OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 17 March 1987 *

Mr President,
Members of the Court,

1. By two actions commenced in June 1984, British American Tobacco Company (hereinafter referred to as 'BAT') and Reynolds Industries Incorporated (hereinafter referred to as 'Reynolds') ask the Court to declare void a measure adopted on 22 March 1984 by the Commission of the European Communities. This measure rejected the complaints submitted by the applicants under Article 3 (2) of Regulation No 17 of 6 February 1972 (Official Journal, English Special Edition 1959-62, p. 87) concerning the agreements entered into between Philip Morris Incorporated (hereinafter referred to as 'Philip Morris') and Rembrandt Group Limited (hereinafter referred to as 'Rembrandt'). According to the Commission, however, those agreements do not in fact contravene Articles 85 and 86 of the EEC Treaty.

This case is set against the background of the Community cigarette market in which those undertakings operate in an oligopolistic situation. The events date back to April 1981. After rejecting offers from BAT and Reynolds, Rembrandt transferred to Philip Morris, for USD 350 million, half the equity in one of its companies, Rothmans Tobacco (Holding) Limited (hereinafter referred to as 'Tobacco Holding'), which in turn had a majority holding in Rothmans International (hereinafter referred to as 'Rothmans'). The contract also provided that the activities of the latter company — the market leader in a substantial part of Europe — should be managed on a joint basis.

But the satisfaction of the contracting parties was very short-lived. On 4 May 1981, Reynolds submitted a complaint concerning their agreement to officials of the Directorate-General for Competition: as a result of its 50% share of the equity in Tobacco Holding — Reynolds stated — Philip Morris is now in a position to exercise considerable influence over the conduct of Rothmans, its direct and strong competitor. As a result, Article 85 (1), regarding agreements, decisions and concerted practices, and Article 86, regarding abuse of a dominant position, are infringed.

Thus was born, and some months later was extended by BAT's parallel complaint (20 January 1982), 'l'affaire des cigarettes'. The Commission dealt with the matter vigorously by sending on 19 May to Rembrandt and to Philip Morris — which had notified the agreement to it in the hope of obtaining the exemption provided for in Article 85 (3) — a formal statement of objections in which it accused them of failing to observe the prohibitions laid down by the Treaty. The two companies drafted an attempted defence, but soon realized that, in order to avoid a finding against them, they would have to make far-reaching changes to the structure of their partnership.

Complex negotiations followed, which were concluded in 1983. Philip Morris agreed, albeit *obtorto collo*, to transfer back its shares in Tobacco Holding and instead to

* Translated from the Italian.

become a direct shareholder in Rothmans, but with a holding carrying 24.9% of the voting rights. For its part, having once again become the sole owner of the holding company, Rembrandt regained control of Rothmans, unfettered by any influence on the part of Philip Morris. The earlier cooperation requirements were removed, whilst a number of clauses already appearing in the 1981 agreement concerning access by third parties to Rothmans's capital were reinforced. The Commission also obtained an undertaking from the parties that they would compete with each other and would notify it in due time of any initiative likely to change the status quo. In short, the only feature of the agreement entered into three years earlier which remained unchanged was the price.

This new basis seemed to the Commission to allow effective monitoring and in any case to be compatible with the Community rules. On 16 December 1983, therefore, the Commission notified to BAT and Reynolds the essential details of the new agreements and the reasons for which it was considering rejecting their complaints, granting them a period within which to submit observations under Article 6 of Regulation No 99 of 25 July 1963 (Official Journal, English Special Edition 1959-62, p. 87).

The two undertakings responded within that period. The agreement — they observed — had changed the form, but not the substance. It should therefore be declared unlawful. Nevertheless, the Commission was unshakeable and on 22 March 1984 — that is to say on the day following signature of the new agreement between Rembrandt and Philip Morris — it notified BAT and Reynolds that it had rejected their complaints. That gave rise to the applications on which the Court is called upon to adjudicate.

2. By orders of 26 September and 28 November 1984 the Court joined the two cases (142/84, BAT, and 156/84, Reynolds) and authorized Philip Morris and Rembrandt to intervene in support of the Commission.

In limine litis Rembrandt objected that the two applications were inadmissible, relying on previous decisions of the Court concerning the subjective and objective preconditions for such actions. Rembrandt claimed in particular that a person who has requested the Commission to establish an infringement of the competition rules is not 'entitled to demand a final decision on the proceedings instituted . . . following his complaint' (judgment of 18 October 1979 in Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, paragraph 18). That does not mean that the letter announcing the closing of the file sent to the complainants pursuant to Article 6 of Regulation No 99/63 is immune from proceedings instituted under the second paragraph of Article 173 of the Treaty. However, in order to be open to challenge, such a measure must produce 'effects . . . binding upon, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position' (judgment of 11 November 1981 in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9).

Admittedly, Rembrandt goes on to say, that is not the only rule laid down by the Court in that regard. Thus, adjudicating on an exemption, the Court held that 'in the interests of a satisfactory administration of justice and of the proper application of

Articles 85 and 86', complainants should be able, wholly or in part, 'to institute proceedings in order to protect their legitimate interests', the reason being that, although they are third parties as regards the measure in question, they satisfy the condition laid down in the last part of the second paragraph of Article 173 (judgment of 25 October 1977 in Case 26/76 *Metro SB-Grossmärkte GmbH & Co. KG* v *Commission* [1977] ECR 1875, paragraph 13). It might be said, Rembrandt further observes, that the two statements are contradictory. In fact, the principles laid down by them are complementary: in order to institute proceedings against the rejection of a complaint, the complainant must show that, even if it does not constitute a decision, the measure in question affects it 'directly and individually' (Metro judgment), in so far as it is prejudicial to his specific interests (IBM judgment).

In actual fact, BAT and Reynolds have not proved that they suffered any damage, whereas it is common ground that the letter of 22 March 1984 was intended to bring to an end the 'affaire des cigarettes' by upholding the legality of an agreement involving only Rembrandt and Philip Morris. The applicants do not therefore have the *locus standi* to bring an action; and that conclusion is confirmed by the judgment of 10 June 1982 in Case 246/81 *Lord Bethell* v *Commission* [1982] ECR 2277, in which an action brought in a case bearing many similarities to this one was declared inadmissible.

Before the arguments I have just summarized are examined, a preliminary observation is called for — it may be a little abrupt, but it needs to be made and is, as the English say, sobering. Reams have been written by the Court and by legal authors on the subject of proceedings under the second paragraph of Article 173. However, they have not succeeded in formulating unambiguous, systematically organized and readily comprehensible rules. The necessary clarity is therefore lacking with respect to an extremely delicate problem of Community law and the present case provides eloquent proof of the difficulties arising from such a situation.

The provision distinguishes two classes of persons entitled to institute proceedings: persons to whom a measure adopted by a Community institution is addressed and persons who, in so far as they do not fall into that category, must prove that the measure is of such a kind as to be of 'direct and individual' concern to them. BAT and Reynolds — whose actions are directed against a 'letter-decision' in which the Commission informed them that it had rejected their respective complaints — clearly belong to the first class. The objection has been made, however, that the letter indicates or reflects the fact that the new agreements entered into between Rembrandt and Philip Morris are regarded as lawful and that, viewed in that light, the letter is not of direct concern to the applicants. We thus move from the first category to the second, which is governed by much more complex, and in any event different, principles.

Which should be chosen? In my opinion, it is impossible to resolve the dilemma for so long as one keeps on deriving binding rules from the case-law of the Court. On the contrary, the exact position of the applicants must be determined with respect to the contested measure and the rules on which it is based. The purpose of those rules, and in particular of Articles 85 and 86, is well known: they are designed to ensure that trade is conducted fairly within the common market between undertakings and with

consumers. In that context, the first implementing regulation (No 17/62) authorizes 'persons who claim a legitimate interest' (but it should be noted that the interest concerned is not merely that of the complainant, in so far as it coincides with that of the legal order) to call upon the Commission to establish whether there has been any infringement of the anti-trust provisions and thus ensure that the objective to which I have referred is attained.

In discharging that duty, however, it is necessary: (a) for the Commission to have the power to make a technical assessment to determine whether it is appropriate to initiate an investigation and whether the conditions for imposing the prohibitions provided for in the Treaty are fulfilled; and (b) for the Commission to exercise those powers lawfully, that is to say in conformity with the purposes which justify them and the rules which govern them. Hence the requirement that individuals should have at their disposal a means of action — legal proceedings — whereby the Court is called upon to determine whether the investigating authority to which they have addressed themselves has appraised the situation to which its attention was drawn in the light of the purposes and in conformity with the criteria provided for by law.

Accordingly, it seems to me that the position of a person who challenges the rejection of his complaint is no different from that of a person who brings an action against a negative clearance or the grant of an exemption, in other words against measures which, formally, are not of concern to him, but — and this is the important point — essentially entail the dismissal of his application. However, it should be noted that in the first case the Court has confined itself to speaking in terms of 'the right to bring an action' or of an 'interest in bringing an action' (thus, for example, judgments of 4 October 1983 in Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, paragraphs 28 to 31 and, less explicitly, of 11 October 1983 in Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045, paragraph 12, of 28 March 1985 in Case 298/83 *CICCE* v *Commission* [1985] ECR 1105, paragraph 18). In the second place, on the other hand, the Court has always considered whether the contested measure was of direct and individual concern to the complainant (see judgments of 28 January 1986 in Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraph 22 *et seq.*, and of 22 October 1986 in Case 75/84 *Metro* v *Commission* [1986] ECR 3021, paragraph 19 *et seq.*).

If those decisions are applied to this case it must be concluded that, merely by reason of having lodged a complaint under Article 3 (2) (b) of Regulation No 17/62, the applicants are also entitled to challenge the rejection thereof. Conversely, if Rembrandt and Philip Morris had been granted a negative clearance or an exemption, BAT and Reynolds, despite having submitted a complaint of the same kind, would be able to challenge those measures only in so far as they fulfilled the condition laid down in the last part of the second paragraph of Article 173. My view is that such a disparity is unjustified. I do not see why the existence of a complaint is sufficient to give rise to the right to bring proceedings against a refusal on the part of the administration; and it does not seem to me that, for that purpose, any decisive importance can be attributed to the more or less active role played by the undertaking in the course of the procedure prior to the action before the Court (*contra*, judgment of 20 March 1985 in Case 264/82

Timex v *Council and Commission* [1985] ECR 849, paragraphs 14 and 15).

But that is not all. It is to be noted that the situation in which an individual is prompted to lodge a complaint (legitimate interest) and the situation brought about by the rejection of the complaint (interest in bringing an action) do not always coincide in the manner referred to in the first *Metro* judgment. For example, Mr van Dijk, a tobacconist, complains to the Commission about an increase in the prices of cigarettes which he imputes to monopolistic manoeuvres on the part of a number of manufacturers. Without undertaking an investigation, the Commission finds out that the increase is due to the introduction of new taxes and therefore declines to charge the manufacturers with conduct incompatible with Community law. Will Mr van Dijk be able to institute proceedings against such a reply? The answer is no; unless — but the hypothesis is practically impossible — he succeeds in maintaining *in limine litis* that his essential interests have been harmed by the failure to adopt an anti-trust measure.

In short, whatever may be said, an interest in bringing an action is always necessary. That does not mean — and this is where Rembrandt is mistaken — that the circumstances underlying the rejection of the complaint must be of direct and individual concern to the applicant — the fact of submitting a complaint is in itself sufficient to ensure that the measure adopted will be of concern to the complainant. The result of that necessity, on the other hand, is that he must show the *possible* repercussions (and not therefore the *specific* impact, as the IBM judgment purports to say) of the effects of that measure on his legal position. In other words, a person who lodges a complaint under Article 3 has a right to bring an action against the express or implied measure rejecting it only where he claims that, so far as may be reasonably foreseen, that measure will cause him to incur a loss.

That is precisely the situation in this case. It is common ground that the new agreements between Rembrandt and Philip Morris have had at least some impact on the Community cigarette market. On the other hand, BAT and Reynolds occupy an important position in that market. Moreover, they are the major competitors of Philip Morris and of Rothmans, which Rembrandt controls indirectly. Those facts prompted the two companies to state in their applications that the Commission's acquiescence has been detrimental to them; and that is a sufficient reason for concluding that their applications are admissible.

3. Rembrandt's objection is therefore unfounded. However, it has the merit of having brought to light a problem which has not been sufficiently explored and is of some considerable importance to the decision to be adopted in this case: what rights do complainants have and what obligations are incumbent upon the Commission when it rejects an application?

It should be remembered that the Community legislature's intention in issuing Regulation No 17/62 was (a) to ensure that 'third parties whose interests may be affected by a decision [are] given the opportunity of submitting their comments *beforehand*'; (b) to ensure 'that wide publicity is given to decisions taken'; and (c) to ensure that '*all* decisions taken . . . under this regulation are subject to review by the Court of Justice' (recitals 11 and 12 in the preamble — emphasis added). In the later

regulation, No 99/63, the first of those purposes was confirmed and further details were given. In the fifth recital in the preamble thereto, it is stated that it is desirable 'to enable [complainants] to submit their comments where the Commission considers that on the basis of the information in its possession there are insufficient grounds for granting the application'; and Article 6 provides that in such circumstances the Commission 'shall inform the applicants of its reasons [for forming that opinion] and fix a time-limit for them to submit any further comments in writing'.

Interpreting that provision for the first time (in *GEMA*, *supra*), the Court held that the communication provided for therein is intended only for information purposes. Indeed, the measure 'implies the discontinuance of the proceedings without, however, preventing the Commission from reopening the file if it considers it advisable, in particular where, within the period allowed . . . the applicant puts forward fresh elements of law or of fact. The . . . argument that an applicant under Article 3 (2) of Regulation No 17 is entitled to obtain a [definitive] decision . . . on the existence of the alleged infringement cannot, therefore, be accepted' (paragraph 17).

Let me say immediately that that statement also leaves me confused. As has been seen, the Council intended to give interested parties an opportunity to express their views *before* the Commission closes the investigation. The communication under Article 6 cannot, therefore, be intended merely to inform the complainant of the reasons for discontinuance of the proceedings where that has already been decided upon; on the contrary, it should enable the complainants to 'submit their comments' on the reasons for which the Commission *plans* to reject the application. Moreover, the laying down of a time-limit for their reply would otherwise be meaningless. Time-limits are imposed when it is necessary to reach a particular result rapidly; and experience shows that the reopening of an investigation which has just been closed cannot be, or rarely is, a matter of urgency.

It is not enough. In a case such as this one, it seems to me, the obligation to give notice of the reasons satisfies two interests: it enables the addressee to check whether the matters of which he has complained have been correctly assessed and it enables the Commission to establish whether, on the basis of the comments submitted to it, 'the information in its possession' is sufficient to justify discontinuance of the proceedings. If the scope of those purposes is reduced, as it is in the *GEMA* judgment, Article 6 is to a considerable extent deprived of useful effect. Finally, I should add that the view which I prefer is in conformity with the provisions of Article 19 (3) of Regulation No 17/62 with respect to the other cases in which the Commission considers that it is not under a duty to apply the prohibitions provided for in Articles 85 and 86.

We now come to the crux of the matter. In its Eleventh Report on Competition Policy (1981), the Commission stated that the communication in question 'is not a decision within the meaning of . . . the Treaty and cannot be challenged before the Court of Justice'. It is true that in the past — as in the procedure followed in *Demo-Studio Schmidt* — the complaint was rejected formally; those cases, however, were of general interest because they raised new legal problems and do not imply that the Commission recognized that individuals are 'entitled . . . to oblige [it] to take action'. In

the course of these proceedings, the defendant has forcefully reiterated those principles and on the basis of them has maintained that the actions are inadmissible to the extent to which they call upon the Court to make an order compelling it to adopt a measure in conformity with the interests of the applicants.

That objection is certainly well founded. In reviewing the legality of Community measures, the Court is not entitled to make orders addressed to anybody. Rather, it is the institution whose measure has been declared void which is required to 'take the necessary measures to comply with the judgment' (as stated in the judgment of 24 June 1986 in Case 53/85 *Akzo* v *Commission* [1986] ECR 1965, paragraph 23). That fact having been recognized, however, it must immediately be added that the practice which the Commission purports to follow is without any doubt incorrect since it is contrary to the objectives of the anti-trust provisions and is not in harmony with the rules of sound administration. This emerges clearly from a brief analysis of the procedure which, following the *Demo-Studio Schmidt* pattern, the Commission has adopted in this case.

The Commission states in the first place that it sent the letter-decision of 22 March 1984 solely because BAT and Reynolds asked it to do so. From this it may be inferred that, had there been no request from the two companies, the Commission would only have sent a communication under Article 6. However, it is undeniable, as will be seen later, that the matter of the agreements between Rembrandt and Philip Morris was such as to present unprecedented problems which would certainly be of general interest. On this point, the Commission does not agree: in its defence (see paragraph XIV, p. 25) it states that the content of the contested letter is in line with the practice adopted in the past. But — the question might be asked in reply — if that was the case, why apply to BAT and Reynolds the approach followed in the *Demo-Studio Schmidt* case?

Thus, there are a number of contradictions; and the circumstances surrounding the background thereto are profoundly disturbing. The essential features thereof can be described easily: the conditions regarding the closing of files in anti-trust investigations and the possibility of subsequent verification by the Court of the propriety thereof are left in their entirety to the discretion of the Commission. In other words, the measure is or is not open to challenge, depending on the name with which the Commission baptizes it: the measure can be challenged if the Commission uses the magic word 'decision', but it cannot be challenged if that word is not used. In short, the situation is entirely remote from the intention to protect third parties and to ensure 'wide publicity' expressed by the legislature in the preambles to the regulations which I have cited.

Let us consider, on the other hand, by what rules the approach to this problem should be inspired in order to ensure that that intention is not frustrated. The first principle is that, having its origin in the aims of the competition rules, the right to bring an action cannot be made conditional upon the form of the measure rejecting the complaint. The second is that, although it is not obliged to adopt a definitive decision as to the existence of an infringement, the Commission cannot suspend *ad libitum* an investigation commenced by it. On the contrary, from the provisions of the regulations referred to (particularly Articles 9 (3) and 19 of the first and Article 6 of the second), it is apparent that, when it intends closing the file in an investigation, it is obliged: (a) to notify the complainant of its reasons for forming that intention; (b) to

allow him a reasonable period in which to submit his comments; and (c) to adopt a definitive measure with respect not to the infringement but to the application.

There is a third principle. In the same way as a negative clearance, the closing of the file is binding upon the Commission only in so far as the state of affairs giving rise to that decision does not change. Being addressed to the complainant, on the other hand, that measure has no effects *vis-à-vis* third parties, other than that of restoring to the Member States the power to apply Articles 85 and 86 (Article 9 (3) of Regulation No 17/62). The conclusion to which these remarks lead is obvious: since a definitive decision on the application guarantees the certainty of the legal relations between the parties, the complainant will be entitled to exercise his right to institute proceedings with knowledge of the Commission's response to his observations and the Court will be in a position to review comprehensively and effectively the legality of the measure adopted with respect to him (in that connection, see the judgment in *CICCE, supra*).

In conclusion, on the basis of the results arrived at in parts 2 and 3 of this Opinion, I consider that the Commission was under an obligation to reject BAT's and Reynolds's complaints by a definitive measure and that the actions brought against the decision of 22 March 1984 are admissible only in so far as they seek a declaration that it is void.

4. In support of their applications, BAT and Reynolds put forward an enormous number of arguments. With a little effort, however, they can be classified in four groups reflecting four main criticisms. For their part, the Commission's defence submissions and the observations of the intervening companies coincide substantially, for which reason I shall be able to consider them together in nearly all cases.

The applicants make the following submissions:

(1) infringement of Article 85 (1) and 86 of the Treaty, alleging a manifest error, in so far as the Commission has decided that the 1984 agreements are compatible with those provisions and that the undertakings given by the parties thereto are sufficient to avoid present and future infringements of Community law;

(2) infringement of Article 190 of the Treaty, in so far as the statement of the grounds on which the decision is based is inadequate;

(3) infringement of the principle of good faith and of essential procedural requirements, in so far as the investigation carried out by the Commission did not enable the complaints to be examined objectively and fairly; and

(4) violation of fundamental rights, in so far as the decision was adopted on the basis of considerations in respect of which the applicants had no way of expressing their views.

5. In view of their connection with the argument dealt with in part 3 of this Opinion, I shall consider the last two criticisms first. As far as the fourth is concerned, BAT and Reynolds observe that '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' (judgment of 23 October 1974 in Case 17/74 *Transocean Marine Paint Association* v *Commission* [1974] ECR 1063, paragraph 15). The Commission failed to disclose to the two companies a number of items of

particularly important information contained in the statement of objections and in the 1981 agreements, relying, by way of justification, upon the need to safeguard the business secrecy claimed by Philip Morris and Rembrandt. Moreover, the decision contains reasons which were not referred to in the letter of 16 December 1983, with the result that the addressees were not able to express their views on them.

I shall now consider the question of good faith and essential procedural requirements. The Commission is said to have acted in breach of those principles by closing the file under the influence of factors extraneous to the proceedings and after holding meetings with representatives of Philip Morris of which no records were kept. That is said to explain, *inter alia*, its surprising metamorphosis from severity in 1981 to indulgence in 1983. In that connection, it will be remembered that the applicants asked the Court to call upon the defendant to produce: (a) the texts of the 1981 agreements, of the statement of objections and of the documents which the Commission wrongly considered to be covered by business secrecy; and (b) all the documents showing the real reasons for its *volte face*.

Both submissions are unfounded. The second one is overturned by the order of 18 June 1986 by which the Court rejected the requests to which I have just referred. The Court said that to accede to the requests would constitute an exceptional measure and therefore one which could be adopted only if the Commission's reasons were the subject of doubts and suspicions such as to give the impression that there had been a misuse of powers. But that is not the case here. In particular, the so-called *volte face* in 1983 was entirely lawful in the light of the case-law according to which the statement of objections is a preparatory measure containing assessments which the Commission is obliged to review if the explanations furnished to it by the companies to which it is addressed or the amendments made by them to the contested agreements justify such a review. And, the Court added, the fact that the Commission held separate meetings with Philip Morris is not open to criticism. Similar meetings were in fact also held with the complainant companies; and, in addition, there was no reason to suspect that they were motivated by covert reasons extraneous to Community law (paragraphs 11 to 17).

Those considerations cannot be faulted and do not call for comment. However, the problem to which they relate gives me an opportunity to make an observation, which is perhaps not lacking in relevance, to develop my discussion in part 3 of this Opinion of the rights of the parties in the administrative procedure. BAT's and Reynolds's applications were inspired by the conviction that the complainants must be provided with the same information and accorded the same safeguards as those available on the one hand to the investigating authority and, on the other, to the companies under investigation. However, there is no basis whatsoever for that assumption. Already in Regulation No 17/62 the legislature drew a distinction between the subjects of an investigation, who have the 'right' to be heard, and interested third parties who must merely be given 'the opportunity' of submitting their comments (recital No 11). This difference of legal position is then confirmed in Article 19 and in the procedural rules contained in the later Regulation No 99/63.

That is not all. If the applicants' view were upheld, it would transform the investigation into a sort of direct confrontation between

individuals making accusations and individuals defending themselves. By contrast, Article 89 of the Treaty is designed to ensure that only the Commission investigates cases of alleged infringements of competition rules. The Commission is therefore the master of the procedure, and all the complainants can do is cooperate with it. Admittedly, the right to be informed of the reasons for which their complaints have been rejected is conferred upon them by law; but that right — which is accorded to them because they have an interest coinciding with that pursued by the legal order and distinguishes them from the third parties whom the Commission allows a hearing — also marks the furthest limit of their participation in the investigation.

A brief comment is called for on the allegation of infringement of essential procedural requirements. The fact that the contested measure contains information not given in the communication under Article 6 is irrelevant because the matters in question relate to the criticisms made by BAT in its reply and are a reiteration of the reasons already put forward by the Commission. This proves that the Commission set out the essential reasons which prompted it to close the file and that the addressee had an opportunity to inform it of its views. Finally, it hardly needs to be pointed out that the passage taken from the *Transocean* judgment relates explicitly to measures adopted with respect to companies which are the subject of a complaint. Far from supporting BAT's and Reynolds's view, it thus confirms that undertakings under investigation are entitled to special protection that cannot be extended to third parties.

6. The problems of procedure, compliance with formal requirements and observance of fundamental rights having been resolved, it is now time to consider the central issue. For that purpose, however, it is first of all appropriate for me to review, in more detail that I could have done at the beginning, the principal characteristics of the companies involved and their market (A), the 1981 agreements (B), the 1984 agreements (C), and the various stages of the long and complex procedure prior to the commencement of the action (D).

(A) All the protagonists in this case are engaged mainly in the manufacturing and marketing of cigarettes. BAT is the largest tobacco manufacturing company in the western world, having its headquarters in the United Kingdom. Reynolds is an American company whose interests extend to the food industry. Rembrandt is a South African company which invests in various commercial activities. Philip Morris is the largest American exporter of cigarettes and possibly the leading multinational in the industry. Finally, the two companies which are parties to the agreement are British: Tobacco Holding, a holding company and wholly owned subsidiary of Rembrandt, and its subsidiary, Rothmans, which is engaged almost exclusively in the manufacture and sale of cigarettes, 50% of them being for European consumption.

As far as the market is concerned, it is appropriate to quote in the first place from a report which the Commission presented to the Parliament in February 1982 (COM(82) 61 final, p. 7). It states that 'notwithstanding the abolition of customs duties . . . and the implementation of two

stages of excise harmonization, there is [still] no true Community market for cigarettes .... There is general agreement that this state of affairs is due to a wide variety of factors ... such as ... the existence of State and private sector producers, differing policies governing advertising [and] differing health policies'. In view of that statement, the question arises as to what, at the material time, were the market shares of the various undertakings in the Community as a whole and in the Benelux countries — in the latter case the markets are extremely homogeneous and Rothmans occupies a dominant position. The answer is furnished by the following tables:

(a) *Community cigarette market: 1976—1982 (in %)*

	1976	1977	1978	1979	1980	1981	1982
Philip Morris	*6.0*	6.7	8.0	9.9	11.8	10.9	*13.1*
Rothmans International	*13.5*	13.7	14.6	15.3	15.4	14.8	15.0
R. J. Reynolds	*2.2*	2.5	2.8	3.3	3.3	3.5	3.6
BAT	*9.8*	9.8	10.7	10.5	10.7	11.1	*10.4*

b) *Belgo-Luxembourg and Netherlands market: 1980—1982 (in %)*

	Belgium and Luxembourg			Netherlands		
	1980	1981	1982	1980	1981	1982
Philip Morris	8.7	10.3	*	7.0	8.8	10.0
Rothmans International	47.8	47.4	*	49.0	48.9	47.2
R. J. Reynolds				10.0	10.0	10.2
BAT	10.2	10.1	*	23.0	24.1	24.5

Those details show, according to the Commission, that the Community market is 'stagnant and oligopolistic'; so much so that 'in the absence of significant price competition or research breakthroughs, *advertising and corporate acquisition [are] the principal means of increasing market share*' (statement of objections, paragraph VIII, p. 14 — emphasis added). At the end of the period under consideration, in fact, only Philip Morris could be regarded as having performed outstandingly, whilst the other undertakings were left more or less at the starting post. To a considerable extent, the same observations apply to the Benelux markets.

(B) Let us now consider the 1981 agreements. In consideration of a payment of USD 350 million, Rembrandt trans-

ferred to Philip Morris half the equity in Tobacco Holding and, indirectly, a 21.9% share of the profits of its competitor, Rothmans. Of the contractual conditions, the one set out in clause 3 is of particular importance. Under that clause, the parties guaranteed each other a right of first refusal in the event of sale of their respective shares and they undertook to ensure that, even if repressive action were taken by the anti-trust authorities, any third-party purchaser was to be made subject to that condition.

That such agreements, and in particular the transfers of shares provided for therein, are incompatible with Community law appears to me to be clear. As the Commission made clear enough in its statement of objections, the acquisition by undertaking X of a substantial holding in the holding company controlling competing undertaking Y 'is likely to restrict competition'. It is clear that if the two undertakings continue to operate in the market, 'they will no longer compete in so thoroughgoing a manner as deliberately to harm each other's interests' (p. 16). In fact — and this applies specifically to the case of Philip Morris and Rothmans, in so far as the first owns 50% of Tobacco Holding and the second is controlled by that company — those undertakings will be 'bound to coordinate . . . [their respective] business activities'.

The effects thus described are made even more far-reaching by the clauses relating to the fundamental obligations. That applies above all to the commitments entered into in clause 3 and the reason is clear. In so far as they require any third-party purchaser to agree to be bound by the condition granting a right of first refusal to which the parties are subject, they are in themselves 'restrictive of competition since they support and consolidate other restrictive provisions and are open-ended in nature, taking no account of the size, market strength or competitive intentions of the acquiring party' (p. 18).

Finally, on the basis of those factors and having regard to the oligopolistic nature of the market, the Commission declared, provisionally, that the agreements were in breach of the prohibition contained in Article 85 (1). There was also an infringement of Article 86: the agreement contributed to weakening Philip Morris's competitive activity by wrongfully strengthening the dominant positions held by Rembrandt, through the Rothmans subsidiaries, in the important Benelux sector of the Community market.

(C) As we know, the 1984 agreements significantly changed the relationship between Rembrandt and Philip Morris. The latter company relinquished its 50% share of the equity in Tobacco Holding and, to offset that, acquired a direct holding representing 24.9% of the voting rights in Rothmans. For its part, Rembrandt recovered 43.6% of those voting rights, and the rest of the company's capital remained in the possession of the small shareholders who already held it. The following are the most important contractual clauses entered into by the parties:

(1) Philip Morris's holding in the capital of Rothmans must in no case exceed 25% of the voting rights;

(2) Rembrandt may transfer its Rothmans shares only if it sells the whole portfolio 'for cash payable on closing' to a single purchaser or to at least 10 purchasers who are independent of each other and all of whom are independent from Rembrandt, provided that none of them holds more than 10% of the voting rights in Rothmans. Before proceeding with any sale, Rembrandt must offer to Philip Morris or to a third party designated by the latter a right of first refusal, indicating the conditions thereof;

(3) The same rules apply to Philip Morris;

(4) (a) If it intends to sell its Rothmans shares to a single purchaser, Rembrandt must cause that purchaser to offer to acquire the whole portfolio of Rothmans shares belonging to Philip Morris 'at the same average cash price per equity share as applies to Rembrandt's sale';

(b) If Rembrandt does not exercise its right of first refusal, Philip Morris may designate a third party to purchase a number of one-vote Rothmans shares (ordinary 'B' shares) equal to at least half of the four-vote shares (ordinary 'A' shares), so as to be able to exercise three-quarters of the voting rights deriving from possession of ordinary 'A' shares, except as regards the appointment or removal of Rothmans directors.

Finally, Philip Morris gave the following undertakings to the Commission:

(a) To inform it about and provide a copy of any amendment or modification made to the agreements promptly after they become effective;

(b) To notify it within 48 hours of any increase in its holding of shares in Rothmans or any other acquisition of voting rights causing the threshold of 25% to be exceeded. In the light of such notifications, the Commission will review the competitive situation in the Community tobacco market and adopt such measures as it considers necessary. At the request of the Commission, Philip Morris will, for three months as from the date of the increase or acquisition, apply a 'hold separate' agreement with regard to its and Rothmans's respective interests, that will assure maintenance of the status quo in that market;

(c) Not to have any representative on the Board or any other management body of Rothmans;

(d) Neither to seek nor accept from Rothmans or Rembrandt any information that might influence the behaviour of any of the companies in its group.

(D) In May 1983 the Commission forwarded the new agreements to the applicants and on 16 December 1983 informed them that there were no longer

sufficient grounds for granting their applications and invited them to submit any comments. In that letter, after describing the changes introduced by the contracting parties, the Commission stated that their agreements 'contain provisions relating to disposal and acquisition of Rothmans shares. Philip Morris has been informed that implementation of those clauses in the Commission's present view is incompatible with the competition rules .... Undertakings obtained by the Commission will ensure that appropriate measures may be taken, urgently if need be, in the event of any future change in the structure of ownership of Rothmans ...' (p. 2).

BAT and Reynolds replied that those observations were inconsistent with the content of the statement of objections since almost all the features which the Commission had then considered to be contrary to the Treaty remained in the new agreements. Thus, the clauses concerning rights of first refusal and the transfer of Rothmans shares had remained almost unaltered. BAT, in particular, observed that the restrictions inherent in those stipulations would dissuade any really independent third party from acquiring any shareholding. They were designed to achieve a specific aim: to ensure that any potential purchaser was subject to prior control by Philip Morris. 'In fact, Philip Morris can ensure ... that any purchaser of part or all of the Rothmans shares is harmless to or, more importantly, prepared to cooperate with Philip Morris'. As against provisions of that kind, the weak and incomplete undertakings obtained by the Commission could be of little effect.

The administrative procedure concluded with the letter of 22 March 1984 containing the decision whereby the Commission notified BAT and Reynolds that their complaints could not be upheld and that the file was to be regarded as closed. That letter contains in particular the following statements:

(1) 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 (paragraph 21);

(2) Whereas the 1981 agreements gave Philip Morris a power of veto over an effective majority of shares in Rothmans by means of its shares in Tobacco Holding, under the new agreements Philip Morris is no more than a minority shareholder (paragraph 22);

(3) Several provisions of the new agreements enable Philip Morris: (a) to take control of Rothmans; (b) to re-establish itself in a position of parity with Rembrandt in the event of a sale of shares by Rembrandt; (c) to sell to a designated third party shares representing 34.5% of the voting rights in Rothmans (paragraph 23);

(4) There is no doubt that those rules allow Philip Morris a possibility of modifying its status as a minority shareholder, in order to obtain control of Rothmans; however, as provisions in themselves they do not have the effect of distorting

competition within the meaning of Article 85 (paragraph 24);

(5) Under the new arrangements, Rembrandt will be able to exercise its Rothmans voting rights without having regard to Philip Morris's policies. There is therefore no reason to believe that it is not in Rembrandt's interest to seek to make Rothmans as successful and profitable a company as possible (paragraph 25);

(6) While Philip Morris would not wish to endanger the value of its investment in Rothmans, it retains a considerable interest in checking by its own industrial and commercial efforts any advance in Rothmans market share in the common market. Only by an effort of that kind will it be in a position to exercise its pre-emptive right in respect of Rothmans shares on the most favourable purchase terms, should the Commission not raise objections against the exercise of that option (paragraph 26);

(7) An abuse of a dominant position (Article 86) cannot be said to have taken place inasmuch as, for the reasons given above, Philip Morris is not, under the new agreements, in a position to control Rothmans's commercial activities (paragraph 29).

7. Let us return to the BAT and Reynolds applications. In considering the first two submissions — infringement of Articles 85 and 86 by virtue of a manifest error of assessment and of Article 190 by virtue of an inadequate statement of reasons — I shall consider only the criticisms relating to the subject-matter of the contested measure, namely the 1984 agreements and the clauses contained in them. I also think it is superfluous to set out the arguments which the applicants base on the possibility available to Philip Morris of changing its position within Rothmans and to consider what effects such a change might have on the competitive relationship between the two companies. In that connection, it is sufficient to bear in mind that Philip Morris must inform the Commission of any initiative capable of changing the status quo and that the Commission may also intervene with respect to events which are not intended by the parties but are capable of affecting their commercial rivalry.

That does not of course mean that I am disregarding the terms of the long-standing debate as to the applicability of Article 85 to *agreements* concerning concentrations between companies, and therefore the favour with which such a prospect is regarded by a number of legal writers, the doubts harboured by the Commission in that connection, the almost general consensus as to the need for the matter to be governed by specific rules and the consequent resentment felt by all parties towards the Council which persists in keeping the proposals made to it by the Commission locked away. I also presume that, if the question were put to it, the Court would tend towards an affirmative answer. Evidence to that effect is provided by the judgment of 13 July 1966 in Case 32/65 *Italy* v *Council and Commission* [1966] ECR 389, at p. 408, according to which, in the absence of a set of rules allowing a derogation to be adopted and

subject to the presence of the other factors described, 'the wording of Article 85 makes the prohibition applicable . . . to *[any] agreement* between a number of undertakings' (emphasis added).

However, it is undeniable that in this case that problem does not exist. The Commission does not in principle deny that Article 85 is applicable to the 1984 agreements; it confines itself to maintaining, on the one hand, that the agreements do not contain elements such as to constitute an infringement of the provision and, on the other, that although the agreements may be capable of leading to a merger, the undertakings given by the parties to the Commission provide it with the means of monitoring and halting any manoeuvre intended to bring about that result. On the latter point — that is to say regarding the Commission's expectations or the efficacy of the instruments with which it has provided itself — there is not much that the Court can say. The Court is interested above all in the first statement which refers not to the future but to the present: that is to say to the agreements as they operate here and now.

That having been clarified, I move on to an analysis of the two submissions. As regards infringement of the provision regarding agreements, the applicants observe that, notwithstanding its oligopolistic nature, the Community cigarette market has remained competitive as a result of several factors: the dimensions of the undertakings operating in it, the market shares held by them, the methods employed in marketing the product, and so forth. However, the 1984 agreements upset this delicate balance because they allow Philip Morris and Rothmans — that is to say two of the largest companies in the industry — to coordinate their activities. The Commission itself acknowledged, in criticizing the 1981 agreements, that if an undertaking invests substantially in the shares of a competitor, the two parties to the sale will no longer 'deliberately harm each other's interests'. Things have not changed since then. Of itself — it is true — possession of 25% of the voting rights in a joint stock company is not contrary to the anti-trust rules; it cannot, however, fail to infringe those rules if that company is a rival and, what is more, a leader in an oligopolistic situation.

And that is not all. As a result of the conditions governing the transfer of Rothmans shares, Philip Morris enjoys a privileged position in the contest for control of Rothmans; at the same time, it is in a position to prevent other parties from participating in that contest with any chance of success and, if Rembrandt does not exercise its right of first refusal, it even has the right to choose the future purchaser. Those restrictions too are obviously designed to induce Philip Morris and Rembrandt to collaborate or, at least, not to obstruct each other; and, that being so, there can be no doubt that, by ignoring the likelihood that the agreement would rule out any conflicts between the parties, the Commission made an erroneous assessment of it.

As regards the failure to apply Article 86, BAT and Reynolds point out that 'the concept of abuse is an objective concept'; it implies that 'the behaviour of an undertaking in a dominant position [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' (judgment of 13 February 1979 in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 91 of the decision). For the purpose of establishing the existence of an abuse, therefore, the extent of the control exercisable by an undertaking does not count; what does count is that the latter operates in such a way as to weaken competition which has already been adversely affected as a result of the position acquired by that undertaking. Nor is it necessary that the weakening of competition should be considerable; rather, what is decisive is that the conduct of the undertaking appreciably affects trade between the Member States.

The Commission is therefore mistaken to maintain that if the investing company is not in a position to influence the undertaking in which it has a holding then there is no abuse. However, even someone who shares that view in the abstract could not fail to agree that in the present case there is influence. To reach that conclusion, all that need be done is to look beyond the finding that Philip Morris's holding amounts to 25% and assess its potential distorting effect in the light of the whole agreement — thus taking account also of the right of first refusal and, more generally, of the conditions governing the transfer of Rothmans shares.

Finally, in support of their second submission, the applicants remind the Court of paragraphs 30 and 31 of the judgment of 26 November 1975 in Case 73/74 *Groupement des fabricants de papiers peints de Belgique and Others* v *Commission*, [1975] ECR 1491. In paragraph 30 it is stated that 'under Article 190 of the Treaty, the Commission is required to state the reasons on which its decisions are based, enumerating [both] the facts forming the legal basis of the measure and the considerations which led it to adopt the decision'; and paragraph 31 goes on to say that although decisions may be reasoned in a summary manner, the Commission must give an account of its reasoning if it goes 'appreciably further than the previous decisions'.

In the present case, in order to reject BAT's and Reynolds's complaints, the Commission was obliged to state that control of 25% of the voting rights in a rival company holding a dominant position in an oligopolistic market is not in breach of the prohibitions contained in Articles 85 and 86. The lawfulness of that principle is at the very least dubious; however, its extraordinary importance for the business world and hence, on the basis of the judgment cited, the need to clarify every aspect of it in a comprehensive and incisive manner are beyond doubt. However, the decision is laconic to the point of coming very close to concealment. It should be added that the Commission has recognized the considerable possibilities of manoeuvre available to Philip Morris under the conditions governing the transfer of Rothmans shares, but it has failed to explain why their inclusion does not at present have the effect of distorting competition.

8. What can be said of those submissions? The arguments advanced in support of the first seem to me to go too far; in other words, they ask of the Court more than it is able to give. The two applications, it will be recalled, seek to have a measure rejecting complaints submitted under Article 3 (2) (b) of Regulation No 17/62 declared

void. I do not believe that in such cases the Court is entitled to verify *all* the conditions required for the application of Articles 85 and 86; I do not believe that to be the case because two factors militate against such a verification: on the one hand, the negative content of measures whereby a file is closed and, on the other, the strictly technical nature of the assessment which must be carried out by the administrative authority. Within the limits imposed by those factors, the examination required of the Court must necessarily conclude with recognition of the fact that the decision of 22 March 1984 takes account of all the disputed circumstances and is therefore free of manifest errors.

The second submission, on the other hand, calls for a more detailed discussion. Let me summarize it in one sentence: the applicants charge the defendant with failing to show why a holding in the capital of a direct competitor and leader in a significant part of an oligopolistic market, albeit a holding representing only one-fourth of the votes, cannot adversely affect competition between the parties.

In those terms, the charge must be rejected. In paragraphs 25, 26 and 29 of the decision, the Commission identified and adequately explained the reasons for which Philip Morris now has an interest in competing with Rothmans and therefore in not abusing the latter's dominant position. Admittedly, the explanation could have been more informative. We must not, however, forget that the applicants took an active part throughout the administrative proceedings and at that time had an opportunity to study every aspect of the problem in detail. Moreover, Article 190 'does not require the Commission to discuss all the matters of fact and of law . . . dealt with during the administrative proceedings'. The statement of reasons on which a decision adversely affecting a person is based has, in the last analysis, only one purpose, namely to 'provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded' (judgment of 11 July 1985 in Case 42/84 *Remia* v *Commission* [1985] ECR 2545, paragraph 26).

In that respect, therefore, the decision to reject BAT's and Reynolds's complaints appears to be properly reasoned. It is obvious, however, that that does not of itself mean that the contested holding has been proved to be innocuous; nor, in that connection, is it relevant to say, as Philip Morris says, that according to the law of one of the Member States (Germany) 25% represents the threshold below which anti-trust practices are in principle presumed impossible. It is self-evident that, by contrast with national provisions, the provisions of the Treaty relate to the whole common market and their object is above all to prevent restrictions on competition from adversely affecting trade between the Twelve by isolating their markets.

Where does that take us? What I wish to say is simply this: the holding in question cannot be treated as if it were a part of an organism capable of being dissected and studied *in vitro*. Quite the contrary: the extent to which it is compatible with the Community rules must be assessed in the light of the impact which the *whole* agreement containing the provision regarding that holding has on the European market. We know that the agreement contains clauses — such as the one relating to the rights of first refusal or the one empowering Philip Morris to designate the purchaser of the Rothmans shares — whose

economic importance is *ictu oculi* extremely great. In rejecting the complaints lodged by BAT and Reynolds, the Commission should therefore have shown that the agreements were not capable of producing harmful consequences, in particular regarding the contractual freedom of any other undertaking operating in the cigarette market. But the Commission did not do so; and, from that point of view, there is no doubt that its measure is subject to a serious defect as regards the statement of the reasons on which it is based.

9. That conclusion, moreover, is firmly supported by the judgment of 13 July 1966 in Joined Cases 56 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299. The Court held that under Article 85 (1) 'competition may be distorted ... not only by agreements which limit it as between the parties but also by agreements which prevent or restrict' it in possible relations between one of the parties and third parties, at least in so far as they are intended 'to create or guarantee ... an unjustified advantage' for the contracting parties. I believe that that principle is applicable in circumstances other than those considered by the Court in that case, and it therefore applies to clauses which, like the one at issue here, form part of an agreement for the purchase of a shareholding. They too can procure for the parties to them 'an unjustified advantage'; and it is a fact, as is stated in the *Remia* judgment cited earlier, at paragraph 17, that the intrinsically lawful purpose of the agreement in which they appear does not mean that they are immune from an examination designed to determine whether they are compatible with the prohibitions contained in Article 85.

No such examination — as we know — took place; but the documents before the Court are sufficient to show those clauses in an unfavourable light. Thus, it seems clear that they were not necessary for, or did not in any event play any part in, securing conclusion of the agreement and they are not designed to protect Philip Morris's investment, whatever those involved may say. The first proposition is borne out by their content, which relates only to the detailed arrangements for any transfer of Rothmans shares to third parties, and the second has been proved by the Commission itself. In paragraph 24 of its decision, the Commission states that, as a result of those clauses, Philip Morris is in a position to obtain control of Rothmans directly or by means of a purchaser upon whom it can rely; and, again, it is the Commission which highlights the fact that the undertakings given to it by the company are in fact designed to enable it to block such a development at its inception.

But there is worse to come. In the statement of objections, it will be remembered, the Commission defined the conditions attached to the old agreements as being 'themselves restrictive of competition' and 'open-ended in nature' because they took no account of the 'size, market strength or competitive intentions of the acquiring party'. However, my impression is that from 1981 to 1984 the restrictions on the access of third parties to the equity of Rothmans became even more stringent. Replying to the letter of 16 December 1983, BAT stated in fact that the new clauses were intended to ensure 'that any eventual purchaser of the [Rothmans] shares ... is subject to prior control by

Philip Morris'. That statement accurately reflects the real situation and — in view of the fact that in the cigarette market the acquisition of shareholdings is perhaps the most effective weapon available in the struggle against the other oligopolists (see part 6 of this Opinion) — provides a decisive key for an understanding of the matter under review.

Naturally, the Commission does not agree. In its rejoinder, indeed, it had acknowledged that, if Philip Morris did not exercise its right of first refusal, the purchase of Rothmans shares would become 'singularly unattractive' to the competitors; but that significant admission was corrected at the hearing. That right — we were told — 'is *simply* a right to be notified that Rembrandt is prepared to sell its shares, and a right to bid, so Philip Morris may bid'; Rembrandt remains free to sell to the highest bidder and there is no reason to doubt that the shares will ultimately be acquired by 'whoever offers the most money' (transcript of the hearing, p. 72).

As a matter of fact, that is not the true position. Consider clause 4 (a): If Rembrandt intends transferring its shares to a single purchaser, it must cause that purchaser to offer to acquire Philip Morris's holding in Rothmans 'at the same average cash price per equity share as applies to Rembrandt shares'. Here the cards are really on the table: the awareness that it is exposed to continuous 'outbidding' from Philip Morris, the enormity of the holding which must be purchased (capital representing almost 70% of the voting rights in Rothmans!), and the fact that payment must be made in cash are all factors designed to deter any third party — even the most strongly motivated — from coming forward or carrying the negotiations through to the end.

I could go into this matter further and in particular dwell upon the no less perverse effects of the right conferred upon Philip Morris to designate a purchaser; but such an investigation would be pointless. To establish whether the conditions at issue are contrary to Article 85 (1) or, conversely, do not limit competition with the other oligopolists was a matter for the Commission. Nor may it be said that the Commission did not do so, because the undertakings obtained from the contracting parties were intended to provide it with a guarantee that those clauses would present no danger; it was the Commission itself which admitted that those undertakings — which, moreover, were given after the agreement was entered into — did not influence its views regarding the lawfulness of the agreement.

In conclusion, there can be no doubt as to the fact that the defendant failed to discharge the obligation imposed upon it by Article 190; the disputed measure should therefore be declared void by virtue of the inadequacy of the statement of the reasons on which it was based regarding one of the preconditions for an agreement between undertakings to be compatible with the prohibition contained in Article 85 (1) of the EEC Treaty.

10. In view of all the foregoing considerations I propose that the Court should uphold the applications lodged by British American Tobacco Company Limited and Reynolds Industries Incorporated against the Commission of the European Communities and declare void the decision of 22 March 1984 concerning procedures Nos IV/30.342 and IV/30.926. Pursuant to Article 69 (2) of the Rules of Procedure, the costs should be borne by the Commission, which has failed in its submissions. Each of the interveners should bear its own costs.