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Access to Justice: Individual Undertakings and EEC Antitrust Law—Problems and Pitfalls

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Federico Mancini

Abstract

In this article, the author deals with a number of aspects connected to the theme of access to justice and in so doing refers in particular to the most recent disputes that have been brought before the Court of Justice in Luxembourg. The author argues that there is a need to establish clearly, at the outset, the preconditions that natural or legal person must satisfy before they can turn to the Community Court in order to obtain judicial review both of measures taken by the Commission or of the reasons for the Commission's failure to act.

ACCESS TO JUSTICE: INDIVIDUAL UNDERTAKINGS AND EEC ANTITRUST LAW—PROBLEMS AND PITFALLS

*Federico Mancini**

INTRODUCTION

By December 31, 1992, the European Economic Community is to adopt the measures necessary finally to establish a single, large market within its territory. This was the commitment that the Member States undertook when they signed the so-called Single European Act on February 17, 1986.¹ If this commitment is acted upon, Europe, in the year 2000, will no longer be what Jacques Pelkmans has described as a “customs-union-plus” or, at best, a “pseudo common market.”² It will comprise “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured”³ As a result, there will be an economic area, extending from Edinburgh to Syracuse and Lisbon to Berlin, where multinationals, conglomerates, small firms, traders, large distributors, banks, insurance companies, and airlines will be able not only to compete but also will have to compete using commercial strategies that, by the very nature of things, will have to be different from those that have been implemented in national markets. Naturally, this marketplace will also be open to overseas companies from the United States, Canada, Japan, and elsewhere, which will be attracted, to an even greater extent than they are today, by the numerous advantages of a commercially uniform European market.

The Community will have to guarantee that these entrepreneurs have a modern and efficient system of legal protection. This is indispensable if the development of the Community's economy is to take place in an orderly manner, that is, in accordance with the rules and programs governing, respectively, the free play of competition and competition policy. In

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1. Single European Act, O.J. L 169/1 (1987).

2. Pelkmans, *The Institutional Economics of European Integration*, in 1 INTEGRATION THROUGH LAW 318, 339-87 (1986).

3. Single European Act, *supra* note 1, art. 13, at 7.

my opinion, it was mainly this desire, more than complaints by the Court of Justice about being overloaded, that prompted the Member States to set up a court "with jurisdiction to hear and determine at first instance . . . certain classes of action or proceeding brought by natural or legal persons."⁴

Notwithstanding the necessarily generic nature of the formula "natural or legal persons," it is not difficult to predict that the main beneficiary of the new configuration of the European court system will, indeed, be the business sector. This will not be, as is often argued in such cases, because the creation of a court has the immediate effect of making those persons who have access to it more litigious. Rather, the creation of the single market will give rise to a real and objective need for legal certainty in the face of factual and legal situations for which no precedents exist. In other words, the changes in the European commercial and economic context cannot help but affect the way in which the Community's antitrust legislation is implemented and interpreted.

For instance, the Treaty Establishing the European Economic Community (the "Treaty of Rome" or the "Treaty") justifies the prohibitions laid down in Articles 85 and 86⁵ on the grounds that the prohibited activities are "incompatible with the common market . . ."⁶ Hence, it was the intention of the draftsmen of the Treaty of Rome, that those provisions would be mainly to protect intra-Community trade against attempts by businesses to compartmentalize the Common Market by means of agreements or abuses of dominant positions. But with the achievement of a market without public economic frontiers, such businesses will probably lose interest in rebuilding barriers that are no longer useful for their purposes, since they will have to confront each other in a single field and, at the same time, fight off competition from outside Europe. In that event, the antitrust rules will have to be construed, above all, as provisions designed to protect the individual's right to participate in business activities on terms of free and fair competition. We will then see businesses themselves taking action

4. *Id.* art. 11, at 6.

5. Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 85-86, 1973 Gr. Brit. T.S. No. 1, (Cmd. 5179-II) at 32-33 (official English version), 298 U.N.T.S. 11, 47-49 (1958) (unofficial English trans.) [hereinafter EEC Treaty].

6. *Id.* art. 85(1), 1973 Gr. Brit. T.S. No. 1, at 33, 298 U.N.T.S. at 47-48.

against competitors' anti-competitive behavior in order to secure equality of opportunity and freedom to compete for operators in the supra-national single market.

Apart from businessmen, others too will start to knock, or will knock more frequently, on the doors of Community law, in particular consumers or, rather, consumer associations. They will assert their right to purchase goods and services at market conditions that are optimal and uniform throughout the Community. Consequently, the Commission will be called upon to tackle radically new administrative problems, and it is obvious that the solutions adopted to these problems will not invariably meet with everyone's approval.⁷ The Community courts of first and second instance will have the task of finding legal solutions, with the awareness that in so doing they will be contributing to the building of an arsenal of case law, which will serve as a genuine code of conduct to all those working in the market and the supervisory institution. Hence, there is the need to establish clearly, at the outset, the preconditions that natural or legal persons must satisfy before they can turn to the Community Court in order to obtain judicial review both of measures taken by the Commission or of the reasons for the Commission's failure to act. In this article, I shall deal with a number of aspects connected with this theme and in so doing I shall refer in particular to the most recent disputes that have been brought before the Court in Luxembourg.

I. *THE INDIVIDUAL'S CONDITIONAL RIGHT TO INSTITUTE ANTITRUST PROCEEDINGS*

For authorities responsible for supervising and enforcing antitrust legislation,

private suits are . . . more of an important supplementary enforcement device. They may be the most effective way of policing the multitude of comparatively local and insignificant violations that will tend to escape the glance of federal enforcement authorities or that, even if noticed, do not merit the expenditure of limited enforcement resources.⁸

To my mind, this is the philosophy behind section 4(a) of

7. An example of this state of uncertainty is afforded by the continuing debate on the applicability of Article 85 to concentration agreements between undertakings.

8. C. KAYSER & D. TURNER, *ANTITRUST POLICY* 257 (1959).

the Clayton Act, which provides as follows: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."⁹

In Community antitrust law there are no so-called "treble-damage actions." Instead, article 3 of Regulation No. 17¹⁰ authorizes the Member States and "persons who claim a legitimate interest"¹¹ to apply to the Commission with a view to its finding that the antitrust provisions of the Treaty have been infringed. If an infringement is found, the Commission "may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end."¹² Consequently, under EEC law, a person who initiates antitrust proceedings certainly does not do so because he is attracted by the prospect of a substantial pecuniary recompense. Consequently, at first glance it might appear *easy* to lay a complaint before the Commission because little must be proved; but, at the same time, such a complaint seems *pointless* because nothing is to be gained. This, however, is not the case. In my view, the relationship between the complaint and the Commission has a fairly substantial content in Community law and yields results that are substantially profitable for both parties. Let us examine how this is so.

The first point to be clarified is the concept of "legitimate interest." Under article 3 of Regulation No. 17, the individual's right to make a complaint is conditional.¹³ What must the complainant prove in order for his complaint to be acted upon? The Court has not yet ruled on this question. The view taken by one learned writer is that "any reasonably direct and practical interest in the outcome of the complaint would be sufficient."¹⁴ I would point out, however, that as a rule, nobody will take the trouble to make a complaint unless there is

9. 15 U.S.C. § 15 (1982).

10. Council Regulation No. 17, art. 3, 5 J.O. 204, at 205-06 (1962), O.J. Eng. Spec. Ed. 1959-62, at 87, 88, Common Mkt. Rep. (CCH) ¶ 2421, at 1731 [hereinafter Regulation 17].

11. *Id.*

12. *Id.*

13. *Id.*

14. Temple Lang, *The Position of Third Parties in EEC Competition Cases*, 3 *EUR. L. REV.* 177, 179 (1978).

the prospect of obtaining at least something of practical utility. On the other hand, a complaint cannot be regarded as the mere identification of a particular economic fact, with the Commission being free to decide whether or not it should act thereon. If that were the case, the Community legislature would certainly not have required the Commission to inform the complainant (Member State or natural or legal person, as the case may be) of the reasons why it does not intend to act on the complaint.

What then is the legal feature that enables an individual to have the same power of complaint as a Member State? In the first place, when the Commission acts under the provision in question "on its own initiative," it does so essentially with a view to restoring the free play of competition in the Common Market. This being so, the subject of the application made by the private individual must be directly connected with the proper operation of Community trade so that by adhering to the Commission's intervention, operators in the market—and hence not only the complainant—can carry out their economic activities in complete freedom with respect to the behavior of the undertaking that was the subject of the complaint.

Accordingly, a "legitimate interest" may be said to exist outside of the confines of the personal sphere of the complainant, transcending it so as to coincide with the general interest of the legal order. In the final analysis, a party who makes an application to the Commission does not assert a right autonomously, as is the case in U.S. law where a person acts in order to obtain damages. A complainant is not even a straightforward informant of the Commission. On the contrary, as a person with a legitimate interest in the complaint, the complainant is entitled to call upon the supervisory authority to act in order to enforce the Community antitrust laws while undertaking to collaborate with that authority.

According to the judgment in *GEMA v. Commission*,¹⁵ an applicant under article 3 of Regulation No. 17 is not entitled to obtain from the Commission a decision on the existence of the alleged infringement of the Community rules.¹⁶ According to the wording of the article, "even when the Commission has

15. Case 125/78, 1979 E.C.R. 3173, Common Mkt. Rep. (CCH) ¶ 8568.

16. *Id.* at 3189-90, ¶ 18, Common Mkt. Rep. (CCH) ¶ 8568, at 8257.

found that there has been an infringement of Article 85 or Article 86, it *may* (and not 'must') . . . require the undertakings concerned to bring such infringement to an end . . ."¹⁷ Certainly, the Commission may, for instance, address to the undertakings recommendations for the termination of the infringement.¹⁸ However, it is clear that if the undertaking in question persists in its infringing conduct, the supervisory authority may not stand idly by but *will be obliged, inter alia*, by virtue of Article 155 of the Treaty,¹⁹ to order the undertaking to terminate the infringement.²⁰

If, however, the Commission takes no action, it must, in any event, communicate to the complainant its reasons for taking no action;²¹ and, as we shall see later, the complainant may bring an action before the Community Court to have that communication declared void.²² Lastly, if the Commission, in order to avoid determining whether the action (or inaction) is lawful or not, refuses to provide the complainant with explanations as to the outcome of his complaint, the latter will be entitled to bring an action for failure to act with respect to that omission under Article 175 of the Treaty.²³ It may, therefore, be stated that Regulations Nos. 17 and 99/63 confer a series of rights—and, also, obligations—on the complainant, that are justified only on the grounds that the complainant has a specific legal interest.²⁴ The other side of the coin is that under

17. *Id.* at 3197, Common Mkt. Rep. (CCH) ¶ 8568, at 8262 (Opinion of Advocate General Capotorti) (emphasis in original).

18. See Regulation 17, *supra* note 10, art. 3(3), at 206, O.J. Eng. Spec. Ed. 1959-62, at 87, Common Mkt. Rep. ¶ 2421, at 1731.

19. EEC Treaty, *supra* note 5, art. 155, 1973 Gr. Brit. T.S. No. 1, at 53, 298 U.N.T.S. at 71.

20. See Joliet, *Lord Bethell Devant la Cour de Justice: En Avion ou en Bateau . . . ?*, 18 CAHIERS DE DROIT EUROPÉEN 552, 559 (1982).

21. See Comm'n Regulation No. 99/63, art. 6, 6 J.O. 2268/63, at 2269 (1963), O.J. Eng. Spec. Ed. 1963-64, at 47, 48, Common Mkt. Rep. (CCH) ¶ 2641, at 1803 [hereinafter Regulation 99/63].

22. See *infra* notes 30-45 and accompanying text.

23. See EEC Treaty, *supra* note 5, art. 175, 1973 Gr. Brit. T.S. No. 1, at 58, 298 U.N.T.S. at 76.

24. See *Fediol v. Commission*, Case 191/82, 1983 E.C.R. 2913, Common Mkt. Rep. (CCH) ¶ 14,013. There, relating to anti-dumping proceedings, the Court stated the following:

[C]omplainants must be acknowledged to have a right to bring an action where it is alleged that the Community authorities have disregarded rights which have been recognized specifically in the regulation, namely the right

these regulations the Commission has precise duties vis-à-vis complainants; in return, the Commission may require complainants to take positive action, which, in practice, takes the form of a *requirement to collaborate* with the Commission.²⁵

In this regard, therefore, the individual and the Commission are pursuing the same aim. Having said this, it must be pointed out that the fact that the claimant may and must cooperate with the Community authority does not transform the Commission's inquiry into a direct confrontation between private individuals making accusations and private individuals defending themselves. On the contrary, Article 89 of the Treaty²⁶ is designed to ensure that only the Commission will investigate suspected infringements of competition rules.²⁷ The Commission is, and remains, in control of the procedure. Admittedly, the law confers on the complainant a right to be given all the information that is necessary for the proper conduct of the investigation²⁸ and—in the case of discontinuance—to be informed of the reasons why his complaints were rejected. This right is accorded to the complainants, because they have an interest coinciding with the general interest of the

to lodge a complaint, the right, which is inherent in the aforementioned right, to have that complaint considered by the Commission with proper care and according to the procedure provided for, the right to receive information within the limits set by the regulation and finally, if the Commission decides not to proceed with the complaint, the right to receive information comprising at the least the explanations guaranteed by . . . the regulation.

Furthermore it must be acknowledged that, in the spirit of the principles which lie behind Articles 164 and 173 of the Treaty, complainants have the right to avail themselves, with regard both to the assessment of the facts and to the adoption of the protective measures provided for by the regulation, of a review by the Court appropriate to the nature of the powers reserved to the Community institutions on the subject.

Id. at 2935, ¶¶ 28-29, Common Mkt. Rep. (CCH) ¶ 14,013, at 14,172-73.

25. See *CICCE v. Commission*, Case 298/83, 1985 E.C.R. 1105, Common Mkt. Rep. (CCH) ¶ 14,157. There, the Court, in dismissing the application brought by the Community's Cinematographic Committee; held that "the Commission was justified in requiring the abuse alleged by the CICCE to be proved or at least corroborated [by the CICCE] by examples . . ." *Id.* at 1124, ¶ 25, Common Mkt. Rep. (CCH) ¶ 14,157, at 15,906. In view of the inaction of the complainant, the decision to discontinue the investigation was, therefore, to be regarded as lawful.

26. EEC Treaty, *supra* note 5, art. 89, 1973 Gr. Brit. T.S. No. 1, at 34, 298 U.N.T.S. at 49-50.

27. See *id.*

28. See *AKZO Chemie v. Commission*, Case 53/85, 1986 E.C.R. 1965, 1989, ¶ 17, Common Mkt. Rep. (CCH) ¶ 14,318, 16,968.

legal order, which distinguishes them from other third parties. This right also marks the absolute limit of their participation in the investigation. On the other hand, the Commission is under a duty, according to the law and the principles laid down in the Court's case law, to observe and enforce the right of the undertakings under investigation to a fair hearing.²⁹

II. *THE COMMISSION'S STATEMENT OF OBJECTIONS*

When the Commission, after receiving a complaint and carrying out an investigation, has sufficient evidence to determine that an antitrust provision has been infringed, it sends a communication to the undertaking concerned.³⁰ According to the Court, that communication

must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure. That may be done summarily and the decision is not necessarily required to be a replica of the Commission's statement of objections. The Commission must take into account the factors emerging from the administrative procedure in order either to abandon such objections as have been shown to be unfounded or to amend and supplement its arguments, both in fact and in law, in support of the objections which it maintains, provided however that it relies only on facts on which the parties concerned have had an opportunity to make known their views and provided that, in the course of the administrative procedure, it has made available to the undertakings concerned the information neces-

29. In this connection, the Court, in *Musique Diffusion Française v. Commission*, Joined Cases 100-103/80, 1983 E.C.R. 1825, Common Mkt. Rep. (CCH) ¶ 8880, stated that the provisions of Regulations 17 and 99/63

are an application of the fundamental principle of Community law which requires the right to a fair hearing to be observed in all proceedings, even those of an administrative nature, and lays down in particular that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty.

Id. at 1880-81, ¶ 10, Common Mkt. Rep. (CCH) ¶ 8880, at 8385; see Jeantet, *La Défense dans les Procédures Répressives en Droit de la Concurrence*, 22 *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN* 53, 53-67 (1986).

30. Regulation 99/63, *supra* note 21, art. 2(1), 6 J.O. 2268/63, at 2269, O.J. Eng. Spec. Ed. 1963-64, at 47, Common Mkt. Rep. (CCH) ¶ 2637, at 1802.

sary for their defence.³¹

In *BAT and Reynolds v. Commission*³² the Court ruled for the first time on complainants' expectations and claims with regard to the Commission's statement of objections. In that case, British American Tobacco ("BAT") and R.J. Reynolds ("Reynolds") brought an action against a decision rejecting their complaints on the grounds, *inter alia*, that the Commission had not explained why it changed its view with respect to the charges brought in the statement of objections notified to Philip Morris and Rembrandt. The applicants thought they could discern the existence of dark plots hatched between the Commission and the companies against which the charges had been brought, and they instituted proceedings before the Court with a view to ascertaining the content of certain documents that they believed would throw light on that sudden *volte face*.

The Court rightly dismissed these claims. It was stated, however, that when

31. *Musique Diffusion Française*, 1983 E.C.R. at 1881-82, ¶ 14, Common Mkt. Rep. (CCH) ¶ 8880, at 8385.

32. *British American Tobacco Co. and R.J. Reynolds Indus. v. Commission*, Joined Cases 142 and 156/84, 1987 E.C.R. __, Common Mkt. Rep. (CCH) ¶ 14,405. The facts of the case may be summarized as follows: In April and May 1981, Rembrandt Group Limited ("Rembrandt"), a South African multinational, transferred to Philip Morris, for US\$350 million, half the equity in Rothmans Tobacco Limited, which in turn had a majority holding in the English company Rothmans International, the leading cigarette manufacturer in the Community. *Id.* at __, Common Mkt. Rep. (CCH) ¶ 14,405, at 17,722-23. British American Tobacco Co. ("BAT") and R.J. Reynolds Industries, Inc. ("Reynolds"), disappointed at seeing a transaction that they thought was within their grasp slip through their fingers at the last moment, submitted a complaint to the Commission concerning the agreement between Rembrandt and Philip Morris, which alleged that the agreement infringed Articles 85 and 86 of the EEC Treaty. *Id.* at __, Common Mkt. Rep. (CCH) ¶ 14,405, at 17,724, 17,726. After carrying out a rapid investigation, the Commission decided that the charges were founded and asked the undertakings in question to alter their agreement—failure to do so would result in annulment of the agreement. Complex negotiations followed and culminated, in 1983, with the conclusion of a new agreement. Under the agreement, Philip Morris obtained from Rembrandt only 24.9% of the voting rights in Rothmans International. *Id.* at __, Common Mkt. Rep. (CCH) ¶ 14,405, at 17,724. The earlier requirements that related to commercial cooperation, which caused the agreement to be prohibited, were removed, while the clauses relating to each of the two partners' pre-emption rights were reinforced. However, the price of the transaction remained unvaried. *See id.* The new approach was deemed to be compatible with Community law and so the Commission decided to close the investigation. This resulted in the applications brought by BAT and Reynolds before the Court of Justice. *Id.* at __; Common Mkt. Rep. (CCH) ¶ 14,405, at 17,731.

the Commission ultimately decides to reject the complaints it must give as its reasons for that decision its final assessments based on the situation existing at the time when the procedure is closed, but it is not under a duty to explain to the complainants any differences with respect to its provisional assessments set forth in the statement of objections.³³

Indeed, there is no doubt that any conflicting statements made by the investigating authority, however deserving of criticism, do not entitle third parties to search the files of the investigating authority or the undertakings under investigation in order to substantiate their suspicions. On the other hand, in the context of an antitrust action, the Court's guidance is not to be construed as meaning that the Commission is free to change its opinion without having to give an account to the various interested parties. On the contrary, if the Commission, after having formed a view on the factual and legal aspects of an undertaking's conduct, proposes to close the file, its obligation to provide the complainants with the reasons why it is taking that course of action assumes special importance; in fact, almost invariably it will be a question of casting light on a situation in which lawful and unlawful aspects have been inextricably mingled.

Furthermore, the party, who by making a complaint enabled the supervisory authority to find that the Treaty rules had been infringed, must be able to know the reasons or the factual basis by which the undertaking's behavior is now deemed to accord with Community requirements. This is especially true when that party is a direct competitor of the undertaking complained of. In the final analysis, while communication of the objections is an essential safeguard for the defense of undertakings,³⁴ the decision to close a file constitutes—for the complainants as well as the companies who were the subject of the inquiry—an essential guarantee of legal certainty. Although formally addressed to the complainants, in substance the *BAT/Reynolds* decision constitutes the Commission's view on what, following the statement of objections, the undertaking

33. *British American Tobacco Co. and R.J. Reynolds Indus. v. Commission*, Joined Cases 142 and 156/84, No. 244797, para. 15, at 9 (Order of the Court of June 18, 1986).

34. *Jeantet*, *supra* note 29, at 59.

that was the subject of the inquiry has done to regularize its situation in light of the Community rules.

III. CLOSING A FILE IN AN ANTITRUST INVESTIGATION

Where the Commission finds "that on the basis of the information in its possession there are insufficient grounds for granting the application, it shall inform the applicants of its reasons and fix a time-limit for them to submit any further comments in writing."³⁵ The Court, interpreting this provision in *GEMA*, held that this communication is intended only for information purposes and "implies the discontinuance of the proceedings . . ."³⁶ However, this does not prevent the Commission from reopening the file, particularly where, within the period allowed by the Commission for that purpose, the applicant puts forward fresh elements of law or fact.

In academic circles, this ruling was the subject of considerable perplexity and there was no shortage of attempts to identify avenues that would give the complainant a means of action in order to protect his initiative.³⁷ On the other hand, the Commission, on the strength of that pronouncement of the Court, stated that the communication referred to in article 3(2) of Regulation 17³⁸ is "not a *Decision* within the meaning of Article 189 of the EEC Treaty and cannot be challenged before the Court of Justice."³⁹

To my mind, what emerges from these words is a profoundly disconcerting situation. The closing of files in anti-trust investigations and the possibility of communication by the Court of the justification for closing the file are left entirely to the discretion of the Commission. To put it bluntly,

35. Regulation 99/63, *supra* note 21, art. 6, at 2269, O.J. Eng. Spec. Ed. 1963-64, at 47, 48, Common Mkt. Rep. (CCH) ¶ 2641, at 1803 (the application in this case is made pursuant to Article 3(2) of Regulation 17).

36. *GEMA v. Commission*, Case 125/78, 1979 E.C.R. 3173, 3189, ¶ 17, Common Mkt. Rep. (CCH) ¶ 8568, at 8257.

37. See, e.g., R. JOLIET, *LE DROIT INSTITUTIONNEL DES COMMUNAUTÉS EUROPÉENNES* 65 (1981); Temple Lang, *supra* note 14, at 181; Waelbroeck, *Judicial Review of Commission Action in Competition Matters*, in 1983 FORDHAM CORP. L. INST. 179, 202 (B. Hawk ed. 1984).

38. Regulation 17, *supra* note 10, art. 3(2), at 205-06, O.J. Eng. Spec. Ed. 1959-62, at 87, 88, Common Mkt. Rep. (CCH) ¶ 2421, at 1731.

39. Comm'n, Eleventh Report on Competition Policy ¶ 118 (1982) (emphasis added).

whether such a measure may or may not be challenged depends on whether the Commission decides to call the communication a "decision." In brief, we have come a very long way from the idea of cooperation between the investigating authority and the complainant—be it a Member State or a private individual or undertaking. This cooperation underlies the present rules on antitrust, and the Commission must continue to use these rules to guarantee free competition within the single European market.

In my opinion as Advocate General in the *BAT/Reynolds* case,⁴⁰ I endeavored to identify the rules upon which the system should be based for the collaborative relationship between the investigating authority and the complainant to be fruitful. In the first place, the communication under article 6⁴¹ cannot be intended merely to inform the complainant of the reasons for the discontinuance of the proceedings where that has *already* been decided. On the contrary, it should enable the complainants to comment on the reasons why the Commission *plans* to reject the application. Moreover, if this were not true, imposing a *time-limit* for the reply would be meaningless; time-limits are imposed when it is necessary to reach a result rapidly. Experience shows that the reopening of an investigation that has just been closed rarely is a matter of urgency. Additionally, an obligation to give notice of these reasons satisfies two interests: it enables the subject of the communication to check whether these matters have been correctly assessed, and it enables the Commission to establish whether, on the basis of the comments submitted, it has sufficient justification for discontinuing the proceedings.

On the other hand, as regards the possibility of challenging the discontinuance of the proceedings, I consider that the following principles hold good: First, the right to bring an action, having its origin in the aims of the competition rules, cannot be made conditional upon the form of the measure rejecting the complaint; second, although it is not obliged to adopt a definitive decision as to the existence of an infringement, the

40. *British American Tobacco Co. and R.J. Reynolds Indus. v. Commission*, Joined Cases 142 and 156/84, 1987 E.C.R. __, Common Mkt. Rep. (CCH) ¶ 14,405, at 17,766-80.

41. *See supra* note 35 and accompanying text.

Commission cannot suspend *ad libitum* an investigation commenced by it. On the contrary, from the provisions of Regulations Nos. 17 (in particular articles 9(3) and 19)⁴² and 99/63 (in particular article 6),⁴³ it is apparent that, when the Commission intends to close the file in an investigation, it is obliged to (a) notify the complainant of its reasons for forming that intention; (b) allow him a reasonable period in which to submit his comments; and (c) adopt a definitive measure with respect to the application, not the infringement.

There is a third principle. The closing of the file is binding on the Commission in the same way as a negative clearance, only insofar as the state of affairs giving rise to that particular decision does not change. Since it is addressed to the complainant, on the other hand, that measure has no binding effects on third parties, other than that of restoring to the Member States the power to apply Articles 85 and 86.⁴⁴ 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.⁴⁵

CONCLUSION

Article 173 of the EEC Treaty,⁴⁶ which confers on the Court the power to review the legality of acts of Community institutions capable of having legal effects, distinguishes two classes of persons entitled to institute proceedings for annulment: persons to whom the measure is addressed and persons who, insofar as they do not fall into the first category, must

42. Regulation 17, *supra* note 10, arts. 9(3), 19, at 207, 210, O.J. Eng. Spec. Ed. 1959-62, at 89, 92, Common Mkt. Rep. (CCH) ¶¶ 2481, 2581, at 1755, 1791.

43. Regulation 99/63, *supra* note 21, art. 6, at 2269, O.J. Eng. Spec. Ed. 1963-64, at 48, Common Mkt. Rep. (CCH) ¶ 2641, at 1803.

44. *See* Regulation 17, *supra* note 10, art. 9(3), at 207, O.J. Eng. Spec. Ed. 1959-62, at 89, Common Mkt. Rep. (CCH) ¶ 2482, at 1755.

45. *See* *CICCE v. Commission*, Case 298/83, 1985 E.C.R. 1105, 1122, ¶ 18, Common Mkt. Rep. (CCH) ¶ 14,157, at 15,905-06.

46. EEC Treaty, *supra* note 5, art. 173, 1973 Gr. Brit. T.S. No. 1, at 57, 298 U.N.T.S. at 75-76.

prove that the measure is of such a kind as to be of "direct and individual" concern to them. In the latter case,

[p]ersons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.⁴⁷

It is easy to see that if such criteria were applied literally, actions brought to obtain the annulment of decisions granting exemptions or negative clearances of which the applicants are not the addressees would be, in most cases, dismissed as inadmissible. In order to avoid that deficiency, the Court, in *Metro v. Commission*,⁴⁸ ruled for the first time on the admissibility of an action brought by a third party against the grant of an exemption and stated:

It is in the interests of a satisfactory administration of justice and of the proper application of Articles 85 and 86 that natural or legal persons who are entitled, pursuant to Article 3(2)(b) of Regulation No 17, to request the Commission to find an infringement of Articles 85 and 86 should be able, if their request is not complied with either wholly or in part, to institute proceedings in order to protect their legitimate interests.⁴⁹

Following that judgment, academic writers, albeit expressing their approval for the solution in principle, pointed out that the Court had failed to clarify the grounds upon which the applicant, Metro, was to be regarded as having been "individually" affected by the decision granting exemption.⁵⁰ Recently again in the *BAT/Reynolds* case⁵¹ the company, Rembrandt, intervening on the side of the Commission, argued that the action, brought against the decision to close the file on the investigation, had to be regarded as inadmissible, because the appli-

47. *Plaumann v. Commission*, Case 25/62, 1963 E.C.R. 95, 107, Common Mkt. Rep. (CCH) ¶ 8013, at 7274.

48. Case 26/76, 1977 E.C.R. 1875, Common Mkt. Rep. (CCH) ¶ 8435.

49. *Id.* at 1901, ¶ 13, Common Mkt. Rep. (CCH) ¶ 8435, at 7848.

50. *See, e.g.*, Joliet, *supra* note 37, at 93; Waelbroeck, *supra* note 37, at 200.

51. *British American Tobacco Co. and R.J. Reynolds Indus. v. Commission*, Joined Cases 142 and 156/84, 1987 E.C.R. ___, Common Mkt. Rep. (CCH) ¶ 14,405.

cants had to show that the measure in question affected them "directly and individually" in the sense that it was prejudicial to their specific interests.⁵² However, I would observe that the criticism expressed by those academics is directed against the very obstacle that the Court sought to eliminate; in other words, with regard to the criteria of admissibility that are laid down in Article 173, and were strictly interpreted in *Plaumann v. Commission*,⁵³ the formula employed in *Metro*⁵⁴ introduces an exception of a special nature, which is justified by the overriding interest of verifying in court proceedings whether the competition rules have been properly applied.

Consequently, for the purposes of the admissibility of the application, it is not necessary in antitrust proceedings to consider whether the contested measure was of individual concern to the applicant. Nor can a decisive role be played in that regard by the fact that he complained or intervened in the course of the administrative inquiry. Indeed, in view of the imperative requirement to secure the proper implementation of Articles 85 and 86, a person may also be held to have standing, although he was not involved in the action taken by the Commission, if he maintains that the Commission's action would prejudice a legal position of his that is directly protected by Community antitrust rules. In the final analysis, to be able to challenge before the Community Court a measure of the antitrust authority that is aimed at third parties, an applicant must show in every case that he has an interest in the action. To that end, he will, therefore, have to show the possible repercussions—not the specific repercussions—to his legal position.⁵⁵

52. *Id.* at ___, Common Mkt. Rep. (CCH) ¶ 14,405, at 17,733.

53. Case 25/62, 1963 E.C.R. 95, Common Mkt. Rep. (CCH) ¶ 8013.

54. *Metro v. Commission*, Case 26/76, 1977 E.C.R. 1875, Common Mkt. Rep. (CCH) ¶ 8435.

55. See C.S. KERSE, EEC ANTITRUST PROCEDURE § 9.05 (1981).

