied.

(2) Infringement of Article 86 in the like manner.

(3) Manifest error, in so far as the Commission considered the undertakings signed by Rembrandt and Philip Morris to be adequate to prevent present or future breaches of Community law.

(4) Infringement of Article 190, in so far as the statement of the reasons on which the decision is based is inadequate.

(5) Breach of the principle of good faith and of essential procedural requirements, since the procedure followed by the Commission did not ensure fair and objective consideration of the complaints.

(6) Violation of fundamental rights, since the decisions were adopted on the basis of assessments and reasons on which the applicants were given no opportunity to comment.

The Commission and the interveners consider that all the submissions put forward against the decision are unfounded.

(1) *Infringement of Article 85 (1) of the Treaty*

(a) BAT states that the Commission did not say that Article 85 is not capable of being applied to the new agreements; but the Commission wrongly concludes that, since they do not restrict competition, there is no infringement of Article 85. In a 1966 memorandum on 'Concentrations in the common market' the Commission stated that acquisitions of shares were prohibited only when they resulted in excessive market power, whereas agreements between undertakings could normally be prohibited as soon as they appreciably affected competition. Even in those circumstances, the

taking of a substantial equity interest in a major competitor in what is acknowledged to be a highly oligopolistic industry falls within the prohibition contained in Article 85. Notwithstanding its oligopolistic character, the industry has to date been highly competitive as a result of the balance which exists at present, which would be destroyed by the acquisition of the shares in question and the logical extension thereof.

BAT also states that the problems connected with the application of Article 85 to share acquisitions made, for example, by accumulation on the stock exchange, that is to say without resort to an agreement or concerted practice, are certainly not present in this case, since the agreements between Rembrandt and Philip Morris were refined at least three times and the restrictions on transferability of the shares are the essential grip which Philip Morris has over Rothmans International and from which flow the restrictions of competition between Rothmans International and Philip Morris and as regards third parties. A rule which *per se* excludes acquisitions of shares from Article 85 was never applied by the Commission in this case, even though the interveners argued during the administrative proceedings that it should do so.

It is BAT's contention that Philip Morris's purchase of a direct equity interest of 30.8% in Rothmans International, carrying with it 24.9% of the voting rights, alters the competitive structure by creating links between two major economic operators on the market and preventing any other operator in that market from acquiring control of Rothmans International. The link between the two largest cigarette manufacturers in the common market in effect destroys the rather even balance of an oligopolistic market. The acquisition also distorts competition through its effects on the behaviour of the undertakings concerned and their personnel through the opportunities it creates for coordination of their behaviour.

According to BAT, the effect of holding a substantial interest in a competitor is inevitably restrictive of competition, irrespective of whether the interest acquired carries with it (a) legal or *de facto* control of the company in which the interest is held; (b) representation of the investor on the board of directors of that company; or (c) direct access to competitive information relating to the activities of that company. As a result of the interest, the investor and the company in which the investment is made will no longer compete in so thoroughgoing a manner as deliberately to harm each other's interests.

In dealing previously with joint venture cases (see for example the Commission decision of 23 November 1977 on 'GEC-Weir Sodium Circulators', Official Journal, L 327, 20. 12. 1977, p. 26), the Commission stated that parent companies would not in general compete with the activities of companies in which they hold substantial stakes, even though contractually free to do so. The Commission's findings as to the anti-competitive effects of the share-

holding were quite independent of its findings with respect to the effects of joint control, board representation or access to competitive information.

In the statement of objections, the Commission reviewed the effects of the 1981 agreements and concluded that they restricted competition on the relevant market. It emphasized in that connection that, even in the absence of the other features of the transaction under review, the acquisition by an undertaking of a large stake in the holding company controlling a competing undertaking is likely to restrict competition. BAT draws attention to the fact that Philip Morris's indirect participation in the capital of Rothmans International under the 1981 agreements was 22% and that, under the new agreements, its direct equity holding in Rothmans International is 30.8%, with 24.9% of the voting rights. According to BAT, the Commission's conclusion regarding the 1981 agreements applies *a fortiori* to the new agreements.

BAT is in full agreement with the Commission's conclusions in the statement of objections and in the decision that Philip Morris would not normally wish to endanger the value of its investment in Rothmans International. Executives of Philip Morris would be failing in their duty to their shareholders if they did not consider it desirable for Rothmans International to earn a maximum or at least acceptable return on an investment of over USD 350 million. The effect of Philip Morris's shareholding in Rothmans International is therefore that Philip Morris wishes Rothmans International to be successful and seeks to protect its investment. In its decisions in the market place, Philip Morris would certainly take account of that investment. The Commission's argument in the contested decision to the effect that Philip Morris retained an interest in 'checking the advance' in Rothmans International's market share with a view to being able to exercise its option to purchase further shares in the most favourable financial circumstances is thus incomplete and illogical and, moreover, contrary to the statements made by Philip Morris in the administrative procedure. The fact that Philip Morris's activity is almost wholly directed at the American-type cigarette market, whereas Rothmans International operates on the Virginia tobacco market, particularly in the Benelux countries, means that the undertakings can cooperate and that Philip Morris can, by subsequently acquiring financial control of Rothmans International, penetrate sectors and countries in which it is not active at present. It is inconceivable that Philip Morris and Rothmans International, which are both worldwide multinationals, could coordinate strategies outside the Community and grant each other sales rights for major brands in third countries, as they have done and still do, without this having some influence on their competitive attitudes within the common market. The Commission has not established that Philip Morris's management structure takes into account the necessity to separate management in that way.

The Commission also failed to consider the fact that if Philip Morris is to lose trade it would prefer to lose it to Rothmans Inter-

national rather than to any other competitor.

A correct analysis under Article 85 (1) compels a finding by the Commission that Philip Morris's acquisition of 30.8% of the shares and 24.9% of the voting rights in Rothmans International will have an appreciable effect on Philip Morris's unilateral conduct with respect to Rothmans International. Philip Morris's interest in competing against Rothmans International is appreciably distorted. By virtue of the financial relationships created between the two companies, Philip Morris's conduct is unlikely to be as it was before the purchase of the shares or as it would have been had that investment not taken place.

In its decision of 22 March 1984, the Commission failed, contrary to the statement of objections, even to consider the effect of Philip Morris's share acquisition on Rothmans International's conduct. By reason of the new agreements, Philip Morris remains able to prevent any takeover of Rothmans International by other competitors and is in a very strong position to acquire legal or *de facto* control of that company. The executives and staff of Rothmans International would adapt their conduct to take account of that situation.

The Commission is naïve to say by implication that Rembrandt, in exercising its power within Rothmans International, will not take the interests of Philip Morris into account. According to BAT, Rembrandt, which holds a 44% share of the votes in Rothmans International and in many situations has *de facto* control of Rothmans International, in view of the widespread distribution of the Rothmans International shares, nevertheless needs the votes of the other large shareholder for resolutions of great importance. It wishes to be able to count on Philip Morris's support. Thus, Rembrandt continues to rely upon Philip Morris in order to exercise control over Rothmans International.

It is logical that occasions will arise where the interests of Philip Morris are at odds with the policies of Rothmans International. In such cases, Philip Morris holds a final threat which it can wield to exert influence on Rembrandt, particularly when the conflict relates to an issue of major importance to Philip Morris. Under the new agreements, Philip Morris has the right to dispose of all its holdings. Although this right is subject to Rembrandt's right of pre-emption, it can in fact be used by Philip Morris to exert influence over Rembrandt. Should Rembrandt not exercise its right of first refusal, Philip Morris will be entitled under the new agreements to choose the purchaser and to ensure that the latter is in a position of voting parity with Rembrandt.

The Commission did not attach importance to the fact that either Philip Morris or Rembrandt could always sell its shareholding if either of the parties failed to respect the other's interests when planning its operations. If Rembrandt sells its shares, Philip Morris would be in a position to secure *de facto* control of Rothmans International by threatening to exercise its right of first refusal in the event of a sale to a single

purchaser and thus to force Rembrandt to sell the shares to 10 or more shareholders. The undertakings given to the Commission do not cover such a situation. Under the terms of the new agreements concerning the sale of shares, both Philip Morris and Rembrandt would have control over Rothmans International.

Philip Morris's minority share acquisition in Rothmans International combined with the provisions in the new agreements on disposal and acquisition of shares effectively prevent any competitor in the industry in question from increasing its market share by acquiring control of Rothmans International. In the statement of objections, the Commission noted that on the cigarette market, advertising and corporate acquisition were the principal means of increasing market share. The agreements between the two main suppliers of the market therefore preclude one of the two means of competing on that market.

BAT adds that it is absurd for a major participant in an oligopolistic market to buy a substantial interest in a major competitor with the sole objective of obtaining an interest in the latter's profits. Philip Morris has three objectives: to earn high profits on its investment, to coordinate its policies with Rembrandt and Rothmans International, and to prevent other competitors from acquiring financial control of Rothmans International by putting itself in a priority position to do so at a later stage. The removal from the agreements of the clause concerning cooperation between Philip Morris and Rembrandt does not eliminate the parties' intention to cooperate and there is nothing in the decision which would indicate that the parties have altered their original intention in that respect. Philip Morris is not in any way precluded from trying to influence the future industrial and commercial policies of Rothmans International. If, as Philip Morris asserts, no such cooperation and coordination will take place now that it has a direct investmentin Rothmans International, it is surprising, in BAT's view, that Philip Morris has paid so much and that the price of the transaction was not reduced in 1984 by comparison with that of 1981.

BAT observes that the conclusion drawn by the Commission in paragraph 24 of the decision, to the effect that the existence of provisions designed to enable Philip Morris either to take eventual control of Rothmans International or to sell to a designated third party shares worth 34.5% of the votes in Rothmans International does not at present have the effect of distorting competition within the meaning of Article 85, is vitiated by lack of reasoning, errors of law and erroneous factual assessments. By not indicating, either in paragraph 24 or in any other paragraph, any reasons to support that conclusion, the Commission has failed in its obligations under Article 190 of the Treaty.

In any event, the Commission's assertion that the provisions on acquisition and

disposal of shares do not have the present effect of distorting competition is based on the erroneous assumption that a present effect on competition is a necessary prerequisite for prohibition under Article 85 (1). This follows from the fact that the Commission made no reference to the object and likely effect of those provisions on competition. The application of Article 85 depends on the real economic situation and that has not changed as far as the 1981 agreements and the conclusions of the Commission in its statement of objections are concerned. The Commission itself stated that the implementation of those clauses is, under the foreseeable circumstances, incompatible with the competition rules of the Treaty. It follows from the judgment of 13 July 1966 in Joined Cases 56 and 58/64 *Consten & Grundig* v *Commission* [1966] ECR 299 that agreements whose purpose is unlawful are themselves unlawful, whether or not the intended result has actually been achieved.

The Commission also makes an erroneous assessment of the facts of the case in maintaining that those clauses have no present effects. According to BAT, the provisions on the transfer of shares strengthen the anti-competitive effects of the acquisition of the shareholding, as stated above.

Finally, BAT states that the Commission concluded in its statement of objections that the 1981 agreements were capable of affecting trade between the Member States and were ineligible for exemption under Article 85 (3). There is nothing in the decision of 22 March 1984 that would indicate that the Commission changed its view regarding the new agreements and it follows that the Commission is not entitled to challenge the reasons and the conclusions set out in the statement of objections.

BAT concludes therefore that the new agreements fall within the prohibition contained in Article 85 and that the contested decision is thus invalidated in so far as it relates to that provision.

(b) In general terms, *RJR* states that in the statement of objections the Commission reached certain conclusions of law and fact on the basis of the 1981 agreements and that the decision of 22 March 1984 must be read on the assumption that those conclusions of the Commission were correct and cannot be challenged in the present proceedings. Neither in the Article 6 letter nor in the decision does the Commission suggest that it has changed its mind on any of the general principles of Community law underlying the statement of objections or on any part of the analysis of fact set out therein.

RJR goes on to state that the Commission makes hardly any attempt in the decision to analyse the detailed terms of the new agreements and consequently it fails to reveal the strongly anti-competitive effect of their provisions. The case cannot be properly understood unless such an analysis is made.

In that connection, RJR notes in the first place that Philip Morris has the right at any time to convert bonds purchased by it into shares in Rothmans International, raising its

interest in Rothmans International to between 30.1% and 37.2% and securing 25.7% to 30.6% of the votes in Rothmans International.

As regards Philip Morris's right of pre-emption, RJR points out that the exercise of that right would give Philip Morris legal control of Rothmans International, by combining Rembrandt's 44% of the votes with Philip Morris's 24.9% of the votes.

RJR is of the opinion that in the event of Rembrandt selling the shares, Philip Morris would in any event have *de facto* control over Rothmans International, as a result of the conditions laid down in the agreement regarding the right of pre-emption. Any sale by Rembrandt of its shares in Rothmans International is subject to a right of pre-emption by Philip Morris; and before Rembrandt may make any sale, it also has to offer to exchange half of Rembrandt's four-vote shares in Rothmans International for Philip Morris's one-vote shares in Rothmans International, or alternatively consent to all of Rembrandt's shares being converted into one-vote shares, so that Philip Morris would be the only purchaser certain to obtain all the votes held by Rembrandt. Unless Philip Morris consents, Rembrandt is not free to sell less than its entire holding in Rothmans International, i. e. Rembrandt is prohibited to dispose of its holding gradually. Any contract by Rembrandt to sell its shares to a single shareholder will be subject not only to the condition precedent that Philip Morris does not exercise the right of pre-emption over those shares but also to a promissory condition that the purchaser shall offer to buy Philip Morris's shares in Rothmans International at the same price as it is buying Rembrandt's shares in Rothmans International. Any purchaser of Rembrandt's holding would take it subject to the same obligations as Rembrandt. The net effect of all these provisions is thus to make the purchase of Rembrandt's shares formidably unattractive to anyone other than Philip Morris. If Rembrandt disposed of its shares to multiple purchasers under the new agreement, Philip Morris would still have 24.9% of the votes as opposed to no more than 10% held by any other shareholder, and would have *de facto* control of Rothmans International, even without exercising the conversion rights attached to its Rothmans International bonds, and even without exchange of its one-vote shares for four-vote shares owned by Rembrandt or procurement of conversion of Rembrandt's four-vote shares into one-vote shares. Philip Morris could thus in effect gain control of Rothmans International without even bringing into operation the undertakings that it has given to the Commission. Moreover, there could be no good commercial or practical reason for including provisions of that kind if the arrangements were simply a trade investment. The overwhelming practical effect of the provisions is greatly to increase the influence that Philip Morris exerts over Rothmans International.

RJR refers to the conclusion, contained in the decision, that after the making of the new agreements Philip Morris retains, by reason of its option to acquire further shares

in Rothmans International, a considerable interest in checking, by its own efforts, any advance in Rothmans International's market share in the common market. RJR points out that that contention, despite being introduced by the word 'notably', is the only ground stated in the decision for reaching a conclusion which departs radically from the statement of objections, is directly contradicted by Philip Morris's evidence during the administrative procedure and is a completely novel point that was not even hinted at in the Article 6 letter. The further contention, advanced by the Commission in its defence, that Philip Morris's evidence in the administrative procedure established that in any event Philip Morris's commercial interest in the profits of its own operations would ensure that competition would not be at all distorted by reason of its 30.8% interest in the profits of Rothmans International was wholly absent from the decision and, again, was inconsistent with the actual evidence and with the Commission's continued conclusions in relation to the illegality of the 1981 arrangements. Moreover, the Commission's conclusion is refuted by a simple arithmetic calculation, which shows that even if there were a further purchase of exactly the same number of shares as are already held by Philip Morris, Philip Morris would be better off paying a higher price for those shares in a company (Rothmans International) whose earnings had increased than paying a lower price for those shares in a company whose earnings had fallen; finally, it is based on the purely hypothetical assumption that Rembrandt is prepared to sell its holding and the Commission to change its views as to the legality of a further purchase by Philip Morris of shares in Rothmans International.

Moreover, the Commission has not dealt with the effect of Philip Morris's shareholding on the conduct of executives of Rothmans International. Philip Morris and Rembrandt emphasized during the administrative procedure that 'people' are very important in a cigarette business. However, there is nothing in the new agreements or in the undertakings given to the Commission to prevent approaches which are normal between a major shareholder and the management of a company and may have a decisive influence on the career of particular key individuals.

The Commission has also failed to take account of the incentive that Rembrandt has to cooperate with Philip Morris and accommodate its views. In view of the vastly elaborate provisions relating to how Philip Morris and Rembrandt may deal with their interests in the future, Rembrandt has every incentive to cooperate with Philip Morris and accommodate Philip Morris's views whenever it can do so without material prejudice to its own separate interests.

As regards the removal from the new agreements of the parts of the 1981 agreement concerning cooperation, RJR considers that there is no reason to conclude that Philip Morris and Rembrandt have abandoned outright their intentions to cooperate, even if they have not expressed their intentions in the new agreements;

neither the Article 6 letter nor the decision says, and there is no evidence, that Philip Morris and Rembrandt have done so. Moreover, Philip Morris and Rothmans International have negotiated about cooperation in Indonesia, Malaysia and the Philippines. RJR infers from this that Philip Morris and Rothmans International will continue their negotiations on cooperation, even within the Community.

According to RJR, the fact that the Commission proposes to take no action in respect of provisions in the new agreements, implementation of which the Commission stated in the Article 6 letter would be in breach of Community law, itself constitutes a breach of the Commission's obligations under the Treaty. The parties implemented those provisions as soon as the new agreements were signed in so far as each of them refrained from dealing with its interests in Rothmans International in a manner prohibited by the various arrangements.

Moreover, there is on the face of the decision a manifest error inasmuch as it fails to condemn agreements having as their object the production of consequences that are stated in the decision itself to be unlawful. The Commission's analysis of the new agreements in paragraph 23 of the decision is that they are designed to enable Philip Morris either to take eventual control of Rothmans International or to enable Philip Morris to re-establish itself in a position of parity with Rembrandt in the event of a sale by Rembrandt to one or more third parties, results which the Commission viewed as unlawful. Agreements which are designed to distort competition are unlawful, even before they produce that effect.

Furthermore, the Commission has not directed its mind to the possibility that Rembrandt may sell its interest in Rothmans International to several third parties and thus leave Philip Morris as by far the largest shareholder in Rothmans International.

(c) According to the *Commission*, its decision of 22 March 1984 in no way contradicts its previous position on concentration and joint ventures. The 1966 study on concentration, the proposed 1973 regulation on the control of concentrations and the Commission's practice concerning joint ventures are all based on the criterion of the control of undertakings. Under the 1984 agreements, Philip Morris did not acquire control of Rothmans International; it merely acquired a minority interest. It is clear that the clause providing for a right of pre-emption does not for the time being create a concentration. Similarly, in view of the relationships between Philip Morris's votes and Rembrandt's votes and Philip Morris's undertakings to the Commission not to be represented on the management bodies of Rothmans International and not to accept competitive information concerning Rothmans International, it cannot be alleged that Rothmans International has been subjected to control exercised jointly by Philip Morris and Rembrandt.

According to the Commission, the matter at issue is whether the Commission was

reasonably entitled to come to the conclusion that the new agreements do not infringe Article 85 (1), since all the provisions of the old agreements and of the agreement providing for cooperation between the parties or expressing the intention to cooperate are no longer in force. It is misleading for the applicants to select statements which relate solely to the old agreements and attempt to attach them to the new situation. Thus, the Commission's observations in the statement of objections in relation to Philip Morris's 50% shareholding in the holding company, Rothmans Holdings, cannot be taken to apply to the present situation, since Philip Morris has no stake in Rothmans Holdings and the new economic realities are those of a minority shareholding combined with the new agreements, the undertakings given to the Commission and the 'hold separate' arrangement.

The first issue raised by the applicants is whether a minority shareholding is restrictive of competition. The applications do not seem to justify such a conclusion. By contrast, they show that the parties to the agreements still have an incentive to compete with each other.

The Commission's legal assessment of the new agreements was that they did not give rise to an infringement of the competition rules of the Treaty.

The old agreements gave Philip Morris a power of veto over an effective majority of shares in Rothmans International by means of the institutional mechanism of the holding company. The Commission took proceedings, sent a statement of objections, held a hearing and gave the undertakings concerned an opportunity to bring their agreements and practices into line with the competition rules of the Treaty. Philip Morris and Rembrandt so modified their previous arrangements, removing the mechanism enabling Philip Morris to exercise decisive influence over Rothmans International, that under the terms of the new agreements Philip Morris is no more than a minority shareholder in Rothmans International. It has not proved possible to establish that the new agreements, when analysed in their legal and economic contexts, have as their object or effect the distortion of competition within the common market. Clearly, if the parties return to a position similar to that objected to in the statement of objections, the Commission will take the necessary steps to ensure that the parties bring any infringements to an end.

The Commission concedes that several provisions of the new agreements are designed to enable Philip Morris either (1) to take eventual control of Rothmans International, or (2) to re-establish itself in a position of parity with Rembrandt in the event of a sale by Rembrandt to one or more third parties, or (3) to sell to a designated third party shares worth 34.5% of the votes in Rothmans International. Those provisions give Philip Morris a future direct and indirect right of pre-emption subject to effective supervision by the Commission to ensure that the implementation of the agreements does not prevent, restrict or distort competition within the common market in breach of Article 85 (1). The new agreements establish Philip Morris

in a priority position only to acquire control of Rothmans International by virtue of its right of first refusal on any sale by Rembrandt of its Rothmans International securities. It is true that if it does not exercise its right of pre-emption the new agreements make the purchase of Rothmans International securities by competitors singularly unattractive. A competing candidate for the purchase of Rothmans International shares must make an offer for the Philip Morris shares and will not know for some time whether (1) Philip Morris will purchase the Rembrandt holdings at the price they had offered, (2) Philip Morris will simply do nothing, thus allowing the third party to purchase the Rembrandt holdings, or (3) Philip Morris will offer its shares to the third party purchaser, thus in effect doubling the size and cost of the investment.

While those provisions give Philip Morris a possibility of modifying in the future its status as a minority shareholder in order to obtain control of Rothmans International, their existence does not at present have the effect of distorting competition within the meaning of Article 85.

On the one hand, there is no reason to suppose that Rembrandt and the executives of Rothmans International have no incentive to seek to make Rothmans International as successful and profitable a company as possible and Rembrandt is in practice able to control Rothmans International through its 43.6% of the votes and the traditional management links with the company. On the other, while Philip Morris would not normally wish to endanger the value of its investment in Rothmans International, it nevertheless retains a considerable interest in checking any advance in Rothmans International's market share by its own industrial and commercial efforts. By so doing, it increases its own profits and its market share and the Rothmans International shares would be cheaper in the event of a further acquisition by Philip Morris. Since Philip Morris's direct investment in the common market by far exceeds its investment in the Rothmans International shares, it is highly improbable that Philip Morris would favour Rothmans International to the detriment of its own companies.

Moreover, the applicants have not established that Philip Morris's competitive attitude and behaviour have been altered as a result of its investment in Rothmans International. In those circumstances, there is no justification for concluding that the new agreements give rise to an infringement of the competition rules.

The second issue raised by the applicants is whether or not the Commission has the power under Community law to enforce the undertakings and take any necessary interim or permanent measures during the 'hold separate' period. The Commission contends that the power exists and describes the suggestions of the applicants in that respect as 'unwarranted and unsubstantiated'.

(d) *Rembrandt* states, by way of a preliminary observation, that the Commission enjoys a wide measure of discretion to settle proceedings and the Court must confine itself to ensuring that

the Commission's closure of the file '[was] not based on a materially incorrect appreciation of the facts and [was] not vitiated by any manifest error of assessment' (judgment of 11 October 1983 in Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045) and that the evaluation of the many complex economic factors involved is a matter for the Commission (judgment of 13 July 1966 in Joined Cases 56 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299). It is for the applicants to prove a materially incorrect appreciation of the facts or a manifest error of assessment. By relying in that respect principally upon the statement of objections, the applicants fail to have regard to the temporary nature of that document and the fact that the situation has changed radically since it was served.

Rembrandt refutes the argument to the effect that Article 85 (1) would apply automatically if the share acquisition were to be shown to distort competition. It states that the new agreements relate solely to Philip Morris's shareholding in Rothmans International and to possible future share acquisitions. Article 85 (1) does not apply to share acquisitions as such, for the following reasons: the policy questions affecting the freedom to transfer ownership of shares and other corporate securities are much too complex and the answers are insufficiently clear-cut to apply the automatic prohibition contained in paragraph (1) to such transactions; Article 85 (2) is an inappropriate sanction to apply to the transfer of proprietary interests; Article 85 (3) is unsuitable for application to such transactions; finally, there is no logical distinction between agreements to buy shares on a stock exchange, to which Article 85 (1) cannot apply, and other ways of acquiring shares. If Article 85 (1) does not apply to share acquisitions, it follows that it likewise does not apply to a right of pre-emption or first refusal.

Thus, according to Rembrandt, the Commission certainly did not commit a manifest error in finding that Philip Morris's share acquisition under the new agreements did not infringe Article 85 (1). Any other conclusion would have been contrary to the Commission's 1966 memorandum on concentrations, the Commission's own previous practice, the principle of the protection of legitimate expectations and Community law.

The Commission's decisions in joint venture cases are not relevant because they concern agreements to cooperate quite different from the new agreements and lay down no principles of general application.

Similarly, the statement of objections does not in any way favour BAT, since the observations made therein are specifically addressed to a 50% holding in the capital of a holding company which has control over a competing company, whereas the new agreements give Philip Morris a direct, albeit minority, holding in the capital of the latter company, without joint control of any company.

Even if Article 85 (1) could apply, which Rembrandt denies, the economic effects of each transaction must be analysed in every case to determine whether, on the individual facts, competition will be restricted or

distorted to an appreciable extent. Rembrandt knows of no developed system of competition law which regards a share acquisition between competing undertakings as prohibited *per se*.

As regards Philip Morris's investment in Rothmans International, Rembrandt states that the new agreements required analysis by the Commission and that the Commission again arrived at the conclusion that Philip Morris could not materially influence Rothmans International or Rothmans International be influenced by Philip Morris. Philip Morris has shown that its primary concern is to optimize the profits of its own tobacco business, in which it has a 100% interest, and not to protect its 30.8% equity interest in Rothmans International. That primary concern demands the pursuit of unrestricted competition against Rothmans International. Moreover, in a market like the cigarette market, any relaxation of a company's efforts in favour of a single competitor necessarily accrues to the benefit of the other competitors.

For similar reasons, it is improbable, even under the 1981 agreements, that Rothmans International would relax its efforts with a view to favouring Philip Morris. The possibility that Rothmans International might take account of Philip Morris's interests has become even more remote under the new agreements. As the Commission concluded, Philip Morris is no more than a minority shareholder and no longer has joint control of Rothmans Holdings, the company with effective voting control over Rothmans International. Furthermore, Philip Morris has undertaken that it will have no presence on any management bodies of Rothmans International so that any potential means for bringing pressure to bear on Rothmans International executives has been removed. Philip Morris has also undertaken that it will not obtain competitive information about Rothmans International's affairs and there is no evidence that Philip Morris would make 'informal approaches' to Rothmans International management. It is implausible to assume that Rothmans International executives would be likely to be influenced by the uncertain prospect that Philip Morris might acquire control of Rothmans International in the future and, even if such a prospect were really likely, it is much more probable that they would compete aggressively against Philip Morris with a view to establishing their reputations with Philip Morris as efficient marketing managers. Rembrandt has no intention to procure Rothmans International's cooperation with Philip Morris.

Contrary to BAT's contentions, Rembrandt states that it will not take into account Philip Morris's interests in exercising its shareholder rights or management role regarding Rothmans International. Rembrandt has an interest in the profitability and success of Rothmans International: its interest is identical to that of the public shareholders and Rothmans International itself. Rembrandt has no interest in Philip Morris's operations in Europe or elsewhere and there is no *quid pro quo* which might influence Rembrandt to take account of Philip Morris's interests when exercising its management role. In practice Rembrandt can secure the passage of ordinary resolutions by casting its 44% of

the votes. Special resolutions are adopted only rarely in the lifetime of companies and the other threats which, according to BAT, could be used by Philip Morris, are hypothetical and without binding force.

Finally, Rembrandt considers the applicants' arguments concerning the rights of first refusal and concludes that they are unconvincing. According to Rembrandt, there will be no difficulty in finding a single purchaser to buy its stake in Rothmans International. The fact that Philip Morris has a contractual right under the new agreements to require such a purchaser to offer to buy Philip Morris's shareholding creates no additional obligation under the City Code on take-overs. In Rembrandt's view, therefore, there would be no significant impediment to any negotiations with an interested purchaser. Likewise, Rembrandt would have no difficulty in placing its shares in the market, which is a common means of disposal of large shareholding stakes, and there again Philip Morris's right of pre-emption would not create any significant impediment to the arrangement of such a placing. It is, moreover, improbable that Philip Morris would seek to place difficulties in the way of Rembrandt disposing of its shareholding in Rothmans International. In any event, that unlikely contingency would not affect Rembrandt's overriding self-interest to promote the best interests of Rothmans International without regard to Philip Morris. The right of first refusal therefore does not at present have the effect of distorting competition. Neither is that its object.

Nor is there any evidence that the Commission has not directed its mind to the possibility that a sale by Rembrandt to third parties would leave Philip Morris as the largest shareholder in Rothmans International and BAT's argument based on that possibility has no significance, for the possibility may never materialize. If it were to do so, the Commission would consider whether the change in circumstances was material and, if so, whether Philip Morris's shareholding in those circumstances contravened Articles 85 or 86. For its part, Philip Morris would continue to be bound by its undertakings to the Commission not to have any representative on any management body of Rothmans International and not to obtain competitive information relating to Rothmans International. Philip Morris would have neither control of Rothmans International nor the ability materially to influence Rothmans International.

(e) *Philip Morris* considers, in its turn, the applicants' arguments and observes that Article 85 has never been applied by the Commission or the Court to share acquisitions. The decision of 22 March 1984 did not in itself raise the issue of the scope of the applicability of that article to share acquisitions. In the joint venture area the applicability of Article 85 (1) rests on the existence of an agreement between the two actual or potential competitors who decide to do something together rather than in competition. The fact that in order to carry out the agreement to cooperate each party acquires shares in the joint venture company does not imply that Article 85 would be applicable to a unilateral share acquisition: it is the agreement to cooperate which is the reason for the applicability of Article 85 (1). The Commission has not to date considered the acquisition of shares as such to fall

under Article 85 (1) when there is no agreement to cooperate.

The present state of Community law affords only a limited control of transactions involving share acquisitions that do not also involve a joint venture or a cooperation agreement between actual or potential competitors. Only if one of the companies involved is in a dominant position under Article 86 could the acquisition in certain circumstances be deemed to be in violation of the competition rules. In any case, there are many instances in the business world where firms, including major firms, own minority shareholdings in competing firms.

Philip Morris is of the opinion that the statement made in the statement of objections, as relied upon by the applicants, did not have the general scope which they attribute to it, and the applicants themselves did not rely on such a broad interpretation of Article 85 in their complaints to the Commission.

Generalized application of Article 85 to the acquisition of shareholdings in competing companies, as advocated by the applicants, would necessarily mean that countless situations which had always been believed to be perfectly legal would become open to challenge by the Commission or by interested private parties under Article 85. In any event, no present anti-competitive effect has been found.

As regards the presumed continuation of cooperation, the new agreements do not contemplate it since the provisions providing for cooperation or an intention to cooperate were eliminated when, as early as 1983, the partnership note was terminated. Moreover, Philip Morris no longer has any blocking power and Rembrandt is in a position to exercise its management role in Rothmans International without even a theoretical need to seek the support of Philip Morris. According to Philip Morris, there is no reasonable interpretation of the new agreements or of the decision other than that Philip Morris and Rembrandt have no intention, express or implied, to cooperate in regard to the tobacco business in the EEC. In the present case, the burden is upon the applicants to prove that cooperation in violation of 85 (1) existed or will take place, and they have not done so. Similarly, the applicants have not specified what effects in the Community might follow from cooperation between Philip Morris and Rembrandt or Rothmans International outside the EEC. Philip Morris claims that any agreement that does exist between Philip Morris and Rothmans International outside the EEC, and likewise the right granted to one of the parties to use certain trade marks of the other party in certain third countries, has no effect on the action of the parties within the Community. All such arrangements that do exist constitute entirely normal licence and commercial arrangements that are consistent in every way with practice in the industry and unrestrained competition and moreover are also used by the applicants.

As regards the provisions relating to the right of first refusal and the disposal of Rothmans International securities by Philip Morris and Rembrandt, Philip Morris

maintains that they have been presented by the applicants in a misleading and artificial way which distorts their true nature and effect.

Those provisions have two main purposes: (1) to provide to the extent feasible for a right of first refusal in case Philip Morris or Rembrandt decides to dispose of its Rothmans International securities; (2) to provide in case of such disposal that each of the parties will receive the appropriate remuneration for its securities. It is absolutely normal for parties making relatively large investments to be concerned with the purchase or disposal of their own or other shares: thus, the right of first refusal is an ordinary feature of many commercial transactions. Provisions of that kind, whose only purpose is to protect the value of the investments made, do not represent a serious obstacle for a third party purchaser who has decided to make a major investment in a major public company such as Rothmans International.

Finally, Philip Morris has no way of inducing Rembrandt to disperse its shareholding and thus acquiring *de facto* control over Rothmans International. It is not realistic to say that Philip Morris will be in a position to force Rembrandt towards a disposal through multiple purchasers, since such a disposal is not likely to maximize Rembrandt's revenues. The only way for Philip Morris to prevent a single purchaser from buying Rembrandt's holdings is to exercise the rights of first refusal and to pay to Rembrandt the price offered by that prospective purchaser and, in such a case, there is no reason why Rembrandt should prefer to disperse its holding. The purpose of requiring a minimum of 10 purchasers is to define the situation in which the parties cease to have any rights of first refusal over other purchasers. In any event, in the unlikely hypothesis that Philip Morris did become the major shareholder in Rothmans International with 24.9% share of the votes, the Commission would have the means of surveillance of the situation and of taking appropriate action. In addition Philip Morris would still be subject to the undertakings given to the Commission.

It follows from the foregoing that the provisions concerned are sound commercial provisions solving in a practical way issues raised in connection with the 1984 restructuring. They provide rights for the parties whose effects can be assessed only if and when those rights are exercised on the basis of the circumstances then existing. Thus, if Philip Morris were at some future date to take control of Rothmans International as a result of the exercise of those rights, that would not necessarily result in an infringement of the Community competition rules. Rothmans International is a large and highly diversified group, active in different parts of the world in a number of different industries. The structure of the Rothmans International group, its activity in the various parts of the world and the various industries may develop differently, and the structure of the markets in which it operates may change. The acquisition by Philip Morris of control over Rothmans International could take place, if ever, at a time or in a situation in which it could not be charged that such acquisition resulted in any prohibited effect under the Community competition rules.

The Commission was therefore justified in finding that there will be no adverse consequences for competition from Philip Morris's shareholding in Rothmans International. The fact that competition has continued just as fiercely since the conclusion of the 1981 agreements is proved by the data on market developments in the EEC.

(2) *Infringement of Article 86 of the Treaty*

(a) By way of preliminary, *BAT* considers paragraph 29 of the decision and draws attention to the fact that precisely what the Commission means by 'control' is not made clear in the decision but apparently refers to the point in paragraph 22 in the decision that Philip Morris no longer has 'a power of veto over an effective majority of shares in Rothmans International' and is now 'no more than a minority shareholder'. Thus, in the Commission's view, Article 86 cannot apply to a transaction in which a company acquires a minority shareholding in its competitor even if the object and the effect of the transaction are to distort competition. The Commission's view is based on an erroneous interpretation of the concept of abuse under Article 86.

In BAT's view, an abuse is any behaviour, including the conclusion of a transaction in which a company acquires a minority shareholding in a competitor, which restricts or distorts competition (see judgment of the Court of 13 February 1979 in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461). BAT infers from that judgment that it is not the degree of dominance but the behaviour of the dominant company or group which must affect competition for an abuse to exist, and that that behaviour need not 'substantially' fetter competition but need only have an 'appreciable' effect on competition and trade between Member States to amount to an abuse of a dominant position under Article 86.

Article 86 (b), which prohibits the limitation of production, markets or technical development, has been held in *Hoffmann-La Roche* (*supra*) and in the judgments of 14 February 1978 in Case 27/76 *United Brands* v *Commission* [1978] ECR 207, of 16 December 1975 in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, and of 6 March 1974 in Joined Cases 6 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223 to apply to behaviour limiting the possibilities of companies other than the undertaking with the dominant position. A transaction in which a minority shareholding is obtained in a competitor is a method different from those which condition normal competition and has a clear effect on the structure of the market. It establishes an important link between two competitors in the market, limits or precludes the possibility that other competitors can ever increase their market shares by acquiring a controlling interest in that competitor and puts the investor in a favourable, or even priority, position subsequently to acquire control of its competitor. Moreover, it distorts competition between the investor and the company in which it has invested.

The limited meaning which the Commission attaches to the concept of abuse is moreover in clear conflict with Article 3 (f) of the Treaty which has been held by the Court to influence the interpretation of Articles 85 and 86.

It follows that the Commission committed an error of law in basing its conclusion on the view that an abuse presupposes control over the conduct of the company in which the investment has been made.

The Commission claims for the first time in its defence that a 'conglomerate's' acquisition of an interest in the profits of another 'conglomerate' cannot be included among the methods different from those which condition normal market competition and which influence the structure of the market. In any event, the use of the term 'conglomerate' is misleading when used with respect to Rothmans International (tobacco accounted for 85% of group sales in 1983) and Philip Morris (tobacco products accounted for 67% of group sales in 1982).

BAT considers that the conclusion of the new agreements was an abuse of dominant positions held jointly by Rembrandt and Philip Morris in the Benelux market pursuant to the 1981 agreements.

It states that there was nothing in the Article 6 letter or the decision which suggests that the Commission has changed its position as to the general principles, reasons and conclusions established and applied in the statement of objections in which the Commission decided that the conclusion of the arrangements between Philip Morris and Rembrandt constituted an infringement of Article 86 if Philip Morris retained joint control with Rembrandt or obtained sole control of Rothmans International. The Commission cannot therefore, in the present proceedings, depart from the position which it adopted in the statement of objections.

Moreover, in view of the financial links existing between Philip Morris, Rembrandt and Rothmans Holdings, and the extensive cooperation established by the 1981 agreements, the Commission was right in considering that Philip Morris and Rembrandt jointly held a dominant position as a result of those agreements. In BAT's view, the conclusion of the new agreements constitutes, even according to the narrow test applied by the Commission, an abuse of that dominant position because, as a result of the acquisition of Rothmans International shares and convertible bonds, the right of first refusal and various special arrangements in relation to future dealings, Philip Morris is in a position to control Rothmans International's business jointly with Rembrandt.

With respect to the correct application of the concept of abuse, BAT states that, as defined by the Court in the *Hoffmann-La Roche* judgment cited above, an abuse is any behaviour which involves methods different from those which condition normal competition, influences the structure of the market and distorts existing competition or prevents competition from developing. The conclusion of a transaction in which a company obtains a significant shareholding in a major competitor is a method different from those which condition normal competition. It

influences the structure of the market, particularly where the market is narrowly oligopolistic. In the present case, the agreements even prevent any other competitor from acquiring a controlling interest in Rothmans International, so that Philip Morris is in a priority position subsequently to acquire control itself.

It follows that in declaring in the decision that the conclusion of the new agreements did not infringe Article 86, the Commission erred either by adopting too narrow a view of the concept of abuse or by denying that Philip Morris has control over Rothmans International.

(b) *RJR* states that the Commission accepts, in paragraph 14 of the decision, that Rembrandt, through Rothmans International, has a dominant position, in the sense of Article 86 of the Treaty, in Belgium and Luxembourg and in the Netherlands. It observes that, as the only ground for rejecting RJR's complaint, the Commission stated in its decision: '... for the reasons given above, Philip Morris is not, under the new agreements, in a position to control Rothmans International's affairs ...'. No indication is given of what those reasons are, but paragraph 22 shows that the term 'control' plainly means a legally enforceable power over a majority of the shares in the company in which the investment is made. That narrow, limited and technical approach to the concept of abuse is contrary to Article 3 (f) of the Treaty and conflicts with the Court's approach in the *Hoffmann-La Roche* judgment cited above. In reaching its conclusion, the Commission therefore relied upon an assumption as to the concept of 'abuse' within the meaning of Article 86 that is incorrect in law. The decision as to Article 86 is thus based upon an error of law and should be annulled.

According to BAT, that article is also infringed for another reason, which extends not only to the Benelux countries but also to the territory of the Community as a whole. The four groups, Rothmans International, Philip Morris, BAT and Imperial Tobacco, together constitute an oligopoly holding a joint dominant position (48.9% of the market) in the common market. It is an abuse of a jointly dominant position held by an oligopoly for any one or any combination of the oligopolistic undertakings to act so as to intensify the oligopolistic nature of the market in question.

The new arrangements represent a continuation and extension of the 1981 agreements in respect of which the statement of objections was issued and they are a continuation and aggravation of the objectionable effects of those agreements. The new and old agreements are intimately intertwined with each other because under the 1984 agreements Philip Morris has acquired 30.8% of the equity (24.9% of the votes) in Rothmans International and elaborate contractual rights in exchange for the interest that it illegally acquired in

Rothmans Holdings under the 1981 agreements and it retains the holding in Rothmans International bonds acquired thereunder.

(c) The *Commission* refers to its report on the implications of further harmonization of the excise on manufactured tobacco. According to that report, the cigarette market in the Community increased between 1970 and 1980 but the cigarette industry had to adjust to a downturn, owing to (1) the general economic climate and the high level of unemployment; (2) vigorous anti-smoking campaigns conducted in many countries; (3) increased tax incidence and (4) the installation of more modern equipment. Moreover, in its statement of objections, the Commission emphasized that costs, in particular those of advertising, are extremely high and consequently market entry or expansion against the established positions of a large international group such as Rothmans International, with valuable local and international trade marks, is very difficult. The Commission adds, however, that the Benelux countries, in which Rothmans International occupies a dominant position, account for only 8% of Community cigarette consumption, which is shared between more than 40 undertakings and over 800 brands and that cross-border sales and switching between manufactured and 'roll your own' cigarettes illustrate the volatility of the cigarette market and the transient nature of any position of strength which a manufacturer may have.

The Commission refers to the judgment of the Court of 21 February 1973 in Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215 and the *Hoffmann-La Roche* judgment, cited above, in which the Court held that an undertaking abuses its dominant position if it strengthens it in such a way as to reach a degree of dominance which substantially fetters competition or impairs the effective competitive structure of the common market (in its rejoinder, the Commission states that when using the word 'substantial' it did not intend to assert more than an 'appreciable' effect). Thus, a concentration, which by definition involves an acquisition of control, can amount to an abuse of a dominant position in violation of Article 86. A share purchase can therefore constitute an abuse when it results in a concentration. The Commission then cites the *Hoffmann-La Roche* judgment: 'The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.'

That definition is confirmed by the judgments of 11 February 1980 in Case 31/80 *L'Oréal* v *De Nieuwe AMEK* [1980] ECR 3775 and of 9 November 1983 in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461.

If an undertaking carrying on business in several different markets, such as Philip Morris for example, obtains a share of the profits of the company in which it has invested, there are no grounds for arguing that, as a result, the acquisition by that

'conglomerate' of a minority holding in another 'conglomerate', such as for example Rothmans International, can be included among the 'methods different from those which condition normal competition', which can be expected to 'influence the structure of a market'.

The Commission rejects the view that the new agreements are in substance a continuation of the old agreements, which were manifestly incompatible with the competition rules of the Treaty. It adds that the administrative procedure gives the undertakings concerned an opportunity to bring their agreements and practices into line with those rules. The changes in the agreements in question were so substantial that the Commission considered the new agreements to stand on their own, so that Philip Morris is no more than an independent minority shareholder in Rothmans International; and the Commission's objections on the grounds of Article 86 have been met, since there is no longer a likelihood of competition being 'substantially fettered' or the 'effective competitive structure of the common market' being impaired. The Court has stated, *inter alia* in the *Hoffmann-La Roche* judgment *supra*, that behaviour limiting the possibilities of undertakings other than the undertaking with the dominant position is prohibited. A transaction in which an undertaking acquires a minority holding in a competitor, even if it establishes a link between them in the market, does not necessarily preclude the possibility that other competitors can increase their market shares.

As regards the pre-emptive rights, the Commission states that they are subject to effective control by it. It repeats that Philip Morris is merely a minority shareholder and that under the new agreements it is not in a position to control Rothmans International's management. Consequently, the applicants' arguments as to the errors of the Commission in considering the application of Article 86 to the new agreements are unfounded. The applicants have failed to show that Rothmans International has behaved in such a manner that 'the degree of competition still existing in the cigarette market' in Benelux, in which Rothmans International has a dominant position, is weakened by the new agreements.

(d) *Rembrandt* is of the opinion that the Commission was right to conclude that Article 86 did not apply to the new agreements. Thus, it is apparent from paragraph 21 of the letter of 22 March 1984 that the agreements in question do not hinder the maintenance of effective competition within the meaning of the Court's judgment in *Hoffmann-La Roche*, cited above.

Rembrandt goes on to say that Rothmans International does not enjoy a dominant position in the market comprising the Community as a whole or on the Benelux market and that even if that were the case the disposal of shares by Rembrandt could not be regarded as an abuse of a dominant position.

Finally, Rembrandt refutes RJR's argument that the new agreements continued unlawful elements of the 1981 agreements. It maintains that the true test for legality of the new agreements is whether the infringing elements in the 1981 agreements have been removed by the new agreements.

(e) *Philip Morris* claims that it is self-evident that an agreement that does not have any effect on competition cannot be held to constitute an abuse within the meaning of Article 86. Furthermore, Philip Morris claims that the application of Article 86 to the acquisition of a minority shareholding would have constituted a highly unusual and substantially new interpretation of that article, which would have resulted in the establishment of a new rule. It is at the very least unusual to describe the sale by a dominant company of its own shares, thus making another company a minority shareholder, as an abuse of a dominant position. Even if it is conceded that under the 1981 agreements Rembrandt and Philip Morris had joint control over Rothmans International, it would likewise be unusual to regard the new agreements eliminating that joint control as an abuse of it.

Philip Morris maintains that the relevant geographic market for the purpose of assessing Rothmans International's market position and the effect of Philip Morris's investment in Rothmans International is the EEC in its entirety. It is wrong to assess that effect only in part of the EEC. It is impossible to deny that although the Rothmans International affiliates are the largest producers in the Benelux countries, they are exposed to intensive competition not only from other companies manufacturing in those countries but also from all other producers in the other Member States. This statement is borne out by the market figures themselves which demonstrate that Rothmans International since 1981 has lost market share in the EEC as a whole and in the Benelux in particular. Each Rothmans International affiliate must, in formulating its strategy, take account of the strategy of the other cigarette manufacturers in the other Member States.

As regards the product in question, the market includes 'roll your own' cigarettes which account for 40% of total consumption in the Netherlands and 18% in Belgium. There is a substantial degree of cross-elasticity of demand for 'roll your own' cigarettes and manufactured cigarettes.

In considering whether Rothmans International holds a dominant position, account must be taken of the structure of the market and the nature of the competition; the structure of the market and the nature of the competition are such that Rothmans International cannot be shown to have the degree of independence from competitors and users that is necessary in order for a dominant position to exist, whatever market definition is chosen. New brands are launched all the time and all manufacturers in the EEC engage in such launches or at least have the capacity of doing so in competition with each other.

(3) *Inadequacy of the undertakings given by Rembrandt and Philip Morris to the Commission*

(a) *BAT* is of the opinion that the undertakings in question were vital to the Commission's decision not to intervene against the new agreements, since the Commission referred to them in paragraph 27 of the decision immediately before the conclusion set out in paragraph 28.

As regards the undertakings, which are designed to avoid anti-competitive effects of the role which Philip Morris might play directly within Rothmans International,

BAT states that in the statement of objections the Commission had previously held that anti-competitive effects result from a major shareholding in a competitor, irrespective of the existence of institutional machinery giving the investor a formal role in the management of the company in which it has invested. That shareholding has anti-competitive consequences for the conduct of Philip Morris, of Rothmans International and of other competitors, even in the absence of Philip Morris board representation in Rothmans International.

Moreover, Philip Morris's position as a major shareholder will give rise to opportunities and inducements for cooperation between Philip Morris and Rothmans International which can be effected at the very least through approaches to management of the type perfectly common and usual in the case of a major shareholder. The Commission has not obtained any undertaking to eliminate the above effects or to renounce the intentions to cooperate expressed in the 1981 agreements.

As regards information on Rothmans International's activities, BAT observes that Philip Morris's undertakings do not prevent Philip Morris from acting on trade rumours from sources other than Rembrandt or Rothmans International as to Rothmans International's future market intentions. Furthermore, the Commission's ability to police and enforce those undertakings is plainly subject to a substantial limitation. What is more, those undertakings relate only to Rothmans International's competitive activities within the EEC. BAT doubts whether Philip Morris, Rembrandt and Rothmans International can in practice separate their activities relating to the EEC from those in other countries.

As regards the undertakings concerning future changes in the shareholding, they are supposed to enable the Commission to take appropriate action if it ascertains an infringement of Community law, but they permit the Commission to intervene only after the event and the 'hold separate' arrangement lasts for only three months, after which time Philip Morris could take full advantage of the increase in voting rights pending the Commission's definitive decision.

(b) According to *RJR*, the undertaking as to board membership deals with what is only a formal aspect of relationships between Philip Morris and Rothmans International, and Philip Morris has given no undertaking to prevent informal approaches to Rothmans International on management issues. The undertaking as to the obtaining of information is vague and subjective in its terms and is impossible to monitor.

The undertaking in relation to increases in Philip Morris's shareholding or voting power in Rothmans International is valueless because it is inadequate to prevent breaches of Community law. Philip Morris could not, moreover, in practice increase its shareholding in Rothmans International without disclosing that fact to the world at large and hence to the Commission. The

only undertaking that might have been significant would have been one that obliged Philip Morris to notify the Commission before it increased its shareholding in Rothmans International. As regards the undertaking to 'hold separate', it is general and imprecise in its terms; it is clear that the contractually binding clauses have yet to be settled. It even seems possible that the actual agreement is not to be drawn up until after the acquisition by Philip Morris of further shares, which will provide little incentive for Philip Morris to agree the terms. RJR also asks what tribunal is to adjudicate on any disputes concerning the application of the agreement and by reference to what proper law.

More generally, the undertakings are essentially undertakings that, after Philip Morris and Rembrandt have taken further, probably illegal, action, Philip Morris will in certain circumstances notify the Commission that it has done so and will then, if so requested by the Commission, take certain ill-defined and perhaps undefinable steps. Even if the undertakings were observed or enforced, they would not be effective to achieve the Commission's objects.

(c) The *Commission* does not regard the undertakings as a prerequisite for the agreements to be compatible with Article 85 (1). The starting point for the new agreements is a new economic situation as between Philip Morris and Rothmans International, with Philip Morris having become a minority shareholder of Rothmans International and the two undertakings having amended the clause in the old agreement which enabled Philip Morris to exercise a decisive influence over Rothmans International. The object of the undertakings is to strengthen the competitive nature of the new agreements and to assist the Commission in monitoring any change in the situation.

The Commission secured undertakings which, in addition to its normal powers in the field of competition, would enable it to take any appropriate measure rapidly, either during the 'hold separate' period or at any other time, if the new agreements were applied in breach of Community law. The Commission has authority to enforce those undertakings and to take any interim or permanent measures necessary during the 'hold separate' period. The 'hold separate' arrangement in question entered into by Philip Morris, which covers a period of three months, is designed to give the Commission the necessary time to take action if it discovers infringements of Community law. According to previous decisions of the Court, in such cases the Commission has the power to take urgent interim measures and the Commission has shown in practice that it is prepared to use that power.

(d) *Rembrandt* supports the Commission's conclusion that the undertakings enable it to monitor the situation and act upon any possible breach of Community law. The Commission did not commit a manifest error in the exercise of its discretion with respect to the undertakings in question.

As regards the undertaking concerning Philip Morris's board membership within Rothmans International, it extends to all the management bodies of Rothmans International. Moreover, the applicants have furnished no proof that Philip Morris is endeavouring to establish contacts with a view to influencing Rothmans International.

Finally, Rembrandt denies that the undertakings on the shareholding and voting rights are inadequate on the ground that an increase in Philip Morris's holding might give it influence over Rothmans International and the Commission would be informed only after the event. That objection has no force. In the hypothetical circumstances postulated, the Commission would be entitled immediately to require Philip Morris to enter into the 'hold separate' arrangement and thus to maintain the status quo regarding Philip Morris's ability to influence Rothmans International. The terms of that arrangement are clear and effective for their intended purpose.

(e) According to *Philip Morris*, the undertakings relating to board representation and access to competitive information are intended solely to facilitate the Commission's surveillance of the new agreements. They are additional to the extensive powers available to the Commission under Regulation No 17 to investigate the activities of Philip Morris and Rothmans International.

The undertakings are not aimed at eliminating a restrictive effect of the new agreements. As the Commission stated in its decision, Philip Morris is, under the new agreements, no more than a minority shareholder in Rothmans International which another shareholder, Rembrandt, is in practice able to control through its 43.6% share of the votes and its traditional management links with the company. Consequently, it is unnecessary to consider whether the undertakings are 'adequate'.

As regards the undertakings relating to changes in the terms of the agreements and to increases in Philip Morris's shareholding or voting power, including the 'hold separate' arrangement, Philip Morris considers that they are effective measures of surveillance to monitor future behaviour of Philip Morris and Rembrandt.

Philip Morris states that the Community system regarding competition is not based on the prevention of infringements but rather on the Commission's powers to bring infringements to an end. Neither does the system lay down any obligation to notify agreements, decisions or concerted practices. In that connection, the undertakings therefore improve and facilitate the Commission's monitoring of the situation.

As regards Philip Morris's undertaking to inform the Commission within 48 hours of any change in the terms of the new agreements and any increase in Philip Morris's holding or voting rights, Philip Morris observes in the first place that it is highly unlikely that it could within 48 hours take any irreversible measure regarding Rothmans International tobacco operations in the Community. In the second place, and most important, the Commission can, within 48 hours after the increase in the investment, request Philip Morris to put into

effect the 'hold separate' arrangement which would impose separate obligations on Philip Morris and meet the aim pursued by the Commission. It would be applied for a period of three months as from the date of the increase in voting rights and, during that period, Philip Morris would be subject to a number of far-reaching obligations which effectively preclude any significant alteration of the status quo.

(4) *Inadequacy of the statement of the reasons on which the decision is based*

(a) *BAT* points out that according to the judgment of the Court of 4 July 1963 in Case 24/62 *Federal Republic of Germany* v *Commission* [1963] ECR 63, in imposing upon the Commission the obligation to state the reasons for its decision, Article 190 of the Treaty seeks to give an opportunity to the parties of defending their rights and to the Court of exercising its supervisory function and that, according to the same judgment, a decision must state the principal issues of law and of fact upon which it is based and which are necessary in order that the reasoning which has led the Commission to its decision may be understood. Moreover, the Court has held that the degree of reasoning required in a particular decision depends on the nature of the measure in question, the circumstances in which the decision is taken and also its consequences and, in its judgment of 26 November 1975 in Case 73/74 *Groupement des fabricants de papiers peints de Belgique and Others* v *Commission* [1975] ECR 1491, the Court held that in a decision that goes appreciably further than the previous decisions the Commission must give an account of its reasoning. The Court also considered that it is in the interests of satisfactory administration of justice and the proper application of Articles 85 and 86 that a complainant acting under Article 3 (2) (b) of Regulation No 17/62 should be able to institute proceedings if its complaint is rejected in whole or in part. In order for the institution of such proceedings to have any meaning at all, the Commission must, through the performance of its obligation to state reasons, give the Court an adequate opportunity to review the legality of the decision. In the contested decision, the Commission states two new principles, namely that Article 85 does not apply to an agreement in which a major competitor on the relevant market obtains a minority shareholding in another major competitor and that an abuse within the meaning of Article 86 cannot exist where an investor does not acquire the right to control the company in which it has invested. The Commission was obliged therefore to give a full and complete account of its reasons establishing and applying the above principles.

According to BAT, the entire decision is defective and is vitiated by reason of the summary manner in which the Commission has dealt with the many complex and detailed issues, which in contrast were reviewed *in extenso* in the statement of objections. The conclusion appearing in paragraph 26 is defective since the Commission failed to state how it arrived at it and failed to state why evidence given by Philip Morris, which contradicted the premise on which the conclusion is based, was disregarded. Although it concluded in the statement of objections and re-affirmed in the decision that the 1981 agreements had both the object and effect of distorting competition, the Commission failed to explain anywhere in the decision the basis for its conclusion in paragraph 21 that the

new agreements do not have as their object the distortion of competition.

In its observations on the submissions of the interveners, BAT considers, by way of example, the matter of the restrictions on the transfer of Rothmans International shares and compares the reasoning of the Commission with that of Philip Morris and Rembrandt.

It is only in paragraph 26 that the Commission actually offers a reason why the new agreements do not restrict competition. It confines itself to stating that Philip Morris will do what it can so as to be in an optimum position to buy additional shares in Rothmans International should the Commission's position change. Thus, the only reason the Commission offers as to why Philip Morris will compete fully with Rothmans International is that Philip Morris will wish to be in a good position to do that which it has promised not to do and which the Commission has said would be forbidden. Whilst Rembrandt at least tries to support the only reason advanced by the Commission by stating that Philip Morris's primary concern demands the pursuit of unrestricted competition against Rothmans International, Philip Morris simply repeats for the most part unreasoned affirmations of the Commission found in paragraphs 21 to 25 of the decision. In its only statement dealing explicitly with paragraph 26 of the decision, Philip Morris omits part of the text. Philip Morris omits precisely that part of the text dealing with the motivation based on an intent to acquire further shares which, for the purposes of the proceedings, Philip Morris must of course steadfastly deny. In so doing, however, it pointed out the inconsistency in paragraph 26 of the decision.

BAT concludes that the above arguments are void, just as is the argument advanced by Philip Morris concerning the right of first refusal. The purpose of that right is not to enable the parties to receive an appropriate remuneration in the event of transfer. The proper value of Philip Morris's shares in Rothmans International would be determined by operation of the market if there were no limitations on their transferability. In the event of the expected disposal by Rembrandt of its interest in Rothmans International, Philip Morris can obtain effective control over Rothmans International either by exercising its option or by not exercising its option and requiring Rembrandt either to sell to a single purchaser, which will be no more than the equal of Philip Morris as a result of readjustment of the voting rights, or to sell to 10 or more purchasers. That, according to BAT, is the true object of the right of first refusal, on which the Commission decision is totally silent.

(b) For its part, *RJR* states, referring to the judgment of 26 November 1975 cited above (*Papiers peints*), that where a decision breaks new ground or goes against the current of previous authority, more detailed reasoning than usual is required. That principle has been stated by the Court not only in the context of expansions or developments of applicable law but also in the case of decisions that are unusual, unexpected or contrary to previous pronouncements of the

Commission. RJR also refers to Joined Cases 19 and 20/74 *Kali und Salz AG* v *Commission* [1975] ECR 499, at p. 527 and Case 158/80 *Rewe* v *Hauptzollamt Kiel* [1981] ECR 1805. RJR considers therefore that the Commission should have given a full explanation of why it believed that the analysis adopted by it in the statement of objections with regard to the 1981 agreements did not apply to the new agreements and why it changed its mind on certain issues after issuing the Article 6 letter. The decision gives no plausible reason for not applying to the new agreements the conclusions of the statement of objections concerning the anti-competitive nature of a substantial interest in the profits of a competitor and the influence on the latter which such a shareholding would give to the investor. Nor did the Commission analyse in its decision the provisions of the new agreements regarding share transfers and it did not deal with the parties' desire to cooperate with each other evinced in the old agreements. The Commission has given no reasons for not taking any action in respect of provisions in the new agreements implementation of which, it stated in the Article 6 letter, would be in breach of the Treaty, nor has it commented on the numerous points raised by RJR in its response to the Article 6 (of Regulation No 99/63) letter.

RJR also relies on the fact that the decision contains a substantial amount of reasoning and of factual assumptions that did not appear in the Article 6 letter and were not put to RJR before the decision was taken.

(c) The *Commission* considers that in the first place a distinction must be drawn between the different categories of decisions which are provided for in the Community rules on competition in order to put the decision at issue in its proper context before dealing with the question whether it satisfied the requirements of Community law with regard to stating reasons.

Article 19 (1) of Regulation No 17 requires the Commission, before it takes the decisions provided for in Articles 2, 3, 6, 7, 8, 15 and 16, to give the undertakings concerned the opportunity of being heard. Moreover, under Article 19 (2), the Commission must hear other natural or legal persons where they show a sufficient interest. Neither those provisions nor those of Regulation No 99/63 require the Commission to discuss all the observations of undertakings on all the objections in its statement of the reasons on which its subsequent decision is based if those reasons are, of themselves, such as to justify the conclusion at which the Commission has arrived (see judgment of 2 March 1983 in Case 7/82 *GVL* v *Commission* [1983] ECR 483). Moreover, the decision at issue is not one of the type listed above.

The standard of reasoning required of a decision depends on the type of decision in question, as the Court held, for example, in its judgment of 14 January 1981 in Case 819/79 *Federal Republic of Germany* v *Commission* [1981] ECR 21. Whilst a decision establishing an infringement of the provisions on competition must set out in detail the reasons for which the Commission considers that those provisions have been infringed, the same does not apply to a decision addressed to a complainant in the position of the applicant stating that there are no grounds for taking action against the undertakings against which the complaint is directed. Such a decision must, of necessity, be subject to a standard of less detailed

reasoning and the Commission cannot be required to prove a negative. In the present state of Community law, the Commission considers that it is not obliged to issue a formal decision at all.

As regards the reference to the judgment of 26 November 1975, cited above (*Papiers peints*), the Commission points out that neither of the applicants attempts to say that the alleged lack of adequate reasoning in the decision in question compares at all closely with that in the abovementioned case. The applicants are attempting to extrapolate from the cases cited by them a general principle to the effect that the Commission is bound by its provisional utterances in the statement of objections — even when the circumstances have changed — and that if at the end of its administrative procedure it comes to a conclusion which is not the one hoped for by a complainant, it must justify doing so in the detailed manner appropriate to a decision which breaks new legal ground. The Commission is not bound to give the reasons for the withdrawal of a view which it provisionally expressed in the statement of objections and the decision at issue is in no way innovative.

Nor is the Commission required to refute in its decision all the arguments adduced during the administrative procedure. In that connection it refers to the judgments of the Court of 29 October 1980 in Joined Cases 209 to 215 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125 and of 17 January 1984 in Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19.

It is clear from paragraph 21 of the decision that the Commission, in the light of all the facts as they stood, had insufficient grounds for a finding that Philip Morris would depart from a normal course of competition as a result of its investment in Rothmans International. The arguments about the effects of financial participation by one competitor in another having been thoroughly dealt with in the course of the administrative procedure, by both the complainants and the defendant undertakings, the complainants cannot fail to have realized, on reading the decision, that their arguments had not prevailed over those of Philip Morris in the context of the new agreements. Since it was obvious that the applicants' arguments had not displaced that analysis by the Commission, it was not necessary for the Commission to spell this out any more than it did in paragraph 26 of its decision. It is unreasonable for the applicant to assume that the Commission's only reason for supposing that Philip Morris would compete against Rothmans International was one which was dependent on a situation which might never come about, namely the purchase of further shares. A more realistic approach would have indicated to the applicants that a more immediate likely set of circumstances must have been present in the Commission's mind, as would the use of the word 'notably'.

(d) According to *Rembrandt*, whether or not the letter of 22 March 1984 is a 'decision' within the meaning of Article 189 of the Treaty, the Commission would be obliged only to state the broad grounds upon which it had rejected the complaint. A formal decision addressed to an undertaking by the Commission pursuant to Article 3 of Regulation No 17 finding an infringement of Article 85 (1) or Article 86 should contain full and detailed reasons, whereas a

communication to a complainant rejecting a complaint cannot be equated with such a decision: the reasoning does not have to be so detailed and it is sufficient if the Commission states the essential grounds for rejection. The rejection of a complaint is generally unlikely to carry consequences as serious as those associated with decisions to apply Article 85 (1) or Article 86; where either of those articles is infringed, the infringing undertaking is almost invariably required to modify its commercial policies in important respects and in certain cases severe financial penalties are imposed on it. Against that background, the statement of the reasons on which the contested decision is based is adequate.

(e) *Philip Morris* is of the opinion that, by virtue of the judgment of 2 February 1973 cited above (*Continental Can*), the obligation to give reasons does not mean that the Commission needs to refute all the arguments adduced during the administrative procedure. In that connection it refers in addition to the judgment of 13 July 1966 in Joined Cases 56 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, in which the Court held that in non-judicial proceedings of that kind the Commission is not required to give reasons for its rejections of the parties' submissions, and to the judgment of 14 July 1972 in Case 48/69 *ICI* [1972] ECR 619, in which the Court stated that the Commission is not bound to include in its decisions all the arguments which it might later use in response to submissions of illegality which might be raised against its measures. The Court has also ruled that, where the applicant participated in the procedure which preceded the adoption of the decision and thus must be deemed to be aware of the reasons underlying the decision, the Commission's obligation to state the reasons in the decision does not apply with the same force as where the decision is addressed to a party not associated with its preparation (see judgments of the Court of 11 January 1973 in Case 13/72 *Netherlands* v *Commission* [1973] ECR 27; of 11 December 1980 in Case 1252/79 *Lucchini* v *Commission* [1980] ECR 3753 and of 14 January 1981 in Case 817/79 *Federal Republic of Germany* v *Commission, supra*).

Philip Morris maintains that the decision does not go further than previous pronouncements of the Commission and, since it is consistent with administrative practice, the Commission was under no duty to give particularly extensive reasons to justify its continued adherence to that practice. The statements made by the Commission in its statement of objections do not have the general scope which the applicants attribute to them. Even if they did, the Commission would be under no obligation to explain its reasons for going back on the provisional views which it had expressed during the administrative procedure. According to Philip Morris, the decision, in particular paragraphs 21 to 25, 27, 32 and 33, deal with all the important questions raised in the course of the procedure and give more than adequate reasons for the Commission's conclusions.

(5) *The principle of good faith*

(a) *BAT* considers that by basing its decision on arbitrary and unverifiable factors the Commission has violated the principle of good faith as well as essential procedural requirements. The Court has established that the Commission is at all times subject to the observance of that principle and that there must be nothing arbitrary about the Commission's decisions (see judgment of 15 July 1960 in Joined Cases 43, 45 and 48/59 *Lachmüller and*

Others v *Commission* [1960] ECR 463). In BAT's opinion the entertainment by the Commission of oral and unrecorded arguments and submissions introduced outside the procedures established by Regulations Nos 17 and 99/63, in so far as they concern the present case, is contrary to both the letter and the spirit of those regulations and violates the principle of good faith.

Although, so far as BAT is aware, the Commission respected the procedural safeguards before and during the hearing held on 5 to 7 October 1982, the Commission was approached by and received lobbyists acting for Philip Morris, in particular a former Vice-President of the Commission. None of the procedural safeguards provided for by Community law was respected at those informal hearings. The content of the statements made by the persons heard was never recorded in minutes, as required by Article 9 (4) of Regulation No 99/63 (Official Journal, English Special Edition 1963-64, p. 47). The circumstances create a strong presumption that the arguments put forward in those meetings were unrelated to the merits of the matter before the Commission.

BAT concludes that the Commission's decision was adopted in whole or in part on the basis of arbitrary, undisclosed factors which were unrelated to the merits of the case and were introduced at hearings outside the established procedures. That violation of the obligation of good faith and the non-observance of the procedural safeguards provided for by Community law are an additional ground on which the Court should annul the decision.

(b) The decision was reached by the Commission after what *RJR* believes to have been extensive further submissions made by Philip Morris and by one or more lobbyists on Philip Morris's behalf outside the regular administrative process. No part of those submissions has been revealed to the applicants by the Commission. Those submissions appear to have been decisive, inasmuch as they have persuaded the Commission to treat as lawful something that previously and during the regular administrative procedure was regarded by it as being unlawful. Moreover, those new submissions were made immediately before a decisive change of mind on the part of the Commission. The Commission should therefore have notified them to the applicants before accepting them and should now give to the Court a full account of the submissions that it has received outside the regular administrative process, in order to enable the Court to adjudicate properly on this matter. RJR adds that the Commission's claim to be free not to reveal the submissions that were made to it outside the regular administrative process illustrates the degree of discretion that would be conferred on it if the Court were to accept its argument to the effect that a complainant has no right to be considered as part of its decision-making machinery.

If the Commission contends that there was no causal connection between the lobbying on behalf of Philip Morris and the change of position by the Commission, it must, in RJR's view, disclose to the Court all the documents in its possession that are relevant

to the lobbying and to whether or not there was any such causal connection.

(c) The *Commission* states that in the statement of objections it adopted a provisional view based on the situation as it found it at the time. It heard the undertakings concerned and also the applicants and gave the undertakings concerned the opportunity to amend their agreements. It subsequently came to the conclusion that, on the facts as they stood, that is to say after Philip Morris and Rembrandt had amended their agreements, there was no longer any justification in applying Articles 85 or 86 of the Treaty. In that connection, it exercised its discretion in good faith and not as a result of lobbying activities.

The Commission states that the 'lobbying' to which BAT refers concerned the negotiations which took place between the Commission and the representatives of Philip Morris in order to determine the changes which were necessary in order to remove the Commission's objections to the old agreements. The administrative procedure affords the defendant undertakings the opportunity to bring the practices complained of into line with the rules of the Treaty. That implies that informal discussions may take place for that purpose between representatives of the defendant and the Commission. In this case, the result of those discussions was that the Commission's objections were removed by the substitution of the new agreements for the old agreements. The terms of the new agreements were made known to the applicants and they were given an opportunity to comment upon them before the final decision was taken to reject the complaints.

The Commission concludes that the applicants' submission is based on wholly unproven allegations in relation to the manner in which the Commission reached its decision and a misunderstanding of the rights of complainants.

(d) *Rembrandt* states that in its judgment of 8 November 1983 in Joined Cases 96 to 102, 104, 105, 108 and 110/82 *IAZ* v *Commission* [1983] ECR 3369, the Court held that the administrative procedure affords the defendant undertakings the opportunity to bring the practices complained of into line with the rules of the Treaty. For that purpose, it is necessary that informal communication should take place between representatives of the defendants and the Commission.

According to Rembrandt, the Commission was not obliged to keep BAT informed of the state of discussions with Philip Morris and Rembrandt. Indeed, it is scarcely possible to see how such discussions could be conducted, unless both the Commission and the parties were able to make proposals and suggestions on a 'without prejudice' and confidential basis.

Finally, with respect to BAT's allegation that the decision was adopted on the basis of arbitrary or undisclosed factors unrelated to the merits of the case, Rembrandt states that it is entirely without foundation. As far as Rembrandt is aware, the Commission's willingness to close the file resulted entirely from the parties' willingness to abandon their former agreements and to enter into the new agreements, accompanied by the undertakings. The applicants had a full opportunity to make comments in that connection.

(e) *Philip Morris* states that contrary to what the applicants' reference to the 'regular' administrative process implies, there is nothing 'irregular' or reprehensible in entering into discussions with the Commission in order to find a means to remove the Commission's objections. Indeed, the applicants refer to contacts they themselves had with the Commissioner with responsibility for competition matters and with the Director-General for Competition. In connection with the present proceedings, Philip Morris has consulted advisers of many kinds, such as the person referred to by the applicants, who is also a professor of economics at the Free University of Brussels. A number of those advisers were authorized by Philip Morris to discuss the case with the Commission. It is obvious that none of them was in a position to exercise influence over the Commission.

(6) *Violation of fundamental rights*

(a) *BAT* maintains that the Commission violated its fundamental right to have an opportunity to comment, prior to the adoption of the decision, on submissions and evidence on which the Commission relied in adopting the decision. The Commission has accepted — and neither Philip Morris nor Rembrandt has contested the fact — that BAT had a sufficient interest to submit its views in writing and to be heard orally pursuant to Article 19 (2) of Regulation No 17 and Articles 5 and 7 of Regulation No 99/63. In those circumstances, the applicants were entitled to rely upon the judgment of 23 October 1974 in Case 17/74 *Sadolin & Holmblad A/S, members of Transocean Marine Paint Association* v *Commission* [1974] ECR 1063, according to which 'a person whose interests are perceptibly affected by a decision taken by a public authority must be given an opportunity of making his point of view known'. However, the Commission refused to provide the applicants with significant parts of the statement of objections, as well as agreements to which the statement of objections related, on the ground that Philip Morris and Rembrandt were entitled to claim confidentiality for them. The claim of confidentiality for those materials was unwarranted and BAT was wrongly prevented from commenting on them in its written and oral submissions under the abovementioned regulations. It therefore requests the Court to order the Commission to produce certain documents listed by it, as a measure of inquiry pursuant to Article 45 (2) (b) of the Rules of Procedure of the Court, in order to determine whether the claim of confidentiality is sustainable.

Moreover, since the submissions made by Philip Morris at the informal meetings were never disclosed to it, BAT never had an opportunity to comment upon them, even though they appear to have been of vital importance to the Commission's final decision.

Finally, the contested decision contains a number of reasons and conclusions that were not set out in the Article 6 letter under Regulation No 99/63 or otherwise communicated to BAT, and in consequence the latter never had an opportunity to comment upon them prior to the adoption of the decision. The matters involved are contained primarily in paragraphs 26 and 29 of the decision and in the undertakings obtained by the Commission.

BAT considers that there is no basis for or logic in the Commission's submission that the fundamental right to be heard applies only to a defendant in a Commission proceeding. There are examples of situations in which an administrative authority may wield a statutory power to the

detriment of third parties by giving its approval to the activities of one or more parties and where interested parties are given the opportunity to make their points of view known. Thus, the Commission itself is required by Article 19 of Regulation No 17 to give third parties an opportunity to comment before it adopts a negative clearance or exemption decision.

(b) In that connection, *RJR* observes that it has been accepted throughout that it has a sufficient interest entitling it to lodge a complaint under Article 3 (2) (b) of Regulation No 17/62 and to a written and oral hearing under Article 19 (2) of that regulation and Articles 5 and 7 of Regulation No 99/63. Moreover, the general principle stated by the Court in the judgment of 25 October 1974, cited above (*Transocean Marine Paint*), applies to any person legitimately interested in or affected by a decision taken by a Community institution. Nevertheless, RJR was prevented from commenting on numerous matters because the Commission failed to disclose them to it during the procedure. The matters in question are essentially the same as those mentioned by BAT.

As regards in particular the documents for which the Commission claimed business secrecy, RJR asks the Court to request, by way of a measure of inquiry pursuant to Article 45 (2) (b) of the Rules of Procedure, production of all the documents and parts of documents listed by RJR so that the Court may determine whether the Commission was guilty of an error of law or misappreciation of the facts when it withheld them from RJR and so that it may, if appropriate, order immediate disclosure of those documents to RJR. Only then will RJR be in a position to make observations to the Court about the legal and practical effects of the withholding of the documents in question.

(c) The *Commission*, replying to the applicants' reference to the *Transocean Marine Paint Association* judgment cited above, considers that the applicants are seeking to rely on that judgment to establish that the Commission is under an obligation to consult complainants on every submission which it receives from other sources, at least where such submissions are contrary to the thrust of their arguments.

In so arguing, the applicants commit two errors: (1) they assume an equivalence between the rights of the defence and the rights of the complainants in a competition case; and (2) they appear to believe that a complainant should be considered as part of the decision-making machinery to be involved at every step of the decision-making process. However, there is no equivalence between the position of a defendant undertaking, which is entitled to be heard on all aspects of the case against it, on any measures the Commission proposes to take against it, and on any conditions the Commission proposes to attach to an exemption under Article 85 (3), and that of a complainant which is only one of many undertakings which may be interested in an investigation being carried out by the Commission. The judgment cited above must be read in the context of that particular case which concerned the rights of the defence. The logic of the applicants' arguments is to promote claims for the

rights of complainants, at the expense of the rights of the defence.

As regards the relationship between a final decision to discontinue the proceedings and the prior Article 6 letter, the Commission, referring to the judgment of 18 October 1979 in Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, contends that it is not in any way obliged to consult the complainants about the proposed content of the final decision, even if it differs from that of the Article 6 letter.

In this case, the Commission clearly did give the applicants an opportunity to make their views known. The applicants were, subject to the rules on confidentiality, supplied with copies of all essential documents, including the Article 6 letter, and were allowed the opportunity of putting forward their views in writing and orally. The documents of which the applicants seek production, despite the confidential nature thereof which the Commission respected in compliance with the judgment of 29 October 1980 (*Van Landewyck*), cited above, concern the 1981 agreements and the Commission's objections to those agreements. They are therefore no longer relevant to the present proceedings.

(d) *Rembrandt* considers that there are no grounds upon which the Court should request, by way of measures of inquiry pursuant to Article 45 (2) (b) of the Rules of Procedure, production of any of the documents or parts of documents listed by BAT.

It states: (1) that the claims by Philip Morris and Rembrandt to business secrecy were not unreasonable; (2) that BAT had ample information about the 1981 agreements to found its complaint and present its evidence and submissions in the course of the administrative procedure; (3) that the excluded material relating to the partnership note forms no part of the new agreements, with which the letter of 22 March 1984 was concerned.

As regards the general principle of law laid down by the Court in its judgment of 23 October 1974, cited above (*Transocean Marine Paint Association*), Rembrandt maintains that that principle does not require the Commission during the course of the administrative procedure either to inform the complainant of every fact and matter upon which it may rely for rejecting the complaint or to state *seriatim* in the Article 6 letter every matter to which it may refer in a subsequent letter definitively rejecting the complaint.

Moreover, the arguments concerning the steps taken by Philip Morris during the discussions with the Commission, referred to by the applicants in both their fifth and their sixth submissions, is without foundation. The Commission did not previously regard the new agreements as unlawful. According to Rembrandt, there could be no decisive change of mind on the part of the Commission regarding new agreements which it had not previously examined. The decisive change of mind resulted from the parties' willingness to conclude the new agreements. The Article 6 letter fully informed the applicants about the new agreements and the Commission's reasons for rejecting their complaint.

(e) According to *Philip Morris*, the applicants have not shown how their rights have been adversely affected by the

non-disclosure of the 1981 partnership note. The existence of the partnership was well known to them since their complaints to the Commission relied mainly upon the allegation that such a partnership was contrary to the Treaty. It is not apparent what further arguments they could have put forward if they had known the detailed contents of the partnership note. Moreover, as from 1983 the documents referred to had ceased to be in force.

As regards the findings made in the decision and not alluded to in the Article 6 letters, a comparison of those letters with the decision shows that the reasons notified in the Article 6 letters are not 'entirely different' from those on which the decision is based, contrary to what is stated by the applicants. In any event, the Commission may alter the provisional reasons in order to take into account the complainants' comments.

O. Due

Judge-Rapporteur