

In Case 6/72

EUROPEMBALLAGE CORPORATION, Brussels (Belgium), and CONTINENTAL CAN COMPANY INC., New York (USA), represented by Alfred Gleiss, Helmuth Lutz, Christian Hootz, Martin Hirsch and Partners, of the Stuttgart Bar, and Jean Loyrette, Advocate at the Court of Paris, having chosen their address for service in Luxembourg in the chambers of Me Georges Reuter, 7, avenue de l'Arsenal,

applicants,

v

COMMISSION OF THE EUROPEAN [UNION], represented by its legal advisers Bastiaan Van der Esch and Jochen Thiesing, acting as agents, having chosen its address for service in Luxembourg in the office of its legal adviser Emile Reuter, 4, boulevard Royal,

defendant,

Application for annulment of the decision of the Commission of 9 December 1971 relating to a procedure in application of [Article 102 TFEU] Case IV/26811 - Europemballage Corporation (OJ 1972, L 7),

THE COURT

composed of: R. Lecourt, President, R. Monaco (Rapporteur) and P. Pescatore, Presidents of Chambers, A. M. Donner and H. Kutscher, Judges,

Advocate-General: K. Roemer

Registrar: A. Van Houtte

gives the following

JUDGMENT

**Grounds of judgment**

- 1 By an action commenced on 9 February 1972, the applicants sought annulment of the Commission's decision of 9 December 1971, finding that Continental Can Company Inc. (hereinafter called Continental) had infringed [Article 102 TFEU] by acquiring, through the Europemballage Corporation (hereinafter called Europemballage), approximately 80% of the shares and convertible debentures of Thomassen & Drijver-Verbliva N.V. (hereinafter called TDV).

A – On the irregularity of the administrative procedure

- 2 (a) The applicants argue that the contested decision was irregular on account of the fact that Continental had been given no opportunity to state its point of view in the administrative procedure in accordance with Article 19 of Regulation No 17/62 of the Council and Article 7 of Regulation No 99/63 of the Commission. Therefore, it was argued, the decision offended against the right of being heard.
- 3 It is established that the applicants, by letter of 14 May 1970 sent through their representative, requested the Commission, which had previously directed its enquiries as to the acquisition of the TDV shares and debentures to Continental, to apply in future to Europemballage. From the minutes supplied by the applicants of the hearing of the parties on 21 September, 1971, it is moreover clear that amongst the people taking part in this hearing was Mr Charles B. Stauffacher, in his capacity as a member of the Board of Directors of both the applicants. From these circumstances it is clear that Continental has had the opportunity to state its case in the administrative procedure.
- 4 (b) The applicants also argue that the statement of objections of 15 March 1971 was not accompanied by a sufficient statement of reasons, for the Commission had simply cited its objections without mentioning the supporting reasons. The statement of reasons in the decision was also insufficient since it merely repeated the statement of objections of 15 March 1971 without taking into consideration the reply given by the affected parties on 9 August 1971, and also because it made no mention of supporting reasons for the objections made.
- 5 As far as the first plea is concerned, Article 4 of Regulation No 99/63 states that the Commission should only take into consideration in its decisions those objections on which the addressee has had the

opportunity to express an opinion. The statement of objections fulfils this requirement as it indicates the essential facts on which the Commission bases its case in an admittedly concise, but nevertheless clear form. In its communication of 15 March 1971 the Commission clearly presented and stated the essential facts on which it based its objections and indicated the extent of the dominant position held by Continental and how it had been abused. The criticisms made of the statement of objections are therefore unfounded.

- 6 As far as the second plea is concerned, the Commission is admittedly obliged to provide the reasons for its decision, but it does not need to refute all the arguments adduced during the administrative proceedings.
- 7 (c) The applicants go on to discern a formal error in the contested decision, since the administrative proceedings are headed 'Continental Can Company' in the *Official Journal of the European [Union]* of 8 January 1972, whereas the French version, which alone is authentic, is entitled 'Europemballage Corporation'.
- 8 This circumstance, however, on account of the economic and legal links between Continental and Europemballage, cannot affect the validity of the contested measure.
- 9 (d) The applicants go on to argue that the contested decision was irregular because it was not duly notified to Continental. The undertaking had received one or two letters from the Commission by post in December 1971, although the decision should have been notified through diplomatic channels.
- 10 A decision is properly notified within the meaning of the Treaty, if it reaches the addressee and puts the latter in a position to take cognizance of it. This was so in the present case, because the contested decision actually reached Continental and the latter cannot make use of its own refusal to take cognizance of the decision in order to render this communication ineffective.
- 11 (e) The applicants finally claim that the Commission offended against Article 3 of Regulation No 1/58 of the Council on the regulation of the language system for the European [Union], by describing the French text of the contested decision as authentic instead of the German one.

12 According to Article 3 of the abovementioned Regulation, written documents, which any organ of the [Union] sends to a person subject to the jurisdiction of a Member State, are to be drawn up in the language of that State. As the applicants have their registered office in a third state, the choice in the present case of the official language of the decision had to be based on what relations existed within the Common Market between the applicants and one state or another of the [Union]. Europemballage had opened an office in Brussels and set out its written observations in the administrative procedure in French. The facts of the case being as indicated, it is not evident that the choice of the French language as the official language of the decision offended against Article 3 of Regulation No 1/58 of the Council.

13 The pleas based on formal errors in the administrative procedure must therefore be dismissed.

#### B – On the competence of the Commission

14 The applicants argue that according to the general principles of international law, Continental, as an enterprise with its registered office outside the Common Market, is neither within the administrative competence of the Commission nor under the jurisdiction of the Court of Justice. The Commission, it is argued, therefore has no competence to promulgate the contested decision with regard to Continental and to direct to it the instruction contained in Article 2 of that decision. Moreover, the illegal behaviour against which the Commission was proceeding, should not be directly attributed to Continental, but to Europemballage.

15 The applicants cannot dispute that Europemballage, founded on 20 February 1970, is a subsidiary of Continental. The circumstance that this subsidiary company has its own legal personality does not suffice to exclude the possibility that its conduct might be attributed to the parent company. This is true in those cases particularly where the subsidiary company does not determine its market behaviour autonomously, but in essentials follows directives of the parent company.

16 It is certain that Continental caused Europemballage to make a take-over bid to the shareholders of TDV in the Netherlands and made the

necessary means available for this. On 8 April 1970 Europemballage took up the shares and debentures in TDV offered up to that point. Thus this transaction, on the basis of which the Commission made the contested decision, is to be attributed not only to Europemballage, but also and first and foremost to Continental. [Union] law is applicable to such an acquisition, which influences market conditions within the [Union]. The circumstance that Continental does not have its registered office within the territory of one of the Member States is not sufficient to exclude it from the application of [Union] law.

17 The plea of lack of competence must therefore be dismissed.

C – On [Article 102 TFEU] and abuse of a dominant position

18 In Articles 1 and 2 of the Commission's decision of 9 December 1971 Continental Can is blamed for having infringed [Article 102 TFEU] by abusing the dominant position which it allegedly held through Schmalbach-Lubeca-Werke AG of Brunswick (hereinafter called SLW) in a substantial part of the Common Market in the market for light metal containers for meat, meat products, fish and crustacea as well as in the market for metal closures for glass jars. According to Article 1 the abuse consists in Continental having acquired in April 1970, through its subsidiary Europemballage, about 80% of the shares and debentures of TDV. By this acquisition competition in the containers mentioned was practically eliminated in a substantial part of the Common Market.

19 The applicants maintain that the Commission by its decision, based on an erroneous interpretation of [Article 102 TFEU], is trying to introduce a control of mergers of undertakings, thus exceeding its powers. Such an attempt runs contrary to the intention of the authors of the Treaty, which is clearly seen not only from a literal interpretation of [Article 102 TFEU], but also from a comparison of the [FEU] Treaty and the national legal provisions of the Member States. The examples given in [Article 102 TFEU] of abuse of a dominant position confirm this conclusion, for they show that the Treaty refers only to practices which have effects on the market and are to the detriment of consumers or trade partners. Further, [Article 102 TFEU] reveals that the use of economic power linked with a dominant position can be regarded as an abuse of this position only if it constitutes the means through which the abuse is effected. But structural measures of undertakings - such as strengthening

a dominant position by way of merger - do not amount to abuse of this position within the meaning of [Article 102 TFEU]. The decision contested is, therefore, said to be void as lacking the required legal basis.

- 20 [Article 102(1) TFEU] says 'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States'. The question is whether the word 'abuse' in [Article 102 TFEU] refers only to practices of undertakings which may directly affect the market and are detrimental to production or sales, to purchasers or consumers, or whether this word refers also to changes in the structure of an undertaking, which lead to competition being seriously disturbed in a substantial part of the Common Market.
- 21 The distinction between measures which concern the structure of the undertaking and practices which affect the market cannot be decisive, for any structural measure may influence market conditions, if it increases the size and the economic power of the undertaking.
- 22 In order to answer this question, one has to go back to the spirit, general scheme and wording of [Article 102 TFEU], as well as to the system and objectives of the Treaty. These problems thus cannot be solved by comparing this Article with certain provisions of the ECSC Treaty.
- 23 [Article 102 TFEU] is part of the chapter devoted to the common rules on the [Union]'s policy in the field of competition. This policy is based on [Article 3 TEU] according to which the [Union]'s activity shall include the institution of a system ensuring that competition in the Common Market is not distorted. The applicants' argument that this provision merely contains a general programme devoid of legal effect, ignores the fact that [Article 3 TEU] considers the pursuit of the objectives which it lays down to be indispensable for the achievement of the [Union]'s tasks. As regards in particular the aim mentioned in [Article 3 TEU], the Treaty in several provisions contains more detailed regulations for the interpretation of which this aim is decisive.

24 But if [Article 3 TEU] provides for the institution of a system ensuring that competition in the Common Market is not distorted, then it requires *a fortiori* that competition must not be eliminated. This requirement is so essential that without it numerous provisions of the Treaty would be pointless. Moreover, it corresponds to the precept of [Article 3 TEU] according to which one of the tasks of the [Union] is 'to promote throughout the [Union] a harmonious development of economic activities'. Thus the restraints on competition which the Treaty allows under certain conditions because of the need to harmonize the various objectives of the Treaty, are limited by the requirements of [Article 3 TEU]. Going beyond this limit involves the risk that the weakening of competition would conflict with the aims of the Common Market.

25 With a view to safeguarding the principles and attaining the objectives set out in [Article 3 TEU], [Articles 101 to 106 TFEU] have laid down general rules applicable to undertakings. [Article 101 TFEU] concerns agreements between undertakings, decisions of associations of undertakings and concerted practices, while [Article 102 TFEU] concerns unilateral activity of one or more undertakings. [Articles 101 and 102 TFEU] seek to achieve the same aim on different levels, *viz.* the maintenance of effective competition within the Common Market. The restraint of competition which is prohibited if it is the result of behaviour falling under [Article 101 TFEU], cannot become permissible by the fact that such behaviour succeeds under the influence of a dominant undertakin[g] and results in the merger of the undertakings concerned. In the absence of explicit provisions one cannot assume that the Treaty, which prohibits in [Article 101 TFEU] certain decisions of ordinary associations of undertakings restricting competition without eliminating it, permits in [Article 102 TFEU] that undertakings, after merging into an organic unity, should reach such a dominant position that any serious chance of competition is practically rendered impossible. Such a diverse legal treatment would make a breach in the entire competition law which could jeopardize the proper functioning of the Common Market. If, in order to avoid the prohibitions in [Article 101 TFEU], it sufficed to establish such close connections between the undertakings that they escaped the prohibition of [Article 101 TFEU] without coming within the scope of that of [Article 102 TFEU], then, in contradiction to the basic principles of the Common Market, the partitioning of a substantial part of this market would be allowed. The endeavour of the authors of the Treaty to maintain in the market real or potential competition even in cases in which restraints on competition are permitted, was explicitly laid down in [Article 101(3)(b) TFEU]. [Article 102 TFEU] does not

contain the same explicit provisions, but this can be explained by the fact that the system fixed there for dominant positions, unlike [Article 101(3) TFEU], does not recognize any exemption from the prohibition. With such a system the obligation to observe the basic objectives of the Treaty, in particular that of [Article 3 TEU], results from the obligatory force of these objectives. In any case [Articles 101 and 102 TFEU] cannot be interpreted in such a way that they contradict each other, because they serve to achieve the same aim.

26 It is in the light of these considerations that the condition imposed by [Article 102 TFEU] is to be interpreted whereby in order to come within the prohibition a dominant position must have been abused. The provision states a certain number of abusive practices which it prohibits. The list merely gives examples, not an exhaustive enumeration of the sort of abuses of a dominant position prohibited by the Treaty. As may further 'be seen from letters (c) and (d) of [Article 102(2) TFEU], the provision is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in [Article 3 TEU]. Abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one.

27 Such being the meaning and the scope of [Article 102 TFEU], the question of the link of causality raised by the applicants which in their opinion has to question exist between the dominant position and its abuse, is of no consequence, for the strengthening of the position of an undertaking may be an abuse and prohibited under [Article 102 TFEU], regardless of the means and procedure by which it is achieved, if it has the effects mentioned above.

D – On the facts set forth in the statement of reasons in the decision

28 The Commission based its decision, *inter alia*, on the thesis that the acquisition of the majority holding in a competing company by an undertaking or a group of undertakings holding a dominant position may, in certain circumstances, amount to an abuse of this position. This

is the case, according to the Commission, if an undertaking in a dominant position strengthens such position through a merger in such a way that real or potential competition in the goods concerned is in practice eliminated in a substantial part of the Common Market.

- 29 If it can, irrespective of any fault, be regarded as an abuse if an undertaking holds a position so dominant that the objectives of the Treaty are circumvented by an alteration to the supply structure which seriously endangers the consumer's freedom of action in the market, such a case necessarily exists, if practically all competition is eliminated. Such a narrow precondition as the elimination of all competition need not exist in all cases. But the Commission, basing its decision on such elimination of competition, had to state legally sufficient reasons or, at least, had to prove that competition was so essentially affected that the remaining competitors could no longer provide a sufficient counterweight.
- 30 In order to justify its thesis the Commission viewed the consequences of the disputed merger from various angles. In this respect a distinction has to be made in the statement of reasons for its decision between four essential elements:
- (a) the present market share of the combined undertakings in the products concerned,
  - (b) the relative proportions of the new unit created by the merger compared to the size of potential competitors in this market,
  - (c) the economic power of the purchasers vis-a-vis that of the new unit, and
  - (d) the potential competition of either the manufacturers of the same products, who are situated in geographically distant markets, or of other products made by manufacturers situated in the Common Market.

In examining these various factors the decision on the one hand is based on the very high market share already held by SLW in metal containers, on the weak competitive position of the competitors remaining in the

market, on the economic weakness of most of the consumers in relation to that of the new unit and on the numerous legal and factual links between Continental and potential competitors; and, on the other hand, on the financial and technical difficulties involved in entering a market characterized by a strong concentration.

31 The applicant contests the exactitude of the data on which the Commission basis its decision. It cannot be concluded from SLW's market share, amounting to 70 to 80% in meat cans, 80 to 90% in cans for fish and crustacea and 50 to 55% in metal closures with the exception of crown corks -percentages which moreover are too high and could not be proved by the defendant -, that this undertaking dominates the market for light metal containers. The decision, moreover, excluded the possibility of competition arising from substitute products (glass and plastic containers) relying on reasons which do not stand up to examination. The statements about possibilities of real and potential competition as well as about the allegedly weak position of the consumers are therefore, in the applicants' view, irrelevant.

32 For the appraisal of SLW's dominant position and the consequences of the disputed merger, the definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products.

33 In this context recitals Nos 5 to 7 of the second part of the decision deal in turn with a 'market for light containers for canned meat products', a 'market for light containers for canned seafood', and a 'market for metal closures for the food packing industry, other than crown corks', all allegedly dominated by SLW and in which the disputed merger threatens to eliminate competition. The decision does not, however, give any details of how these three markets differ from each other, and must therefore be considered separately. Similarly, nothing is said about how these three markets differ from the general market for light metal containers, namely the market for metal containers for fruit and vegetables, condensed milk, olive oil, fruit juices and chemico-technical products. In order to be regarded as constituting a distinct market, the products in question must be individualized, not only by the mere fact that they are used for packing certain products, but by particular

characteristics of production which make them specifically suitable for this purpose. Consequently, a dominant position on the market for light metal containers for meat and fish cannot be decisive, as long as it has not been proved that competitors from other sectors of the market for light metal containers are not in a position to enter this market, by a simple adaptation, with sufficient strength to create a serious counterweight.

34 Besides, there are in the decision itself indications which make one doubt whether the three markets are to be considered separately from other markets for light metal containers, indications which rather lead one to conclude that they are parts of a larger market. In the first part of the statement of reasons, where, under letter J, it deals with the main competitors of SLW in Germany and of TDV in Benelux, the decision mentions a German undertaking which holds a higher share of production of light metal containers for fruit and vegetables than SLW, and another one which supplies 38- to 40% of the German demand for crown corks: this seems to confirm that the production of metal cans for meat and fish cannot be considered separately from the production of metal cans for other purposes and that, when considering the production of metal closures, crown corks must not be left out. Furthermore, the decision, when examining the possibilities of competition by substitutes, does not -in No 16 of its second part - confine itself to the three relevant 'markets', but deals with the market for light metal containers for other purposes as well; in this connection it states that these containers could be replaced by containers made of other material to a limited extent only. The fact that the Commission could not maintain this allegation in view of the facts put forward by the applicants in the course of the proceedings, proves in itself how necessary it is sufficiently to define the market concerned in order that the relative strength of the undertakings in such a market might be considered.

35 Since there are in the decision no data on the particular characteristics of metal containers for meat and fish and metal closures (other than crown corks) designed for the food packing industry, whereby these goods constitute separate markets which could be dominated by the manufacturer holding the highest share of this market, it is for this reason characterized by an uncertainty which has an effect on the other statements. from which the decision infers the absence of real or potential competition in the market in question. As regards in particular

competition by other manufacturers of metal containers, the Commission argued in the course of the proceedings in Court that Continental licensees 'agreed upon restrictions of competition within the framework of the so-called market information system described ... under D 4 b', but it claims, on the other hand, that TDV and SLW had had 'the possibility of entering into competition with each other'.. The argument put forward in No 19 of the statement of reasons that the plants of certain manufacturers in the countries bordering on Germany were located too far away from most German consumers to enable the latter to decide to use them as a permanent source of supply, has not been substantiated. Moreover, this argument is difficult to reconcile with the allegation in No 25 (a) that the break-even distances for the transport of empty containers are 150 -300 kilometres for the relatively large containers, and 500 - 1 000 kilometres for smaller ones. In addition, it is uncontested that transport costs are of no essential significance in the case of metal closures.

36 Besides, as far as potential competition from large consumers capable of manufacturing their own cans is concerned, the decision alleges in No 18 that such competition is out of the question due to the heavy capital investments involved and the technical lead of the Continental Group in this field, whereas in the last paragraph in J No 3 it is stated that in the Belgian market the Marie Thumas cannery through its subsidiary Eurocan makes metal containers for its own use and for sale to other consumers. This contradiction is a further indication of the Commission's uncertainty with regard to the definition of the market or markets concerned. In letter (e) of No 30 of the statement of reasons in the decision, it is stated that 'except for Marie Thumas/Eurocan, manufacturers of their own cans do not make more than they themselves need and are not suppliers of empty metal containers', while, on the contrary, under K No 2, second paragraph, it says that certain German firms who manufacture their own had begun to market their surplus output of metal containers. It can be concluded from all this that some undertakings which have begun to manufacture their own containers were able to overcome the technological difficulties, yet the decision does not contain any criteria for evaluating the power of competition of these undertakings. These considerations show further contradictions which, likewise, affect the validity of the decision contested.

37 All this leads to the conclusion that the decision has not, as a matter of law, sufficiently shown the facts and the assessments on which it is based. It must therefore be annulled.

Costs

38 Under Article 69 (2) of the Rules of Procedure the losing party is to be ordered to bear the costs.

The defendant has lost its case.

On those grounds,

Upon reading the pleadings;  
Upon hearing the report of the Judge-Rapporteur;  
Upon hearing the oral arguments of the parties;  
Upon hearing the opinion of the Advocate-General;  
Having regard to the Treaty [on the Functioning of the European Union], especially [Article 3 TEU], [Articles 101 and 102 TFEU];  
Having regard to the Protocol on the Statute of the Court of Justice of the European [Union];  
Having regard to the Rules of Procedure of the Court of Justice of the European [Union];

THE COURT

hereby:

- 1. Annuls the decision of the Commission of 9 December 1971 on a procedure under [Article 102 TFEU] (IV/26.811 - Europemballage Corporation)**
- 2. Orders the defendant to bear the costs of the proceedings.**

Lecourt

Monaco

Pescatore  
Kutscher

Donner

Delivered in open court in Luxembourg on 21 February 1973.

A. Van Houtte

R. Lecourt

Registrar

President