

I N F O R M A T I O N (Competition)

EUROPEMBALLAGE :

A DOMINANT POSITION CONDEMNED BY THE EUROPEAN COMMUNITY

On December 9, 1971 the Commission of the European Community took a decision prohibiting a merger which had been carried out in 1970 between two firms specialising in light metallic packagings, under the auspices of a holding company named "Europemballage" which handles the European activities of the American corporation "Continental Can".

The two firms in question are the German firm Schmalbach and the Dutch firm Thomassen and Drijver-Verblifa, which also controls the Belgian company Sobemi.

According to the Commission, the Schmalbach company, which has a dominant position in an important part of the market for light metallic packagings for meat preserves, charcuterie, fish and shell-fish, has abused this position by limiting the freedom of choice of its customers to an extent incompatible with the Treaty, by acquiring control of the Dutch firm, which is the leader in this specialty, both in the Netherlands and in Belgium.

Abusive extension of a dominant position

The fact to which the Commission takes exception is, essentially, the extension into Benelux of the dominant position held by Schmalbach in the German market. The abuse to which the verdict relates, arises through the fact that the merger of the two firms, which make the same range of products and are therefore competitors, results in practice, in restricting the customer's freedom of choice.

The position arrived at by the two merger firms is such that, in the market for their principal specialties, buyers are virtually obliged to become customers of the Europemballage group, owing to their inability to obtain supplies elsewhere.

The concentration thus infringes one of the essential principles of competition in the Common Market — that any buyer should have a free choice of supplier.

The legal basis for the Commission's
decision

The aim and desire of the European Community to guarantee "fair competition" was important enough to be mentioned in the preamble to the Treaty of Rome. A few pages later, the article in which the Community objectives are set out foreshadows "a system to ensure that competition inside the Common Market is not falsified". Further on, in Articles 85 and 86, the Treaty of Rome assigns to the Commission the duty of maintaining

the state of competition in the Common Market, and gives it legal instruments to prohibit on its own authority, agreements between firms, State aids and the abuse of dominant positions.

For Europemballage, the Commission decision is based on Article 86, which is directed against the abuse of a dominant position which any firm, or group of firms, may have in the market for products in its own special line, when similar or substitute products are scarce or do not exist.

The first prohibition, issued in July 1971, was against the abuse of a dominant position in Germany, by the authors and musical composers' protection society GEMA. It was directed only against certain discriminatory practices. In the Europemballage prohibition, against the acquisition of control of Thomassen Drijver-Verblifa, the Commission is making its first incursion into the field of big industrial groups, many of which are of recent formation. In the present case, the Commission takes the view that, quite apart from any aggressive intention, such as a dumping campaign or unduly high prices, abuse may exist in the mere fact that buyers will, in practice, be forced to take their supplies from the merger undertaking.

The abuse begins at the moment when the freedom of choice of the consumer is first compromised. In the case of Europemballage, this threshold would be crossed at the moment of the acquisition of Thomassen Drijver-Verblifa.

Circumstances constituting the abuse

In the case of Continental Can, the Commission's view is that "the purchase of a majority shareholding in a competing undertaking by any firm, or group of firms, may in certain circumstances constitute an abusive exploitation of this position".

The circumstances referred to, require that one of the firms should, before the merger, be in a dominant position in an important part of the market. They also require that the two firms should offer a competing line of products, which was indeed the case of Schmalbach and Thomassen Drijver-Verblifa. They also require that, in the market under consideration — the huge and very diverse market for packagings — users should find themselves in difficulty in obtaining supplies of similar, or substitute, products from other firms in the Community or elsewhere.

A study of the Continental Can structures in Europe, of competing Community and foreign companies, and an examination of substitute products, led the Commission to the conclusion that Continental Can satisfied the necessary pre-conditions for abusive exploitation of a dominant position.

In the case of Europemballage, the Commission took into account the part of the market dominated by the parties to the concentration; but it also considered other elements by which its judgement might be confirmed. The chief of these were :

- the size of the undertaking, by comparison with competitors in the EEC and abroad ;
- its high technological level ;
- the geographical distribution of its production facilities which, since they cover a wide territory, give it an important advantage in transport costs ;
- its international financing, which gives it wide access to capital markets ;
- its production of conditioning machinery adapted to group packaging ;
- the small degree of competition from substitute products.

Thus, apart from the share of the market held by Europemballage, the inducement to the Community to take action lay in the financial and technological structure of the concentration.

The European structures of Continental Can

The American company, Continental Can, with its subsidiary Continental Can International Corporation, is the world leader in the production of metallic packagings. It is also an important producer of paper and plastic packagings. The group has 200 factories, employs 62,000 people and has a turnover of \$ 1,780 million, of which, more than 17 % is in external markets.

The Company has majority or minority shareholdings in some 30 companies outside its own country. It has entered into licensing and technical assistance agreements with 51 companies.

In the European Community, Continental Can holds 85.8 % of the capital of the German company Schmalbach-Lubeca Werke of Brunswick. This company is itself the biggest metal packaging producer in Germany and in the Community. The takeover dates from 1969.

At this time the group already had links with companies operating its licences in the Netherlands and in France. It held 10.4 % of the capital of the Dutch company Thomassen and Drijver-Verblifa and 8.1 % of the French company J.J. Carnaud et Forges de Basse-Indre.

The affair begins with the formation in the USA in 1970, of the holding company Europemballage, which was to take over and expand the assets of Continental Can in Europe, consisting of the 85 % interest in the German company Schmalbach and the 10.4 % interest in the Dutch company Thomassen Drijver-Verblifa. The expansion of the holding company was to be promoted by an agreement with Metal Box, the leading British company in the packaging business, which was to have brought in the Superbox company in Italy, which is under its control, as well as a minority shareholding in Thomassen Drijver-Verblifa.

In parallel with this, a takeover offer sent by Europemballage to Thomassen and Drijver-Verblifa shareholders, was to bring this company into the group. It is the leading company in its line in Benelux; and the Europemballage holding company would thus have comprised production units covering a large part of the Community (except France) and in England, with ramifications in Austria and the Netherlands Antilles.

The Commission's first intervention

In March 1970, the Commission sent a warning note to the companies, putting them on notice that the operations contemplated might be regarded as incompatible with the Community doctrines on competition.

Shortly after this, Metal Box stated that it would not be giving effect to the project, and therefore would not be contributing to Europemballage as arranged.

Nevertheless, the operation, without the British participation, was carried through on April 8, 1970. The final result was that Europemballage held 91 % of Verblifa, 86 % of Schmalbach, but only 1.3 % of Superbox, which remained under the control of the British Metal Box group.

The firms merged in Europemballage

- Schmalbach Lubeca Werke AG of Brunswick is the biggest light-metal packaging producer in continental Europe. Since 1956, the group has absorbed several German manufacturers and holds 45 % of the capital of a Belgian firm. It has a subsidiary in Austria.
- Thomassen and Drijver-Verblifa of Deventer is the biggest metal packaging manufacturer in Benelux. In 1964 the group merged with Sobemi S.A., the biggest Belgian manufacturer in this line.

There is insufficient competition from substitute products

The Commission adds a further argument to its decision, by stating that the competition of substitute products cannot be used by Europemballage to justify the takeover.

The basic production, both of Schmalbach and Verblifa, consists of light metallic packagings in tinfoil, uncoated metal or aluminium, which represent 80-88 % of the turnover for each of them. These consist of cans, boxes and containers for dry products, aerosol containers, metallic closures and other products.

The range of products offered by Continental Can and its licensees (including 5,000 products by the Schmalbach company alone) fully covers the great majority of the requirements of the entire packaging sector for meat preserves, charcuterie, fish and shell-fish. Moreover, in those market sectors in which the group has a very important position, there is practically no similar or substitute product.

For all these reasons the Commission considered it was in a position to require Continental Can to put an end to the situation created by the merger between Schmalbach and Thomassen and Drijver-Verblifa and, for this purpose, to make proposals before July 1, 1972.