JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber, Extended Composition)

15 January 2003 *

In Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01,

Philip Morris International, Inc., established in Rye Brook, New York (United States), represented by É. Morgan de Rivery and J. Derenne, lawyers, with an address for service in Luxembourg,

applicant in Cases T-377/00 and T-272/01,

R.J. Reynolds Tobacco Holdings, Inc., established in Winston-Salem, North Carolina (United States),

RJR Acquisition Corp., established in Wilmington, New Castle, Delaware (United States),

R.J. Reynolds Tobacco Company, established in Jersey City, New Jersey (United States),

R.J. Reynolds Tobacco International, Inc., established in Dover, Kent, Delaware (United States),

represented by P. Lomas, Solicitor, and O. Brouwer, lawyer, with an address for service in Luxembourg,

applicants in Cases T-379/00 and T-260/01,

* Language of the case: English.

Japan Tobacco, Inc., established in Tokyo (Japan), represented by P. Lomas, Solicitor, and O. Brouwer, lawyer, with an address for service in Luxembourg,

applicant in Case T-380/00,

v

Commission of the European Communities, represented initially by X. Lewis and C. Ladenburger and subsequently by C. Docksey and C. Ladenburger, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

European Parliament, represented by R. Passos and A. Baas, acting as Agents, with an address for service in Luxembourg,

Kingdom of Spain, represented by R. Silva de Lapuerta, acting as Agent, with an address for service in Luxembourg,

French Republic, represented by G. de Bergues, acting as Agent, with an address for service in Luxembourg,

Italian Republic, represented by U. Leanza, acting as Agent, with an address for service in Luxembourg,

Portuguese Republic, represented by L. Fernandes and Â. Cortesão de Seiça Neves, acting as Agents, with an address for service in Luxembourg,

Republic of Finland, represented by T. Pynnä and E. Bygglin, acting as Agents, with an address for service in Luxembourg,

interveners in Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01,

Federal Republic of Germany, represented by W.-D. Plessing and M. Lumma, acting as Agents,

Hellenic Republic, represented by V. Kontolaimos, acting as Agent, with an address for service in Luxembourg,

interveners in Cases T-260/01 and T-272/01,

Kingdom of the Netherlands, represented, in Cases T-260/01 and T-272/01, by H. Sevenster and, in Case T-379/00, by H. Sevenster and J. van Bakel, acting as Agents, with an address for service in Luxembourg,

interveners in Cases T-379/00, T-260/01 and T-272/01,

APPLICATIONS for annulment of two decisions by the Commission to commence legal proceedings against the applicants before a federal court in the United States of America,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of: R.M. Moura Ramos, President, V. Tiili, J. Pirrung, P. Mengozzi and A.W.H. Meij, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 26 June 2002,

gives the following

Judgment

Facts

1 As part of its efforts to combat the smuggling of cigarettes into the European Community, the Commission approved, on 19 July 2000, 'the principle of a civil action, in the name of the Commission, against certain American cigarette manufacturers'. It also decided to inform the Permanent Representatives Committee (Coreper) through the appropriate channels, and empowered its President and the Commissioner responsible for the budget to instruct the Legal Service to take the necessary measures.

2 On 3 November 2000, a civil action was brought by the European Community, represented by the Commission and 'acting on its own behalf and on behalf of the Member States it has power to represent', against several companies belonging to the Philip Morris group (hereinafter 'Philip Morris') and the Reynolds group (hereinafter 'Reynolds'), and against the company Japan Tobacco Inc. before the United States District Court, Eastern District of New York, a federal court of the United States of America (hereinafter 'the District Court').

3 In that action (hereinafter 'the first action'), the Community alleged involvement on the part of the applicants, which are tobacco companies, in a system of smuggling aimed at bringing cigarettes into the territory of the European Community and distributing them there. The Community was seeking in particular compensation for the loss resulting from the smuggling, consisting mainly in lost customs duties and value added tax (VAT) which would have been paid on legal imports, as well as injunctions aimed at having the alleged activities stopped.

4 The Community based its claims on a federal law of the United States, the Racketeer Influenced and Corrupt Organisations Act 1970 (hereinafter 'RICO'), as well as on certain common law doctrines, namely, common law fraud, public nuisance and unjust enrichment. RICO is aimed at combating organised crime, particularly by facilitating proceedings against economic operators when they engage in criminal activities. To that end, it provides for a right of action for civil parties. In order to encourage such civil proceedings, RICO provides that the plaintiff may be awarded damages corresponding to three times the loss actually incurred by him ('treble damages').

5 By decision of 16 July 2001, the District Court dismissed the claims of the European Community.

6 On 25 July 2001, the Commission approved 'the principle of a new civil action in the US courts, jointly by the Community and at least one Member State, against the groups of cigarette manufacturers who had been defendants in the previous action'. It also empowered its President and the Commissioner responsible for the budget to instruct the Legal Service to take the necessary measures.

7 On 6 August 2001, a fresh action was filed with the District Court against Philip Morris and Reynolds by the Commission, on behalf of the European Community and the Member States it was empowered to represent, and by 10 Member States, namely the Kingdom of Belgium, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic and the Republic of Finland, in their own name. In that action (hereinafter 'the second action'), the Community no longer based its claims on RICO, but solely on the common law doctrines invoked in the first action. The Member States, however, based their claims both on RICO and on the common law doctrines invoked by the Community. In addition, the second action alleged economic and non-economic loss which the Community had not alleged in the first action, and introduced additional elements with respect to the doctrines of public nuisance and unjust enrichment.

8 The Community did not appeal against the District Court's decision of 16 July 2001 referred to in paragraph 5 above. However, on 10 August 2001 it submitted to the American court a motion to vacate that judgment and to amend the complaint. That motion was dismissed by a decision of the District Court of 25 October 2001.

9 On 9 January 2002, the Community, represented by the Commission, and the 10 Member States mentioned in paragraph 7 above filed a third action with the District Court against the applicant Japan Tobacco Inc. and other associated companies (hereinafter 'the third action').

10 On 19 February 2002, the District Court dismissed the second and third actions of the Community and the Member States, on the basis of the common law revenue rule, under which United States Courts refrain from enforcing the fiscal legislation of other States.

11 On 20 March 2002, the Commission approved the principle of appealing against the judgment of the District Court. On 25 March 2002, an appeal was filed on behalf of the Community and the 10 Member States before the United States Court of Appeals for the Second Circuit.

Procedure

12 By applications lodged with the Registry of the Court of First Instance on 19 and 20 December 2000, the applicants brought Cases T-377/00, T-379/00 and T-380/00, seeking annulment of the decision by the Commission to bring the first action, and, in Cases T-379/00 and T-380/00, annulment of any decision by the Council relating thereto.

13 By separate documents, lodged with the Registry of the Court of First Instance on 29 January 2001, the Council and the Commission raised objections of inadmissibility in each of the cases, pursuant to Article 114 of the Rules of Procedure of the Court of First Instance.

14 On 7 June 2001, the Court decided to refer the three cases to a Chamber composed of five Judges (Second Chamber, Extended Composition).

15 By order of 2 July 2001, the President of the Second Chamber (Extended Composition), after hearing the parties on this point, joined the three cases for the purposes of the written procedure, the oral procedure and judgment, pursuant to Article 50 of the Rules of Procedure.

16 By order of 12 July 2001, the President of the Second Chamber (Extended Composition) granted the Kingdom of Spain, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Portuguese Republic, the Republic of Finland and the European Parliament leave to intervene in the joined cases in support of the forms of order sought by the Commission and the Council.

17 On 27 July 2001, the Court of First Instance invited the parties to submit their observations on the decision of 16 July 2001 of the District Court. The applicants, the Commission, the Council, the Kingdom of Spain, the Italian Republic, the Portuguese Republic, the Republic of Finland and the Kingdom of the Netherlands submitted their observations within the period allowed.

18 By applications lodged with the Registry of the Court of First Instance on 15 October 2001, Reynolds and Philip Morris brought Cases T-260/01 and T-272/01, in which they seek annulment of the decision to bring the second action.

19 On 23 November 2001, the Commission forwarded to the Court of First Instance the decision of 25 October 2001 of the District Court, in which the motion to vacate the decision of 16 July 2001 was dismissed. It asked the Court of First Instance to give the parties the opportunity to submit their observations on the question of whether that decision had made the actions in Cases T-377/00, T-379/00 and T-380/00 devoid of purpose. The applicants, the Commission, and

the Kingdom of Spain, the Italian Republic, the Kingdom of the Netherlands, the Portuguese Republic, the Republic of Finland and the European Parliament lodged their observations on whether there was still a need to give a decision in Cases T-377/00, T-379/00 and T-380/00 within the period allowed to them for that purpose.

20 By separate documents lodged with the Registry of the Court of First Instance on 10 and 18 December 2001, the Commission raised an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure in Cases T-260/01 and T-272/01.

21 On 10 January 2002, the Court of First Instance decided to refer Cases T-260/01 and T-272/01 to a Chamber composed of five Judges (Second Chamber, Extended Composition).

22 By order of 31 January 2002, the President of the Second Chamber (Extended Composition), after hearing the parties on this point, joined the five cases (T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01) for the remainder of the written procedure, the oral procedure and judgment.

23 By decision of 31 January 2002 of the Second Chamber (Extended Composition), the application by the applicant in Case T-272/01 to have the case dealt with under the expedited procedure was dismissed.

24 On 6 February 2002, the applicants in Cases T-379/00 and T-380/00 withdrew their actions in so far as they were directed against the Council. By order of 21 March 2002, the President of the Second Chamber (Extended Composition) ordered that the two cases be removed from the register in so far as they were directed against the Council.

25 By order of 22 March 2002, the President of the Second Chamber (Extended Composition) granted the European Parliament, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Portuguese Republic and the Republic of Finland leave to intervene in Cases T-260/01 and T-272/01 in support of the forms of order sought by the Commission.

26 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure without undertaking measures of inquiry. It did, however, put questions to the Commission, which replied within the prescribed period.

27 The parties presented oral argument and answered questions put to them by the Court at the hearing on 26 June 2002.

Forms of order sought

28 The Commission and the interveners contend that the Court should:

— dismiss the actions as inadmissible;

— order the applicants to pay the costs.

29 Philip Morris claims that the Court should:

— reserve its decision on the objection of inadmissibility for the final judgment;

— in the alternative, dismiss the objection of inadmissibility;

— order the Commission to pay the costs.

30 Reynolds and Japan Tobacco claim that the Court should:

— reserve its decision on the objection of inadmissibility for the final judgment;

— in any event, dismiss the objection of inadmissibility;

— reserve its decision on costs.

Law

Arguments of the parties

31 The Commission's objections of inadmissibility are each founded on a single plea, to the effect that the contested acts are not open to challenge as contemplated in the fourth paragraph of Article 230 EC. In addition, some of the interveners argue that the applicants are not directly and individually concerned by the contested acts and that they have no interest in bringing proceedings.

32 The arguments of the parties in respect of the plea raised by the Commission concern three aspects of the issue of admissibility of the present actions. Firstly, the parties discuss considerations relating to the nature of the Commission's decisions of 19 July 2000 and 25 July 2001 (hereinafter 'the contested acts'). Secondly, they examine the different effects which those acts are liable to produce. Thirdly, they discuss certain considerations of a general nature put forward by the Commission to justify its position.

The nature of the contested acts

33 The Commission, supported by the interveners, states that a decision to bring an action before a court is not an act open to challenge as contemplated in the fourth paragraph of Article 230 EC.

34 According to the Commission, there are analogies to be drawn between the contested acts and certain other acts which, according to the case-law, are not open to challenge.

35 The Commission refers first to the judgment of the Court of Justice in Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, from which it deduces that a decision by the Commission to commence infringement proceedings under Article 226 EC before the Court of Justice is not an act open to challenge as contemplated in Article 230 EC.

36 Second, the Commission, supported by the Kingdom of Spain, the Federal Republic of Germany and the Hellenic Republic, takes the view that the decisions to commence proceedings before the American court have all the characteristics of preparatory measures.

37 Third, the Commission contends that the bringing of a civil action is a statement of a legal opinion which has no binding legal effects, and may be compared to the opinions which that institution may address to national authorities without binding them.

38 The Parliament, the Federal Republic of Germany and the Hellenic Republic add that the contested acts fall within the scope of the internal organisation of the defendant institution.

39 In response to a question from the Court, the Commission stated that the only acts open to challenge are those by which the institution itself changes the legal position in question, and not acts by which it asks a third party to take binding measures.

40 The Commission, supported by the Federal Republic of Germany, also considers that the fact that in the present case there is no subsequent act by a Community institution which may be challenged by annulment proceedings cannot justify the use of a legal fiction to treat the contested acts as though they were definitive acts producing legal effects. It accepts that the principle of effective judicial protection is a fundamental right, but that principle does not mean that every act by an institution must be amenable to judicial review, including acts incapable of producing binding legal effects. The Commission, supported by the Federal Republic of Germany and the Italian Republic, adds that the applicants are sufficiently protected in the proceedings before the District Court by the guarantees under United States procedural law, including the right to invite the District Court to examine whether a plaintiff which has brought a case before it has entitlement to sue.

41 The applicants emphasise, first of all, the extraordinary nature of the contested acts by which, in their submission, the Commission is seeking to circumvent the entire system of tax recovery in force, including the division of powers pertaining thereto between the Community and the Member States. They affirm that no sovereign body can recover taxes indirectly by means of an action for damages. They stress that they were never informed by the competent authorities of the Member States that they owed tax, and thus never had the opportunity to present their point of view on the matter before the actions were brought.

42 The applicants maintain that the contested acts are challengeable in annulment proceedings because they produce legal effects, because they are final measures representing the definitive position of the institution and because they therefore have brought about a distinct change in their legal position. Reynolds further contends that, to determine whether an act is open to challenge, the test is not necessarily whether the act produces legal effects, but whether the act is intended to produce legal effects.

43 The applicants take the view that the contested acts cannot be compared to a decision to initiate infringement proceedings under Article 226 EC, which was the situation in Case C-191/95 *Commission* v *Germany*, cited in paragraph 35 above. They argue that a decision to bring infringement proceedings constitutes a mere step in a Community law procedure whereby the Court of Justice, the only body competent in this connection, establishes a failure by a Member State to fulfil its obligations. Thus it does not affect the rights and obligations of the Member State concerned.

44 The applicants argue that the contested acts cannot be termed preparatory acts. They maintain that the essential criterion for determining whether a measure has legal effects or is merely preparatory is whether the decision adopted constitutes the definitive settlement of the matter within the Community legal order or whether it is a measure whose purpose is to prepare the final decision, the illegality of which may be raised in proceedings brought against it. They stress that the present actions offer the only opportunity for the Community judicature to review whether the Commission has acted within its powers and in compliance with Community law in bringing the actions before the District Court.

45 The applicants take the view that the bringing of a civil action before an American court cannot be treated as an expression of an opinion on the law by the Commission which may then be accepted or rejected by the court.

46 Nor can the contested acts be treated as measures of internal organisation.

47 In response to a question from the Court, the applicants stated that there was no difference between the Commission's adopting an act itself and asking a third party to do so.

48 In the alternative, the applicants maintain that the contested acts lack even the appearance of legality, so that the Court must annul them even if they are only preparatory acts. The applicants refer to Case 60/81 *IBM* v *Commission* [1981] ECR 2639, and to Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 49, which they maintain stand for the proposition that the Community judicature has jurisdiction to annul a preparatory act which is manifestly unlawful.

The effects of the contested acts

49 The Commission, supported by the interveners, considers that a distinction must be drawn between the procedural effects that an act may produce, which it terms consequences of fact, and binding legal effects. The Commission states that the effects pleaded by the applicants resulting from the bringing of the actions before the American court are merely consequences of fact which any defendant in Court proceedings must face. The Commission argues that they are not legal effects because the applicants are not compelled to alter their practices unless and until a court so orders.

50 At the hearing, the Commission stated that the bringing of the actions before the District Court did not have the effect of precluding procedures for the recovery of taxes or the prosecution of fraud at Community level. Such procedures are under

way and the Commission will participate in them to the extent allowed under national law. However, those procedures have a different purpose and involve different parties from the actions at issue here.

51 The applicants maintain that the contested acts and the actual bringing of the actions before the District Court have produced various effects which, they claim, are of a legal nature. The applicants allege, first, certain effects within the Community legal order. Secondly, they cite certain effects flowing from the procedural law applicable before the American court seised of the cases.

52 With respect to the legal effects of the contested acts in the Community legal order, the applicants argue, firstly, that through the contested acts the Commission adopted a definitive position on its competence to bring the actions before the District Court. They argue that a unilateral, independent decision of that nature, by which the Commission adds to the powers granted to it by the Treaty the power to bring legal proceedings before a court in a non-Member State, must be open to challenge, in keeping with the case-law of the Court of Justice (see Case C-366/88 *France* v *Commission* [1990] ECR I-3571). They stress that no act which is liable to affect the institutional balance provided for by the Treaties can escape judicial review. In support of this argument, they refer *inter alia* to Case C-327/91 *France* v *Commission* [1994] ECR I-3641, concerning the agreement between the Commission and the United States of America regarding the application of their competition laws, to Case C-170/96 *Commission* v *Council* [1998] ECR I-2763, concerning a joint action on airport transit arrangements, and to Case C-303/90 *France* v *Commission* [1991] ECR I-5315, concerning a code of conduct for financial control in the context of structural assistance.

53 Second, the applicants submit that the contested acts have a binding legal effect because those acts expose them to civil proceedings before the courts of a

non-Member State and thereby subject them to the rules of a different legal order. The legal actions in the United States expose them to heavier penalties than those provided for under the national law of the Member States.

54 The applicants argue that the Commission, the guardian of the Treaty, is circumventing Community law procedures in order to obtain a result through proceedings in the United States which would be unavailable to it under Community law. They stress that they are not purporting to have a right not to be sued, but rather a constitutional right to have applied to them the procedures laid down by Community law.

55 The applicants submit that the uncertainty surrounding the outcome of the proceedings in the United States does not preclude the view that the contested acts have a definitive legal effect because they force the applicants to conduct proceedings before the American courts and thus expose them to a risk to which they would not have been exposed under the Community legal system.

56 They stress that a judgment of the District Court cannot be reviewed by the Community judicature and is not subject to the safeguards guaranteed under Community law to natural and legal persons accused of infringing Community law. In particular, the District Court is not bound by the principle of primacy of Community law over national law and could apply United States law rather than Community law in determining whether the Community was competent to bring an action before it.

57 The applicants also argue that the Commission's decision to sue them before an American court has changed their legal position from a procedural standpoint.

They rely *inter alia* on Joined Cases 8/66 to 11/66 *Cimenteries CBR and Others* v *Commission* [1967] ECR 75, and Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, where it was held that acts producing legal effects at a procedural level may be challenged. The applicants state that the contested acts ignore the procedures laid down by Community law for recovery of taxes and customs duties and for combating fraud. Under Community law, only the Member States would have been able to claim unpaid tax from the applicants. The only remedy available to the Commission is infringement proceedings against the Member States. Such proceedings would have guaranteed 'that... no arbitrary finding [would] be made against [the applicants]'. The applicants claim that the contested acts have deprived them of procedural safeguards under national law and of the benefit derived from the obligation of national courts to raise questions of Community law of their own motion. They state that the present case is liable to give rise to many difficult questions of Community law and stress the importance of the preliminary ruling procedure in resolving those issues. The contested acts have precluded the ability, or the obligation, to make a reference for a preliminary ruling. They add, however, that a detailed discussion of the procedures which have not been followed and of the safeguards which they would have provided goes to the substance of the case.

58 In response to a question from the Court, Reynolds and Japan Tobacco stated that no proceedings had been brought against them by Member States. They submit that the principle *non bis in idem* would, in any event, prevent proceedings being brought against them simultaneously before the District Court and in a Member State.

59 As regards legal effects resulting from United States law, the applicants argue, firstly, that the mere filing of a civil action before the American court does produce such effects, because they are thenceforth subject to the procedural rules applicable before that court. The applicants refer in particular to the obligation to respond to the suit, or risk judgment by default, and to set forth immediately at the start of the litigation all means of defence, or risk not being able to plead them subsequently. They refer to the necessity of engaging counsel, and to the resulting very high legal costs which will not be reimbursed under United States law even if

they are successful. They also consider that a change in their legal position results from the fact that they must comply with the discovery rules applicable under United States civil procedure, which require them to disclose numerous matters which would be protected in proceedings in a Member State, and refer to the penalties which may be imposed on them if they refuse to cooperate. Accordingly, they submit that the filing of legal proceedings in the United States produces legal effects.

60 The applicants argue that another legal effect of the filing of the proceedings before the American court is that the Community is legally bound by the terms of the complaints lodged with the American court.

61 Secondly, the applicants argue that the Commission's action exposes them to penalties. They set out the likely consequences of application of RICO, in particular the risk of being ordered to pay damages corresponding to three times the loss actually incurred ('treble damages'). They also refer to the claim by the Community that they be ordered to pay punitive damages in so far as its actions are based on common law doctrines. They consider that the filing of the proceedings thus produces effects comparable to a decision to lift immunity under Article 15(6) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-62, p. 87), which was held to be open to challenge in *Cimenteries CBR and Others* v *Commission*, cited in paragraph 57 above. The applicants add that the actions accuse them of criminal conduct, and that United States law provides that the parties to a lawsuit enjoy immunity from defamation actions for statements made in those proceedings.

62 Thirdly, the applicants consider that the contested decisions have produced legal effects because the American court has published the Commission's complaints

on the internet. They are of the view that those effects are similar to those which flow from the decision considered by the Court of First Instance in Case T-353/94 *Postbank* v *Commission* [1996] ECR II-921.

63 Lastly, they refer to the consequences that the filing of the legal proceedings may have on the disclosure requirements of quoted companies.

General considerations pleaded by the Commission to justify its position

64 The Commission submits that there are a number of reasons of a general nature justifying the view that a decision to apply to one court cannot be the subject of an action for annulment before another court.

65 Firstly, the Commission, supported by the Italian Republic, states that this view is based on the principle that there is a fundamental right to apply to the court laid down by law and it is for the court seised to assess whether it has been seised properly.

66 The Commission submits, secondly, that this view results in an important economy of procedure, because all the pleas and submissions in relation to the action brought, whether on substance, procedure or jurisdiction, are raised and concentrated before the court actually seised.

67 The Commission states, thirdly, that, in the absence of a treaty or convention between the Community and the United States of America dealing with *lis pendens*, the view that it puts forward is the one most in keeping with the principle that disputes should not be split between different courts.

68 The Italian Republic adds that the present actions seek to transfer to the Community judicature the decision as to the existence of the substantive right which is the subject of the proceedings in the United States. Thus, in its view, the present actions are to be equated with abuse of the right to judicial review of acts of the Community institutions.

69 The applicants point out that the European Community is based on the rule of law and emphasise that, where the admissibility of an action is in issue, the Community judicature must be guided by the need to ensure that the parties involved are afforded sufficient legal protection. The need for effective judicial protection has been recognised *inter alia* in Case T-177/01 *Jégo-Quéré* v *Commission* [2002] ECR II-2365.

70 The applicants dispute that the actions in question here are civil in nature. They argue that in the present case the Commission is acting as a public body. They deny that it is for the District Court to rule on whether it has been properly seised, arguing that the present case raises fundamental issues of public law on which the American court is not competent to rule. They take the view that the question of whether the Commission was entitled to bring the matter before the American court is not an issue of United States procedural law, but rather of public Community law, and may not necessarily be of concern to an American court.

71 The applicants reject the second argument of the Commission, stating that the economy of procedure referred to can be envisaged only when the two courts

seised are on an equal footing to rule on the matter in dispute. Pointing out that the present instance concerns judicial review of a foreign administrative act, the applicants consider that the two courts are not on an equal footing, since the American court is not competent to rule on that issue.

72 In response to the third argument of the Commission, concerning *lis pendens,* the applicants maintain that the present proceedings and those before the District Court have a different subject-matter. They argue that the principle of *lis pendens* applies only when the first court seised has jurisdiction to rule on the issues raised. According to the applicants, the American court lacks jurisdiction to rule on the question as to the Commission's competence raised in the present proceedings. They refer in addition to the risk of an 'amalgam of interpretations of Community law' if courts of non-Member States were to rule on questions of Community law. Reynolds and Japan Tobacco also refer to the judgment in Case 314/85 *Foto-Frost* [1987] ECR 4199, which, in the view of the applicants, reserves to the Community judicature the power to invalidate acts of Community institutions.

73 Finally, the applicants add that the autonomy of Community law requires that all acts which undermine the coherence of Community law must be reviewable by the Court of Justice or the Court of First Instance.

Findings of the Court

74 Under the fourth paragraph of Article 230 EC, '[a]ny natural or legal person may [...] institute proceedings against a decision addressed to that person or against a

decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

75 The present actions are against, first, the decision by which the Commission approved, on 19 July 2000, 'the principle of a civil action, in the name of the Commission, against certain American cigarette manufacturers' and, second, the decision of 25 July 2001, by which the Commission approved 'the principle of a new civil action in the US courts, jointly by the Community and at least one Member State, against the groups of cigarette manufacturers who had been defendants in the previous action'.

76 According to consistent case-law, in order to ascertain whether a measure whose annulment is sought is open to challenge, it is necessary to look to its substance; the form in which it is cast is, in principle, immaterial (*IBM* v *Commission*, cited in paragraph 48 above, paragraph 9, and Joined Cases C-213/88 and C-39/89 *Luxembourg* v *Parliament* [1991] ECR I-5643, paragraph 15; see also to this effect Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, paragraphs 43 and 57).

77 It is also settled case-law that only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position are acts or decisions which may be the subject of an action for annulment (see, in particular, *IBM* v *Commission*, cited in paragraph 48 above, paragraph 9; order in Case C-117/91 *Bosman* v *Commission* [1991] ECR I-4837, paragraph 13; *Air France* v *Commission*, cited in the preceding paragraph, paragraph 43; order in Case T-175/96 *Berthu* v *Commission* [1997] ECR II-811, paragraph 19).

78 Thus it should be examined whether the contested acts aimed at bringing proceedings before the District Court produce such legal effects.

79 The commencement of legal proceedings is not without legal effects, but those effects concern principally the procedure before the court seised of the case. The commencement of proceedings constitutes an indispensable step for the purpose of obtaining a binding judgment but does not *per se* determine definitively the obligations of the parties to the case. That determination can result only from the judgment of the court. The decision to commence legal proceedings does not, therefore, in itself alter the legal position in question (see, concerning a decision by the Commission to bring an action under the second paragraph of Article 226 EC, *Commission* v *Germany*, cited in paragraph 35 above, paragraph 47). When it decides to commence proceedings, the Commission does not intend (itself) to change the legal position in question, but merely opens a procedure whose purpose is to achieve a change in that position through a judgment. In principle, therefore, such a decision by the institution cannot be considered to be a decision which is open to challenge.

80 This reasoning holds true not only for actions brought by an institution before the Court of Justice, but also for proceedings it may commence before national courts. In both cases, it is not the institution which brings the case before the Community or national court but only that court which, by the decision which it is called upon to give, can alter the legal position underlying the case and determine definitively the rights and obligations of the parties.

81 The consequences which may follow by operation of law from the commencement of judicial proceedings, such as interruption of the limitation period or the obligation to pay interest on the amount claimed, are not *per se* legal effects for the purposes of Article 230 EC, as interpreted in the case-law. Nor does the fact that the commencement of legal proceedings opens up the possibility for the court seised to take decisions capable of affecting the legal position of the parties

constitute, as such, a change in the legal position of the party concerned which may be attributed to the party which brought the proceedings.

82 As regards the applicants' argument that the issue is whether the contested acts are intended to produce legal effects and not whether they actually produce them, it should be noted that a decision to commence proceedings is not, in principle, intended to produce any effects other than those connected with the commencement of the proceedings. Although it is certainly true that a party bringing proceedings wishes to obtain judgment in its favour, it cannot be said that the decision to bring proceedings is intended to produce by itself the effects of the judgment.

83 However, it must be examined whether, in view of the fact that the contested acts in the present case concern the commencement of proceedings not before the Court of Justice or a court of a Member State but before a court of a non-Member State, those acts have produced definitive legal effects beyond the effects necessarily flowing from the commencement of proceedings before any court and which bring about a distinct change in the legal position of the applicants.

84 The applicants refer to certain effects which, they argue, the acts have produced in the Community legal order and to certain effects which the commencement of civil proceedings has produced under United States law.

Effects of the contested acts in the Community legal order

85 It is appropriate, first, to examine the applicants' argument that the contested acts have undermined the institutional balance and thereby produced legal effects on the division of powers for which the Treaty provides.

86 The Court finds that, like any act of a Community institution, the contested acts carry an incidental implication that the institution in question has adopted a position as to its competence to adopt them. The adoption of such a position cannot, however, be viewed as a binding legal effect for the purposes of Article 230 EC, as interpreted in the case-law. Even if the position adopted is erroneous, it has no significance independent of the act adopted. If that were not so, recommendations and opinions would not be excluded from the category of acts which are open to challenge on the ground that they produce no legal effects, because those acts also imply adoption of a position as to the competence of their author. In addition, adoption of such a position, unlike an act designed to confer competence, such as the act giving rise to Case C-366/88 *France* v *Commission*, cited in paragraph 52 above, is not intended to alter the division of powers provided for by the Treaty.

87 Likewise, it cannot be argued that the Commission's alleged lack of powers and any undermining of the institutional balance resulting therefrom are sufficient to give the contested acts binding legal effects. That type of reasoning would be tantamount to concluding that an act is open to challenge because it may be unlawful. It follows from the Court's case-law that the seriousness of the alleged infringement by the institution concerned or the extent of its adverse impact on the observance of fundamental rights cannot justify an exception to the absolute bars to proceedings laid down by the Treaty. Thus an alleged infringement of the institutional balance cannot give rise to an exception to the admissibility rules governing actions for annulment laid down by the Treaty (see, by analogy, the order in Case C-345/00 P *FNAB and Others* v *Council* [2001] ECR I-3811, paragraphs 39 to 42).

88 The case-law relied on by the applicants does not cast doubt on this conclusion. Although it is true that the Court of Justice and the Court of First Instance have referred, in relation to preparatory acts, to the possibility of examining whether 'in exceptional circumstances, where the measures concerned lack even the appearance of legality, a judicial review at an early stage... may be considered compatible with the system of remedies provided for in the Treaty' (*IBM* v *Commission*, cited in paragraph 48 above, paragraph 23; see also *Cimenteries*

CBR and Others v *Commission*, cited in paragraph 48 above, paragraph 49), the Community courts have never confirmed that it is possible, by way of exception, to carry out such review of preparatory acts or other acts which have no legal effects. Moreover, the decisions in which that possibility was mentioned were before the order in *FNAB and Others* v *Council*, cited in the preceding paragraph, in which the Court of Justice clearly ruled against making the admissibility of an action contingent on the seriousness of the infringements of Community law alleged.

89 Nor can it be concluded from *Commission* v *Council* or from Case C-303/90 *France* v *Commission*, both cited in paragraph 52 above, that the Court broadened the concept of acts open to challenge to include acts which have no binding legal effects.

90 Furthermore, the applicants' argument cannot succeed on the basis of Case C-327/91 *France* v *Commission*, cited in paragraph 52 above, in which the Court found that the act whereby the Commission intended to conclude an agreement with the United States of America concerning the application of competition law was open to challenge (see paragraphs 15 and 17 of the judgment). The applicants maintain that the act contested in that case was the decision empowering the Vice-President of the Commission to sign the agreement and argue that that decision is similar to the decisions challenged in the present case, which empowered the President and a Member of the Commission to take the measures necessary to bring cases before an American court. However, the effects flowing from a decision to confer certain powers on a person depend on the purpose of that conferment. In Case C-327/91 *France* v *Commission*, the agreement in question was, as evidenced by its wording, intended to produce legal effects, particularly by establishing reciprocal obligations on the Commission and American authorities to exchange information and engage in cooperation. In the present case, the powers conferred related only to bringing the cases before the District Court and thus produced no effects independent of the decisions to commence proceedings.

91 It follows from the foregoing that the applicants' argument that the contested acts produced binding legal effects with regard to the Commission's powers and the institutional balance is unfounded.

92 Second, it is necessary to examine the applicants' argument that the contested acts produced binding legal effects by ignoring procedures provided for under Community law and the law of the Member States governing the recovery of tax and customs duties and anti-fraud measures, by depriving the applicants of the legal safeguards they would have enjoyed under those procedures and by subjecting them to the rules of another legal order.

93 It should be recalled, as a preliminary point, that the commencement of proceedings before a court does not *per se* alter the legal position of the parties to the case for the purposes of Article 230 EC, as interpreted in the case-law (see paragraph 79 above). This rule is true regardless of whether the proceedings are brought before the Community judicature, a court in a Member State, or even a court in a non-Member State, such as the United States. It is not affected by the fact that all courts are required to apply the procedural rules of their own legal order and the substantive rules determined in accordance with their own rules governing conflict of laws. Regardless of which rules are applicable, the resulting legal effects, whether they arise by operation of law or from the decisions of the court seised, cannot be attributed to the party who brought the proceedings.

94 Consequently, neither the fact that the commencement of proceedings before the District Court results in that court's applying its own law, nor the fact that that law may differ in some respects from Community law or the law of the Member States, is sufficient in itself to bring about a distinct change in the legal position of the applicants.

95 The applicants rightly point out that some procedural decisions may produce binding and definitive legal effects for the purposes of Article 230 EC, as interpreted in the case-law.

96 They include decisions which, whilst being stages in an administrative procedure in progress, do not merely establish the conditions for the subsequent conduct of that procedure, but produce effects which go beyond the procedural framework and substantively alter the rights and obligations of the parties concerned.

97 This is the case *inter alia* with decisions taken pursuant to Article 15(6) of Regulation No 17, altering rights by removing the immunity from fines enjoyed by undertakings pursuant to Article 15(5) of the Regulation by reason of notification of their agreements (*Cimenteries CBR and Others* v *Commission*, cited in paragraph 57 above), decisions requesting information under Article 11(5) of Regulation No 17 (Case T-46/92 *Scottish Football Association* v *Commission* [1994] ECR II-1039, paragraph 13), decisions refusing to consider that documents from an undertaking are covered by commercial confidentiality (Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965) and decisions initiating the procedure for examining State aid pursuant to Article 88(2) EC and provisionally classifying the aid as new aid, thus obliging the Member States to modify their behaviour regarding the aid (*Spain* v *Commission*, cited in paragraph 57 above, paragraphs 12 to 24; Case C-400/99 *Italy* v *Commission* [2001] ECR I-7303, paragraphs 55 to 63; Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraphs 68 to 86).

98 Unlike the examples just given, the acts contested in the present case do not by themselves substantively alter the applicant's rights and obligations. In particular, the absence of a Community procedure for the recovery of taxes and customs duties cannot be likened to the immunity expressly conferred on the parties to a notified agreement pursuant to Article 15(5) of Regulation No 17. Moreover, although it may be true that the contested acts entail a provisional assessment by the Commission of the applicants' conduct under United States law, they are different from the decision to initiate the procedure for examining State aid because Community law does not provide that specific legal consequences are to

ensue from that assessment. The commencement of proceedings before an American court does not, therefore, impose new obligations on the applicants and, as rightly pointed out by the Commission, does not oblige them to modify their practices.

99 In addition, certain procedural decisions are actionable because they prejudice the procedural rights of the parties concerned (see, regarding a decision to suspend an administrative procedure under Regulation No 17 and to institute infringement proceedings, the judgment in Case T-16/91 *Rendo and Others* v *Commission* [1992] ECR II-2417, paragraphs 39 to 57, partly annulled, on other grounds, in Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319).

100 In the present case, however, the applicants would not have enjoyed procedural rights in the infringement proceedings which, they maintain, the Commission should have instituted. Consequently, the commencement of proceedings before the District Court could not have deprived them of any rights in this regard. Case 110/76 *Pretore di Cento* v *X* [1977] ECR 851, on which the applicants rely, did not recognise any specific procedural rights for individuals. It merely ruled on the division of powers between the Community and the Member States for the recovery of taxes. In the absence of Community competence to recover the duties and taxes in question, there is equally no relevant procedure laid down by Community law conferring on the applicants safeguards which they would have been denied.

101 Nor have the applicants shown that the contested acts affected their legal position in terms of the procedures for the recovery of taxes and customs duties existing in the Member States. It is true that they have stated in a general manner that the laws of the Member States contain rules which may limit or exclude their liability in this area and rules which grant them procedural guarantees. However, they have not submitted that specific procedures being pursued in a Member State have been disregarded or circumvented by the commencement of proceedings

before the American court. In fact, in response to questions from the Court, the applicants indicated that, as far as they knew, no procedures for the recovery of sums due had been instituted against them in any of the Member States.

102 Nor can the applicants' argument that no sovereign body may recover taxes indirectly by means of an action for damages establish that their procedural rights have been infringed. This is, moreover, an argument going to the merits of the case.

103 Likewise, the applicants have not demonstrated specifically in what manner the contested acts have affected their legal position as regards anti-fraud procedures.

104 It follows that the applicants have not established that the Commission, by the contested acts, disregarded or circumvented existing procedures governing recovery of taxes and customs duties or anti-fraud procedures within the Community legal order.

105 The applicants have rightly pointed out that the proceedings before the District Court differ from those which might be instituted before the courts in the Member States in that there is no mechanism for a reference for a preliminary ruling pursuant to Article 234 EC. It is normal, however, in cases with elements of an international nature, that the court seised must apply foreign legal rules and that it does so within the context of its own procedural rules. Moreover, commencement of legal proceedings before any court necessarily entails application by the court of its own procedural rules. This cannot therefore be

viewed as a legal effect for the purposes of Article 230 EC, as interpreted by the case-law. Additionally, whilst Article 234 EC enables courts in Member States to refer questions for a preliminary ruling and imposes on some of them an obligation to refer, it does not confer any right of referral on the litigants.

106 It follows that the contested acts did not infringe the applicants' procedural rights.

107 Therefore, the applicants' argument that the contested acts produced binding legal effects by subjecting them to another legal order or by bringing about a change in their legal position at the substantive or procedural level is unfounded.

108 Accordingly, the contested acts do not produce binding legal effects in the Community legal order for the purposes of Article 230 EC, as interpreted in the case-law.

Effects of commencement of the civil actions under United States law

109 The applicants correctly point out that the commencement of the civil actions before the federal courts in the United States has numerous consequences for them, in terms of both the procedural law applicable and the substantive law relied on in those actions.

110 As regards the procedural effects of the commencement of proceedings before the District Court, it is clear that the consequences relied on by the applicants are, to a large extent, no different from those which necessarily arise when any court is seised and are, to a certain extent, purely factual. This is particularly true of the fact that the applicants, in order to protect their interests, are obliged to defend themselves against the actions and that this entails high costs.

111 Next, it cannot be denied that the federal courts in the United States can, by virtue of their procedural law, adopt decisions having binding effects for the parties to the case, obliging them in particular to disclose facts and documents.

112 However, those effects result from the independent exercise of the powers with which those courts are vested under United States law. Consequently, it cannot be concluded that the contested acts *per se* have produced binding legal effects in this regard (see, by analogy, Case T-113/89 *Nefarma and Bond van Groothandelaren in het Farmaceutische Bedrijf* v *Commission* [1990] ECR II-797, paragraphs 95 and 96).

113 For the same reasons, the Court rejects the applicants' argument that one legal effect of the filing of the proceedings before the American court is that the Community is legally bound by the terms of the complaints lodged with the American court, because it may impose penalties on the Community, even if the action is withdrawn, if it turns out that the action was abusive, frivolous or vexatious. Unreasonable or vexatious conduct on the part of a plaintiff which may be the subject of penalties imposed by an American court cannot be likened to the adoption of an act having binding effects by a Community institution.

114 As regards the substantive effects of the commencement of proceedings before the District Court, the applicants rely, firstly, on the potential content of a judgment against them. However, the decision to commence proceedings before the District Court *per se* does not alter their legal position in this respect by exposing them to penalties which, were it not for that decision, could not be imposed. It merely sets in motion proceedings intended to establish their liability, the substantive existence of which is not determined by the filing of the action. While the contested acts may therefore have had the effect of informing the applicants that they were running a real risk of having penalties imposed on them by the American court, this is a mere consequence of fact and not a legal effect which the contested acts are intended to produce (see, by analogy, *IBM* v *Commission*, cited in paragraph 48 above, paragraph 19). Although the commencement of the proceedings is an indispensable procedural step for a definitive judgment on the applicants' conduct, it does not have a substantive effect on the legal position on which that court must rule.

115 Turning next to the applicants' argument that the actions accuse them of criminal conduct, the Court finds that this involves a consequence of fact. The applicants also rely on the immunity which parties to a lawsuit enjoy from defamation actions for statements made in those proceedings. This, however, results solely from the American statutory provisions and is not, therefore, an effect of the contested acts which may be attributed to the Commission.

116 The same is true of the publication by the District Court of the Commission's complaints on the internet. They were published by the court seised acting in the exercise of its own powers. It cannot therefore be likened to a decision by which the Commission lifts a prohibition imposed on undertakings who have received a document relating to a case pending before it, preventing them from using the document in national legal proceedings, such as that at issue in Case T-353/94 *Postbank* v *Commission* [1996] ECR II-921.

117 Finally, the consequences that the filing of the legal proceedings may have on the disclosure requirements of quoted companies are also factual in nature.

118 Accordingly, the effects of the filing of the civil actions under United States law relied on by the applicants cannot be held to be binding legal effects for the purposes of Article 230 EC, as interpreted in the case-law.

119 The Court finds, therefore, that the contested acts are not acts which may be challenged under Article 230 EC. In those circumstances, it is not necessary to examine further the parties' arguments on whether the acts may be classified as preparatory measures, acts comparable to opinions or measures of internal organisation.

The need for effective judicial protection

120 The applicants stress that if the present actions were found to be inadmissible, they would have no legal means of challenging the contested acts. They submit that since the court seised of the case is in a non-Member State and there is no subsequent act of a Community institution, neither the Community courts nor the courts of the Member States can rule on the lawfulness of the Commission's conduct.

121 In this connection, the Court of Justice has stated that access to justice is one of the constitutive elements of a Community based on the rule of law and is

guaranteed in the legal order based on the EC Treaty in that the Treaty has established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions (Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 23). The Court of Justice uses the constitutional traditions common to the Member States and Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as a basis for the right to obtain an effective remedy before a competent court (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18).

122 The right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated has, moreover, been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1). Although this document does not have legally binding force, it does show the importance of the rights it sets out in the Community legal order.

123 It must be stated that individuals are not denied access to justice because conduct lacking the features of a decision cannot be challenged by way of an action for annulment, since an action for non-contractual liability under Article 235 EC and the second paragraph of Article 288 EC is available if the conduct is of such a nature as to entail liability for the Community.

124 Although it may seem desirable that individuals should have, in addition to the possibility of an action for damages, a remedy under which actions of the Community institutions liable to prejudice their interests but which do not amount to decisions may be prevented or brought to an end, it is clear that a remedy of that nature, which would necessarily involve the Community judicature issuing directions to the institutions, is not provided for by the Treaty.

It is not for the Community judicature to usurp the function of the founding authority of the Community in order to change the system of legal remedies and procedures established by the Treaty (Joined Cases T-172/98 and T-175/98 to T-177/98 *Salamander and Others* v *Parliament and Council* [2000] ECR II-2487, paragraph 75).

125 It follows from the foregoing that the applications must be dismissed as inadmissible.

Costs

126 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

127 Since the applicants have been unsuccessful, they must be ordered jointly and severally to pay the costs of the Commission, as applied for by it.

128 Under the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States and the institutions which have intervened in the proceedings are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber, Extended Composition)

hereby:

1. **Dismisses the applications as inadmissible;**

2. **Orders the applicants to bear their own costs and, jointly and severally, the costs incurred by the Commission.**

3. **Orders the interveners to bear their own costs.**

Moura Ramos Tiili Pirrung

Mengozzi Meij

Delivered in open court in Luxembourg on 15 January 2003.

H. Jung R.M. Moura Ramos

Registrar President