11. Articles 85 and 86 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 85 cannot become permissible by the fact that such behaviour succeeds under the influence of a dominant undertaking and results in the merger of the undertakings concerned.

12. The list of abuses contained in Article 86 of the Treaty is not an exhaustive enumeration of the abuses of a dominant position prohibited by the Treaty.

    Article 86 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 (f) of the Treaty. 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.

    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.

13. The question of the link of causality 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 86 of the Treaty regardless of the means and procedure by which it is achieved, if it has the effect of substantially fettering competition.

14. 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. 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.

15. 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.

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 COMMUNITIES, 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 86 of the Treaty 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

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

1. Continental Can Company Inc. (Continental) of New York (USA), a company manufacturing metal packages, packaging materials of paper and plastic and machines for manufacturing and using these packages, by successive purchases during the year 1969, brought its share in Schmalbach-Lubeca-Werke AG (SLW) of Brunswick (Germany) to 85·8 % of the nominal capital.

During the same year, Continental contemplated the formation, with The Metal Box Company Ltd (MB) of

London, of a European holding company for packaging, in which the licensees of Continental in the Netherlands and in France, Thomassen & Drijver-Verblifa N.V. (TDV) of Deventer and J. J. Carnaud and Forges de Basse-Indre (Carnaud) of Paris, would be invited to participate. However, Carnaud indicated, at the end of August 1969, that it could not participate in the contemplated holding company.

On 16 February 1970, an agreement was signed between Continental and TDV whereby it was agreed:

(a) that Continental would set up in Delaware (USA) a company (subsequently called Europemballage Corporation) to which it would transfer its interests in SLW;

(b) that Continental would induce Europemballage to offer to the shareholders of TDV other than MB and Carnaud, a sum of 140 florins cash for each TDV share of 20 florins nominal value. Each TDV shareholder offering his shares would also receive a certificate granting him a preferential right to purchase ordinary shares in Europemballage when these should be offered to the public. Continental would provide Europemballage with the necessary funds for such a purchase by acquiring additional shares in Europemballage.

In implementation of this agreement:

— on 20 February 1970, a company called Europemballage Corporation (Europemballage) was set up in Wilmington, under the legislation of the state of Delaware. This company opened an office in New York and another in Brussels;

— on 16 March 1970, TDV published the take-over bid made by Europemballage.

In March and April, the Commission drew the attention of the undertakings concerned to the possible incompatibility of the transaction contemplated with the provisions of Article 86 of the Treaty, and to the legal and financial consequences which might thereby arise for these companies. MB then indicated that it was postponing its contemplated transaction with Europemballage.

On 8 April 1970, Europemballage carried out the purchase of the shares and debentures of TDV offered up to that date, thus bringing the initial share of Continental in TDV to 91·07 %.

2. On 9 April 1970, the Commission decided to open of its own motion a procedure (in application of Article 3 (1) of Regulation No 17/62) against Continental and its subsidiary Europemballage concerning the acquisition by the latter of the majority of the shares in TDV. On completion of that procedure the Commission made, on 9 December 1971, a decision under Article 86 of the Treaty which, having set out the reasons on which it was based concerning the characteristics of the undertakings in question, their mutual links on a personal, financial, contractual and technical level and, particularly as regards SLW and TDV, the characteristics of their production, their sales on their respective markets, the exports of one company into the territory of the other, their competitive situation, etc., provides as follows:

'Article 1

It is found that Continental Can Company Inc. of New York, which holds through the medium of its subsidiary, Schmalbach-Lubeca-Werke AG of Brunswick, a dominant position over a substantial part of the Common Market on the market for light packaging for preserved meat, fish and crustacea and on the market in metal caps for glass jars, has abused this dominant position by the purchase made in April 1970 by its subsidiary Europemballage Corporation of approximately 80 % of the shares and convertible debentures of the Dutch

undertaking Thomassen & Drijver-Verblifa N.V. of Deventer. This purchase has had the effect of practically eliminating competition in the above-mentioned packaging products over a substantial part of the Common Market.

Article 2

Continental Can Company Inc. is required to put an end to the infringement of Article 86 of the Treaty establishing the EEC found in Article 1. For this purpose it must submit proposals to the Commission before 1 July 1972.

Article 3

This decision is addressed to Continental Can Company Inc. in New York.'

This decision, published in the *Official Journal of the European Communities* of 8 January 1972, No L 7 — wherein it is stated that 'the French language version is the only authentic version' — was notified to Europemballage on 14 December 1971 and to Continental Can by post during the same month. The German version also was communicated to counsel for the applicants on 20 December 1971.

This decision is the subject of the present application, lodged with the Registry of the Court on 9 February 1972.

3. In the application, and subsequently by a separate document lodged with the Registry of the Court on 23 February 1972, the applicants submitted, under Article 185 of the EEC Treaty, a request for suspension of execution of Article 2 of the contested decision. The President of the Court, after hearing the parties, rejected this request by order dated 21 March 1972.

On the report of the Judge-Rapporteur, after hearings the Advocate-General, the Court decided to open the oral procedure, after inviting the parties to reply before 1 September 1972 to a certain number of questions.

The parties presented oral arguments at the hearing on 20 September 1972.

The Advocate-General presented his opinion at the hearing on 21 November 1972.

II — Submissions of the parties

The *applicants* submit that the Court should:

'1. Declare null and void the decision of the Commission of the European Communities of 9 December 1971 'IV/26 811 — Europemballage' finding that in purchasing 80 % of the shares of the undertaking Thomassen & Drijver-Verblifa N.V. of Deventer, through the medium of its subsidiary Europemballage Corporation, Continental Can Company Inc. of New York has infringed Article 86 of the EEC Treaty, requiring it to put an end to this infringement and enjoining it to submit proposals to the Commission before 1 July 1972.

2. Hold that under Article 73 (b) of the Rules of Procedure of the Court of Justice of the European Communities the Commission of the European Communities is required to repay to the applicants the costs incurred by the parties in these proceedings.'

The *defendant* submits that the Court should:

'dismiss the application and order the applicants to bear the costs.'

III — Pleas and arguments of the parties

The pleas and arguments of the parties may be summarized as follows:

A — General observations

The *applicants* submit that the procedure leading up to the adoption of

the contested decision involved irregularities which also had an effect on that decision:

— First, the statement of reasons for the objections notified by the Commission to the interested parties in its communication of 15 March 1971 is insufficient, since the Commission confined itself to expressing its legal opinion without attempting to give reasons for it.

— Secondly, the decision taken essentially reiterated the objections set out in the abovementioned communication from the Commission, without showing any reaction to the reply which had been made to this communication on 9 August 1971 and without indicating the reasons on which its legal opinion was based.

— Finally, this attitude is not compatible with the proper conduct of the oral hearing provided for by Article 7 of Regulation No 99/63, so that in the present case the hearing was inadequate, the Commission having confined itself to protesting against the statement of facts contained in the reply of 9 August 1971, without its representatives and those of the other authorities taking part having asked the slightest question.

After emphasizing that it is for the Commission to prove and to give reasons for its objections, the applicants refer to the wording of the said reply, indicating that they rely on it as a subsidiary document in so far as its contents are not superseded by the argument developed in the application.

The *defendant* replies *inter alia* as follows:

— The statement of objections satisfied the conditions laid down in Article 4 of Regulation No 99/63, since it indicates clearly — albeit in a concise form — the essential facts on which it is based. In its statement the Commission not only set out the facts but also explained in what way the Continental group holds a dominant position and has abused that position by purchasing the majority of the shares of TDV.

— In an administrative procedure under Regulation No 17/62, the Commission is not obliged to give reasons for rejecting the arguments adduced by the parties. Moreover, the decision dismissed in favour of the applicants several points made in the statement of objections of 15 March 1971.

— According to Article 7 of Regulation No 99/63, the oral hearing is only intended to afford an opportunity for completing or developing the written observations already submitted under Article 5. Since the applicants had made very detailed written observations, the officials of the Commission and of the Member States had no questions to ask at the hearing on 21 September 1971. Moreover, it was only after a close examination of the statement of its objections, the reply of 9 August 1971 and the minutes of the hearing, that the Commission issued the decision.

B — Procedure

The *applicants* call attention to a certain number of formal irregularities committed by the Commission, which in their view suffice to nullify the decision challenged, particularly:

— lack of 'notification' of the decision challenged to Continental, at any rate by the normal, i.e. diplomatic, channel, Continental having merely received in December 1971 one or two letters from the Commission which had been addressed to it by post and which it sent back to the Commission on the advice of its lawyers;

— irregular description in the *Official Journal of the European Communities* of 8 January 1972 of the procedure opened against Continental, the French version of the decision being entitled 'Europemballage Corporation';

— infringement of the language rules (Article 3 of Regulation No 1 of the Council, OJ No 17, 1958), the Commission having indicated the French version of the decision as the authentic version whereas counsel for Europemballage, authorized to reply to the Commission's statement of objections, had indicated in the letter accompanying his reply that the German version of this document should be authentic;

— violation of the rights of the defence, Article 2 of the decision challenged specifying Continental whereas the Commission's statement of objections (addressed solely to Europemballage) had not been notified to Continental, so that the latter had not had an opportunity to make known its point of view in accordance with Article 19 (1) of Regulation No 17/62;

— the fact that in this case the Commission has exceeded its powers since Articles 1 to 3 of the decision challenged specify Continental, which, not having a registered office and not exercising any activity on the territory of the Member States, is not, according to the general principles of the law of nations, subject to the authority of the Commission nor to the jurisdiction of the Court of Justice.

The *defendant* replies as follows:

— Community law does not require that notification should be by diplomatic means. Moreover, even if the notification of the act challenged was vitiated by an irregularity, this irregularity does not justify the request for annulment submitted by the applicants.

— The description of the procedure in the *Official Journal* is not decisive for the purposes of the validity of the decision challenged. It is in any case indisputable that Continental must be considered the indirect purchaser and Europemballage as the direct purchaser of the majority of the shares of TDV.

— Since Continental has its registered office in a third state, the Commission was entitled, under Article 3 of Regulation No 1, to choose any af the four official languages of the Community. It chose the French language chiefly because Europemballage, which acquired the TDV shares on behalf of Continental, has an office in Brussels and had itself drawn up in French its reply to the Commission's objections.

— The allegation that Continental did not have the opportunity to make known its point of view regarding the objections made by the Commission is disproved by a whole series of facts forming part of the procedure in question and recorded in the dossier, and also by the conclusions which might be drawn from a statement by Mr Charles B. Stauffacher, Vice-Chairman of the Board of Continental Can Company and Chairman of the Board of Europemballage Corporation, at the hearing on 21 September 1971.

— Even on the strict application of the so-called principle of territoriality, there is no doubt that States (and the Community) are entitled to apply their legislation to acts carried out on the territory subject to their sovereignty, whatever may be the nationality of the authors of those acts. Continental has indeed acted within the Community through the medium of a subsidiary which,

although having its own legal personality, possesses no economic independence.

The *applicants* insist on the 'lack of competence' of the Commission in relation to Continental, contending that the behaviour of its subsidiary cannot be imputed to that undertaking without violating the fundamental principle of the autonomy of legal personality. Furthermore, the legal person which committed the alleged abuse (Europemballage) is not the same as that which held the dominant position (SLW).

The *defendant* objects that these arguments are based on purely formal concepts. Having regard to the purpose for which Continental set up Europemballage and to the fact that the latter, although having legal personality, has no economic independence, the legal personality of Europemballage cannot be taken into account for the purposes of application of the rules of Community law on competition. Moreover, a telegram sent by Continental to the Commission dated 14 April 1970 indicates that Europemballage was not yet completely organized at the time when it published its bid in March 1970. It did not, therefore, have at that time any representative who could even in theory have refused to carry out the instructions given by the parent company. Furthermore, it cannot be disputed that SLW, which holds a dominant position on the German market, is placed under the direct control of Europemballage and under the indirect control of Continental.

Finally, the references contained in the memorandum of Me. Loyrette to the legal situation existing in the Member States as regards the problem of imputing the behaviour of a subsidiary to its parent company are not correct having regard to the solution given to this problem in Germany, in the Netherlands and in Belgium. As for American anti-trust law, it is clear that in that law companies which form a unit from the economic point of view are considered as a legal whole even if each of them has a distinct legal personality.

Finally, the defendant objects to the lodging by the applicants of a memorandum drawn up by counsel for Continental in New York, Mr Helmer Johnson. This memorandum cannot be taken into account, first because its author is not qualified under the provisions of Article 17 of the Protocol on the Statute of the Court and secondly because he does not fulfil the conditions of Article 29 (3) of the Rules of Procedure. Subject to these objections, the defendant observes that the arguments of Mr Johnson on the problem of 'competence' reflect ideas borrowed from American law which are inappropriate in applying Community law, for which it suffices that the effects of the behaviour in question are produced within the Common Market.

C — Merits

The discussion on the merits of the dispute between the parties is concerned with the *legal* problems bound up with the *interpretation* of Article 86 of the Treaty and with its application to concentrations of undertakings, and with the *factual* questions underlying the contested act.

1. Interpretation of Article 86: 'dominant position' and 'abuse of dominant position'

The *applicants* contend that the concept of abuse enunciated by the Commission (part II, consideration C, 23) arises from a legal conception whose object is to make Article 86 of the Treaty an instrument for controlling concentrations, in disregard of the objective content and scope of this provision.

This conception is contrary to the results arrived at by an objective analysis of Article 86 in the light of various criteria of interpretation:

— The very wording of this Article shows that it is not concerned with the

creation or reinforcement of dominant positions nor with facts which might impede them or bring them to an end. The preparatory work on the Treaty contains nothing to militate against this conclusion. Moreover, a comparison between the ECSC Treaty and the EEC Treaty shows that whilst Article 85 of the EEC Treaty is essentially in line with Article 65 of the ECSC Treaty, Article 66 of the ECSC Treaty has not been subsumed by Article 86 of the Treaty of Rome except for the part relating to the 'dominant position' (Article 66 (7)). If the legislator had also intended to set up under the latter Treaty a control of concentrations and a possibility of dissolving them, it would have been easy for him to include in it provisions analagous to those of Article 66 (1) to (6) of the former Treaty.

In striving to achieve a preconceived result in the sphere of competition policy, the Commission has far exceeded the limits of a teleological or dynamic interpretation. To attain the desired result it cannot base itself on Article 3 (f) of the EEC Treaty, for the rule laid down by that provision is merely a framework rule, which the authors of the Treaty have only made specific in Article 86 by prohibiting certain forms of abuse of a dominant position, without however laying down any provisions on the creation or the enlargement of that position, which are phenomena *of a structural nature.*

— These conclusions are confirmed by an analysis of the constituent elements of Article 86. In defining in its decision the concepts of 'dominant position' and 'abuse of dominant position', the Commission has introduced a distinction within the process of 'domination' which is not to be found in Article 86. It has allotted two phases to this process, one consisting in the 'possibility of independent behaviour', the other in the 'reinforcing of the dominant position with the elimination of residuary competition, potential or effective', and it has identified the second phase with the concept of 'abuse'.

The first phase quite simply defines the ability of the entrepreneur to exercise a substantial influence on the market situation, and corresponds both to the natural inclination of the entrepreneur and to the typical characteristics of a market economy. This is why Article 86 does not take it into account. It is only the second phase that is indicative of a situation where economic power attains the degree of intensity necessary and sufficient for the concept of 'dominant position'. By wrongly identifying this phase with a case of 'abuse' the Commission has misconstrued the meaning and structure of Article 86 of the Treaty. In this way it has arrived at an erroneous conception of the meaning of dominant position and of abuse of this position, and has applied it erroneously to the present case.

(a) Dominant position

The concept of 'dominant position' adopted in the decision in question (part II, consideration B, 3) is, according to the applicants, purely theoretical. First it is based on an unrealistic criterion, which can only with difficulty be subjected to judicial control. The existence in the present case of 'independent behaviour' such as excessive prices, scarcity of goods, deterioration in quality, has not been proved anywhere in the disputed decision. If the Commission's view were correct, it would follow that the Continental group would be in a position to increase its profits or at least to maintain them at the same level without having to take any account of its competitors. However, the contrary has occurred since the acquisition of the TDV shares, the net profit of SLW in 1971 having fallen in relation to 1969.

Furthermore, the only concrete fact produced by the Commission in support of its objection relates to the share of the market held by this company. But even supposing that this element were correctly calculated it does not suffice to

prove the existence of a dominant position, since it gives no indication of the effective margin of action available to the undertaking. The existence or the maintenance of a dominant position is not necessarily linked with the share of the market held by the undertaking, but with various factors liable to arise on that market from time to time. By reason of the increased dynamism of technology and of present-day markets a dominant position might today be changed to the point of disappearing more rapidly than the material and geographical boundaries of the market which it is supposed to dominate.

Furthermore, to establish the existence of a dominant position — which implies the need to define the 'relevant market' — any production other than that concerning the products in question cannot be taken into account, but must be considered in the context of competition by alternative products.

The *defendant* replies that the application of Article 86 to the present case rests fairly and squarely on objective facts which the applicants cannot dispute. It is incorrect that the existence in this case of a dominant position had to be proved by the 'behaviour' mentioned by the applicants. Such practices in fact constitute cases of 'abuse' of a dominant position. Moreover, the argument based on the alleged decline in the profits of SLW is not such as to call in question the existence of such a position. If SLW had really made less profit in 1971, it is not easy to see why Continental has recently made an offer to the independent shareholders of SLW still remaining, who hold about 14 % of the share capital, to purchase their shares at a rate equal to 375 %.

The *applicants* reply that the purchase of the remaining SLW shares was decided upon by Continental with a view to clarifying its relations with the minority shareholders. The *defendant* observes that it is not sufficient to refer to figures to support a 'fall in profits', but for this purpose it is necessary to take into account numerous factors extending over several financial years.

(b) Abuse of dominant position

The *applicants* then criticize the concept of 'abuse' adopted in the contested decision (part II, consideration C, 23 and 24), which they contend is based on an erroneous interpretation of the scope of Article 86.

This Article sets out in its second paragraph various types of behaviour on the part of undertakings which are regarded as abuse. Whilst it is true that the phrase 'in particular' makes it clear that this list is not exhaustive, it is nonetheless true that the cases listed in a legislative provision, even by way of example, reveal the intention of the legislator and indicate implicitly the kind of situations he envisaged.

In this case, it is clear from this enumeration that the *kind* of practices aimed at by Article 86 are *behaviour having direct effects on the market.* This conclusion also applies to the case mentioned in item (b) of the said paragraph. The explicit reference to the prejudice which the behaviour mentioned must cause to consumers shows that such behaviour cannot simply consist of practices internal to the undertaking or of a structural character. Admittedly, it is not excluded that the phrase 'in particular' is intended to allow for the case where a concentration has been achieved under the effect of a constraint exercised by an undertaking which uses its dominant position for this purpose. But where, as in the present case, the concentration has been made possible without any pressure being exercised, by the offer made to the shareholders to purchase their shares at favourable prices, there can be no question of abuse.

Quite apart from these considerations, Article 86 of the Treaty requires at least the existence of a *link of causality* between the dominant position and its abuse. By reason of this link, action

cannot be taken against Continental for infringement of Article 86 unless it appears that it has used the allegedly dominant position of SLW in the Federal Republic of Germany with a view to purchasing the shares of TDV in the Netherlands. Such a link, however, is lacking in the present case, from which it is apparent that there has not been any use of a dominant position within the meaning of Article 86. Continental could have bought the shares of TDV on the capital market without having control of SLW, and even if the latter company had not existed. More, it would even have been impossible in the present case to use such a position on the market in the products in question.

It is also apparent, from the definition of dominant position adduced in the decision itself and from the link of causality described above, that the abuse must occur on the *same market* as is allegedly dominated, or, to put it more strictly, on a market in similar products. This requirement also is not fulfilled in the present case.

Continental did not purchase the shares of TDV either on the market in products in relation to which there is, according to the Commission, a dominant position in Germany, nor on the German market in other products in the packaging industry. Nor did the purchase of TDV shares take place on the market in these products in the Netherlands, but solely on the market in shares and debentures. The disputed aquisition of TDV shares, therefore, as regards both its subject matter and its geographical limits, took place on a market other than the one allegedly dominated.

The *defendant* shares the view that Article 86 of the Treaty does not afford a basis for effective intervention *in advance* in a process of concentration. However, the contested decision has nothing to do with the problem of prior control of concentrations in the sense of Article 66 of the ECSC Treaty, so that the observations made on this subject by the applicants are not relevant in the present case.

The defendant, moreover, does not see whence the applicants have drawn their conclusions on the intention of the legislator at the time of drawing up Article 86 of the Treaty, since the proceedings of the inter-governmental conference which drew up the text of the Treaty in 1956-1957 have not been published. It is only on the basis of a process of exegesis with due regard to the fundamental objectives of the Community that the content and scope of Article 86 can be discerned. The method of interpretation followed by the Commission is in conformity with the nature of the Treaty which, as a framework treaty, entrusts to the Commission the task of seeing to its application, under the judicial control of the Court, with a view to ensuring the correct functioning and development of the Common Market.

Since the concept of abuse has not been defined in Article 86, it is necessary in the Commission's opinion to take account, first of all, of the objectives and purposes which the Treaty has laid down for the Community, and then to take into consideration the examples of abuse cited by Article 86 itself.

It is clear from Article 2 of the Treaty that the Community has as its task *inter alia,* by establishing the Common Market, to promote throughout the Community a harmonious development of economic activities and an accelerated raising of the standard of living in the Member States. For this purpose the contracting parties considered it absolutely necessary to guarantee the maintenance of an effective system of competition (Article 3 (f) of the Treaty). In the context of such a system, the concept of abuse is linked with the existence of behaviour on the part of an undertaking which is 'objectively' illicit in relation to the purposes of the Treaty. Since the 'objective' existence of such behaviour is sufficient to establish an abuse contrary to the Treaty, the concept of abuse of dominant position in Article 86 does not therefore imply that there is also a fault in the sense of a

failure in propriety or morality. It does not matter, for example, whether in the present case the applicants paid, as they allege, a fair purchase price to the shareholders of TDV. The real problem is whether the applicants have by this acquisition practically eliminated the competition which existed or at least was possible in these products between TDV and SLW at the date of the transaction in question.

The abovementioned behaviour might take place in relation to competitors (real or potential) as well as in relation to suppliers and users. The allegation that the prohibition of Article 86 is concerned only with certain abusive behaviour on the market is without foundation, as is apparent from Article 86 (b). In the examples of abusive behaviour cited by this provision, there is no question of behaviour on the market, but of measures internal to an undertaking. The Treaty imposes restrictions on undertakings in a dominant position even in the matter of internal measures, with a view to protecting consumers from any prejudice. It suffices in this connection, to give rise to a presumption of abuse, that the behaviour has prejudicial *effects* for consumers.

The applicants base themselves also on an erroneous conception of the *link of causality* within the meaning of Article 86, particularly as regards the argument that the abuse of a dominant position must take place on the same market as that on which the undertaking holds such a position.

The question whether there is or is not an abuse of a dominant position depends on the situation created on the market where the dominant undertaking exercises its activity.

The defendant concludes by specifying that since the market in question extends at least from the north of Benelux to the centre of the Federal Republic of Germany the abuse of a dominant position affects trade between Member States within the meaning of Article 86 of the Treaty.

The *applicants* reply that on the practical level, the situation of the undertaking concerned in a case of subsequent control is even less favourable than in that of prior control, particularly since Article 86, unlike Article 85 (3) of the EEC Treaty and Article 66 of the ECSC Treaty, confines itself to prohibiting purely and simply the abuse of a dominant position without providing any possibility of authorization.

The Commission must, then, in the present case, investigate whether there is an abuse of a dominant position, that is to say illicit behaviour involving damage to the detriment of suppliers, competitors, or customers. It cannot 'evade' this concept of abuse, to appeal solely to concepts as vague as 'the objectives of the Treaty'.

Furthermore, the defendant itself has considered it indispensable that the behaviour of a dominant undertaking should in fact lead to prejudice to consumers, which has not been the case here. Also Article 86 (b) supposes the existence in fact, nor merely the theoretical existence, of such prejudice. If the Commission is seeking indirectly to apply this provision, it cannot rely on the argument that the acquisition of the TDV shares amounts to 'limiting production, markets . . .' since the production of metal cans and its technical development at increasingly favourable prices has progressed in Europe, thanks to Continental, to the benefit of consumers. If, on the other hand, the Commission is seeking to use Article 86 (b) to indicate a situation by way of example, it cannot continue to see in this situation a case of 'measures internal to an undertaking', since it is clear from the words 'to the prejudice of consumers' in this Article that the behaviour regarded as an abuse of a dominant position must have a bearing on the market involving the consumer.

Finally, the applicants believe that they can discern the origin of the argument adduced by the Commission:

— in an erroneous conception from the outset on the subject of interpretation, which has led the Commission to interpret the relevant rules of the Treaty according to the principles applicable in American anti-trust legislation, whose sources, philosophy and history are, however, different from those of the competition law created by the six Member States, and in certain theoretical studies on competition, which they analyse briefly.

After citing certain literature in support of their argument, the applicants conclude by asserting that there is an obvious contradiction between the prohibition of the merger of large-scale undertakings and the industrial policy laid down by the Commission, the European Parliament and the Economic and Social Committee.

The *defendant* in its rejoinder puts forward the view that the applicants are mistaken in thinking that undertakings are in a less favourable position in the case of retrospective control of mergers than in the case of antecedent control.

The defence submits that the applicants in this line of argument fail to recognize that Article 66 of the ECSC Treaty made all mergers subject to prior approval and that as a result the freedom of action of undertakings was more severely restricted than in a situation where the authorities can retrospectively demand measures of dissolution. In addition, Community law offers undertakings the possibility of making sure about the Commission's verdict on any intended behaviour, as they can apply for a negative clearance under Article 2 of Regulation No 17.

The defendant goes on to make its standpoint more precise by attempting, in view of the silence of the provisions on this point, to develop the scope of Article 86 on the basis of the examples cited in the second paragraph, especially that mentioned in sub-paragraph (b). It argues that this latter example shows that even so-called 'internal' measures, i.e. actions which are not directly aimed at the market, fulfil the conditions for abuse and are thus forbidden, if they are damaging to consumers. The reason for this is obvious. If one or several undertakings has a dominant position, then this results in a limitation of competition and a serious restriction of consumers' freedom in obtaining supplies. Article 86 expressly forbids the abuse of this dependence of the consumers on these undertakings. The detriment to the consumers becomes even more serious if an undertaking in a dominant position, by means of a merger with its remaining competitors, further restricts consumers' freedom of choice. This is even more true in the present case, in which the applicants, by means of a merger with the last remaining serious competitor, have practically eliminated the competition still remaining in the relevant market.

In addition, it is argued, an interpretation of the general clause of Article 86 in the light of the examples given in the second paragraph suggests that Article 86 prohibits undertakings in a dominant position from engaging in practices which are permissible for a 'normal' undertaking. Such actions, even if adopted by a normal undertaking cannot be viewed as fitting in with the aims of the Treaty; however, they are less damaging, both for trading partners and competitors and for consumers, since the normal undertaking, which is exposed to competition, runs the risk in the long run of losing its customers to other suppliers. The undertaking in a dominant position is, however, not exposed to this risk. 'Limiting production, markets, ... etc.', leads, in consequence of the dominant position, directly to the detriment of consumers, who have at their disposal only insufficient possibilities, or none at all, of changing to products offered by other undertakings.

In the same way a merger of two comparatively small undertakings that had previously been in competition with one another could indeed bring about a noticeable restriction of competition, but it does not lead to the elimination of all effective competition, because trading partners and consumers still have sufficient possibilities of alternative choice. But if, on the other hand, an undertaking in a dominant position, by means of a merger with the last serious competitor, totally excludes all competition, then possibilities of choice for trading partners and consumers no longer exist.

Thus the applicants' thesis that a direct *link of causality* must exist between the dominant position and the acquisition of the majority shareholding in TDV, so that the dominant position had been used as the instrument of abuse becomes, it is argued, untenable. Such a use of the dominant position might admittedly be in the background to the cases quoted as examples in sub-paragraphs (a), (c) and (d) of Article 86, but in the case of sub-paragraph (b) and the present case this point has no significance.

2. The facts underlying the disputed decision

The *applicants* are of the view that the statement of reasons for the disputed decision is insufficient, incomplete or erroneous, both with regard to the *facts* of the case and with regard to the *conclusions* drawn from them by the Commission. The description of the facts of the case in particular is said to contain a series of 'background claims', which are devoid of substance and could give the superficial observer the impression that an extensive conspiracy against competition was at work. There can be no justification for saying that there is any plan by Continental to merge its European participations within the framework of Europemballage. Moreover, as far as the decision on the legal dispute is concerned, what is important is not what the firms Continental and Europemballage might possibly have intended to do, but what they have actually done.

To this, the *defendant* makes objection that the description of the facts in the case is by no means incorrect or insufficient, but in connection with the conclusions drawn from it gave a precise picture of the actual market conditions. A totally false picture would have arisen if the disputed decision had not taken into consideration Continental's position in the packaging industry and in particular in the market for all light metal containers, as well as its economic, financial and technical importance.

In addition, the defendant maintains its position that there was a plan by Continental to extend its dominant position in Europe by means of the purchase of existing undertakings. In this connection the defendant draws attention to a section (on pages 7 and 8) of Annex 1 of the reply.

The applicants and the defendant go on to discuss several points in the statement of reasons for the decision and in particular the following sections:

'The facts' (part I of the statement of reasons for the decision)

Characteristics of SLW: Consideration B 2

The *applicants* declare that the number of SLW's employees, its profit and its invested capital were in 1971 less than the Commission stated. In addition four of the plants mentioned in the decision had been closed on account of insufficient profitability.

To this, the *defendant* replies that the data contained in the decision described the state of affairs at the time of the events reported. If the number of employees had decreased in 1971, this was most probably to be attributed to measures of rationalization after the merger with TDV.

Continental's licensees and their freedom to sell: Consideration D 1

The *applicants* argue, in opposition to what is stated in the decision, that Continental's licensee is 'always' and not only 'in principle' free to sell the products manufactured under licence outside his territory. The sale of the products made under licence by competitors of the applicants is not restricted by the licence system, but by the variety of specifications desired by the users in different countries.

To the statement of the *defendant* that licensees had agreed on limitations of competition among themselves in the framework of the so-called market information system described in section b of consideration D 4, the *applicants* reply that this market information system has nothing to do with the question in dispute.

SLW's total sales of metal cans: Consideration E 4

The *applicants* contest the correctness of the figures mentioned in the decision in dispute as far as the percentage share of cans for meat products in SLW's total sales is concerned. These figures actually include the sales of cans for animal foods, which are in a category of their own that is quite distinct. To be able to survey the total position of SLW, one would have to take into consideration, in addition to the light metal containers, every other activity of SLW in the packaging field (plastic containers, cardboard, paper, machinery and apparatus, etc.). The low percentage shares, within SLW's total sales, actually occupied by the figures mentioned in the decision shows that these figures do not have the importance attributed to them by the Commission (cf. Annex 8 of the application).

The *defendant* points to the fact that the statement of SLW's and TDV's total sales in 1969 is based on the data which SLW and TDV had made available to the Commission. SLW itself had not differentiated between cans for meat products and cans for animal foods. These latter cans are not, moreover, a separate and quite distinct category from meat cans. Official German statistics do not include a special category called 'cans for animal foods'. Since the decision is only concerned with light metal containers, in which the applicants hold a dominant position through the medium of SLW, further data were not required. It is not claimed in the decision that Continental (through Europemballage as well as through SLW and TDV) possesses a dominant position in other types of packaging. The data in Annex 8 of the application moreover confirm that SLW's turnover predominantly arises from the sale of metal containers.

To this, the *applicants* reply that cans for animal foods and meat cans are two separate categories, which are differentiated in particular by their intended application. If SLW did not report the figures for animal food cans separately, that was because the Federal Statistical Office, for reasons of confidentiality, does not and cannot distinguish between these two categories.

The *defendant* objects that cans for animal foods have no particular characteristic attributes: they can also be filled with other products, especially meat, for human consumption. In addition the applicants themselves admit that SLW is the only producer of these cans in Germany. If one accepts the applicants' point of view that there was a particular separate market for these products, then one would come to the conclusion that the applicants have a monopoly position in that market.

Shares of the market held by TDV: Consideration F

The *applicants* state that TDV's share of the market in meat cans in Holland was not as large as the Commission alleges, because imports by Cebal (France) occupied a small share of the market. Also as far as beer cans were concerned, the alleged percentage is no longer correct, on account of the imports of the

firm Kaiser-Aluminium (Germany) which after the merger has become a serious competitor in the market for this kind of packaging in the Netherlands. Besides, these cans do not form part of the 'relevant market', and have nothing to do with meat cans, if only because the type of machinery required for the production of these cans is different in the two cases.

Finally, as far as the cans for fish and crustacea are concerned, the percentage mentioned by the Commission gives a misleading picture of the real situation, since there was only a very restricted market in Holland in this field, in which TDV's turnover in 1970 had shown a tendency to fall rapidly.

The *defendant* replies that at the time of the disputed merger TDV was almost the only supplier of cans for meat products and for beer in the Netherlands. The imports of Cebal and Kaiser-Aluminium had been minimal; and they had essentially not started until after the merger. In the case of cans for fish and crustacea, TDV is still the only supplier in the Netherlands. Even if there was something of a fall in this market, this was far and away compensated by the rapid development of the market for beer cans.

Substitute products: Consideration H

The *applicants* are of the view that the importance of competition by substitute products would become clearer, if it had been mentioned under section 3 of this consideration that 99 % of the beer sold in small containers is put into glass bottles and that glass is used for by far the majority of preserved fruits, jams, instant coffee and baby foods.

To this, the *defendant* objects that it is generally well known that for a number of preserves there is competition by substitutes, that is glass packaging, and thus it had been unnecessary to make special mention of it. However, the decision did expressly refer to this circumstance.

Change in the type of packaging: Recital I

The *applicants* are of the view that the Commission failed to indicate that the users' choice of type of packaging is not determined by the *'various criteria'* mentioned in the decision, because all large scale packers can at practically any time change over from one means of packaging to another, and in fact do so.

To the objection of the *defendant* that a change in the type of packaging, for which considerable investment is required, is for smaller and middle-sized firms bound up with considerable difficulties, and poses problems even for large undertakings, the *applicants* put forward an estimate of the cost of a glass-filling machine with a capacity of 150 glass jars per minute.

The *defendant* objects that the change from one type of packaging to another is not only a question of costs. The peculiarities of the products to be packed, as well as the habits of consumers, also restrict the possibilities of such a change.

3. The 'economic assessment' of the facts found by the Commission

(a) The 'dominant position'

— SLW's share of the market

The market in cans for meat products and fish: Recital B, 5 and 6

The *applicants* dispute the allegation that SLW has in the Federal Republic of Germany a share of the market in cans for *meat products* of between 70 and 80 %. After the defendant has put forward figures in support of its estimate, the applicants reply that the calculation is incorrect, because the figures for other competitors apart from Züchner, and also the figures for imports, are missing. The applicants, on their part, put forward a new calculation giving the result that the share of SLW of the market in meat cans comes to 65 %.

In addition, as far as the market for *fish*

cans in concerned, the Commission has not taken into consideration the fact that glass and plastic containers, with a market share of about 30 %, with a tendency, in the case of the latter, to a slight increase, represent essential competition between these products and metal cans.

To the objection of the *defendant* that in the case of preserved fish products, glass receptacles and plastic containers on the one hand, and metal cans on the other, are hardly in competition with one another because they are used almost exclusively for the packing of products of different kinds, the *applicants* remark that metal is also used for products that are not sterilized and that glass is also used for 'genuine' preserves.

The *defendant* replies that in the light of the weak position of other suppliers and importers a market share of 65 % in the case of *meat* cans would in itself suffice for the assumption of a dominant position of SLW in this market. In actual fact, however, SLW's shares of the market must be much higher. The applicants' estimates are incorrect because they take into consideration cans imported from Germany. It must be assumed that the import and export of cans for meat and animal foods are in approximately the same ratio as is stated in the decision in dispute (Part I, Recital J, 1) for the import and export of open cans for preservatives of every kind in 1969, *viz.* 6 : 5.

As far as the market for *fish* cans is concerned, the defendant refers to a passage in SLW's annual report for 1969, from which it appears that SLW had increased its turnover in this product (page 16 of the rejoinder).

The market for metal caps: Recital B, 7

The *applicants* argue that it is incorrect to state that SLW has a 50 to 55 % share of the market in metal caps in Germany. Besides this, the market in metal caps has peculiarities which preclude the existence of a dominant position even more clearly than in the case of cans for fish and meat.

In the first place the problem of transport is of no importance at all in the case of these products, and in the second place 'White Caps' are produced in about 47 countries by licensees who are not obliged to observe any territorial restrictions in the sale of their products, and in fact sell them within whatever geographical area they can reach.

The *defendant* in reply puts forward a calculation made on the basis of the official German statistics for 1969 and data supplied by SLW: from these, it is argued, it can be concluded that SLW's share of the market in Germany in metal caps for glass containers (of the 'twist-off' type) comes to 52 %.

As far as the peculiarities of the market are concerned, while it is theoretically correct that other metal caps can be imported into Germany without special difficulties and without high transport costs, users prefer the 'twist-off' type of cap, which Continental has legally protected by patents and which may only be produced by its licensees. In Germany SLW is practically the only undertaking supplying metal caps of the 'twist-off' type and the machines necessary for their use, because the licensees in other countries only exceptionally export these caps to Germany.

The *applicants* reply that the calculations of the defendant are incorrect and that SLW's share of the market in metal caps only comes to about 42 %. The Commission's estimate is based on a gap in the official German statistics, which could be explained by an error (since corrected) in the figures supplied by one of the SLW plants.

Moreover, the applicants dispute the suggestion that the licensees in other countries only exceptionally export 'twist-off' caps to Germany. For example, Metal Box supplies a number

of German customers, as also does the firm le Bouchage Mécanique, which belongs to the Saint Gobain Group. The preference of users for caps of this type cannot be blamed on the applicants, because there are sufficient substitute products for closing glass receptacles.

The *defendant* does not accept the explanation given by the applicants as regards the alleged inaccuracy of the official statistics on this point. If this explanation is correct, then the applicants omitted to declare no less than 46 % of their production of metal caps, and this seems scarcely credible. Moreover, the statements of the applicants cannot be reconciled with their own data about SLW's share of the market in all types of metal closures (Part I of the decision, Recital F, d). If the share of the market in metal caps were reduced in accordance with the applicants' explanation, then the share of the market in crown corks would have to be raised correspondingly, so that the total market share cited by SLW would again be reached. This share would then be clearly higher than SLW had reached according to the defendant's investigations in 1969.

In the decision it has also been taken into consideration that metal closures (including metal caps) were imported into Germany (at this point the defendant refers to Part I, Recitals G and J, 1 c of the decision).

Finally, there could be no question of the applicants being blamed for the consumers' preference for 'twist-off' caps. Glass containers could be closed with three different types of caps ('twist-off', 'Pano' or 'Omnia'), but in each case they are produced for a definite type of cap. TDV produces all three kinds of cap, so that the applicants can now offer also products which could be used as a substitute for 'twist-off' caps. At the time of the merger, TDV exported metal caps to Germany in fairly large quantities. Since then two production lines for 'twist-off' caps have been removed by TDV to Germany.

The market in metal containers for beverages: Recital B, 8 a and b

In the opinion of the *applicants* the description of the market for beverage containers given by the Commission, in sub-section a, gives the impression that although SLW was not, even in the Commission's view, in a dominant position in the *total market* for beverage packaging, it was very strong on the market in metal containers. A strong position in the case of containers for beer and other beverages is, however, of no significance, since for example 99 % of packaged beer is bottled, and in the case of fresh milk, the metal can has practically no share of the market at all (the applicants refer to Annex 9 to the application).

In 8 b) the Commission was apparently trying to give the impression that SLW had a strong position in the market for plastic packaging for fish as well. At the same time no consideration was paid to the fact that fish, apart from fish preserves and marinated fish products, is mainly marketed fresh, frozen or smoked. In addition fish frequently comes in containers provided by the producers themselves.

The *defendant* points out that the decision itself makes it clear that for the packing of liquid nourishment, glass containers have the first place. But it correctly states that SLW, with the share of the market mentioned, has a strong position in the field of metal containers for beverages.

In b) the decision states that SLW also manufactures plastic containers with various applications, so that it is in a position to deliver such packaging for fish products. The argument that fish is mainly marketed fresh or frozen has no value. The same is true for meat, fruit and vegetables.

The *applicants* remark that it is of no importance whether SLW is in a position to deliver plastic packaging for fish as well, but whether SLW actually does make such deliveries.

The supply of machinery and the scope of the production programme: Recitals B 9, 10, 11 and 13

The *applicants* point out that Continental's advantage in producing certain *machines* itself for the production and use of light metal containers does not establish any dominant position for SLW on the German market. No *customer* of SLW uses Continental machines for the production of cans, for the simple reason that the cans are sold ready-made by SLW. Users who made their own packaging exclusively used machines of suppliers other than Continental. Besides, no closing machines manufactured by Continental are being used by SLW's customers.

SLW's *product diversification,* it is stated, is brought about largely by differences in the types and dimensions of the products themselves. Small enterprises are more adaptable than SLW, because they have a relatively broad production programme due to semi-automated techniques, and this allows them to change over easily to many different products. SLW, in order not to lose its customers to such smaller producers, now has, regardless of production costs, to offer too many diverse products: that obviously does not strengthen its market position. Finally the conclusions reached by the Commission in Recitals 10, 13 and 14 with regard to the position held by Continental in the relevant market, especially on the basis of its technical experience and economic and financial strength, were insufficiently based upon facts and not proven.

The *defendant* objects that the fact that an undertaking not only manufactures packaging, but also the machinery necessary for the production and use of the packaging, must in the long run provide it with a technical lead and therefore with an advantage over its competitors who only make packaging. In claiming that no closing machine manufactured by Continental was being used by SLW's customers, the applicants were apparently failing to take into consideration the fact that both SLW and the International Machinery Corporation (Belgium) manufacture such machines under licence from Continental for sale in Europe. Besides, the applicants cannot deny that the major manufacturers of metal containers mentioned in Recital 10 are Continental's licensees and rely on its know-how.

Finally, it is argued, it is indisputable that the extensive production programme makes it possible for SLW to offer users almost all desired types of packaging. By this means SLW has a competitive advantage, because for reasons of convenience users prefer to obtain all the packaging they need from the same supplier. Finally, the statement in Recital 13 that Continental has, owing to its size, easier access to the international capital market than smaller undertakings is indisputable.

With regard to the supply of machines the applicants reply that there are enough suppliers of packaging machines that are independent of the applicants to exclude the possibility of SLW having a technical lead in the long run, and therefore a competitive advantage, over competitors who only manufacture packaging. SLW did not manufacture any closing machines under licence from Continental and moreover there is an abundance of competing suppliers of such machines.

Dealing with the production programme, the applicants make the point that whilst it may be convenient for purchasers to buy all the packaging they require from the same manufacturer, what is decisive is the fact that they are at liberty to obtain it elsewhere. Naturally Europem-ballage has considerable financial backing from Continental. But that does not make it different from other undertakings active in the European packaging market. American Can, Saint Gobain, and Metal Box, for example, have the same access to the capital market, and this access is therefore no

special peculiarity of the Continental Group.

Over against this, the *defendant* remarks that it is not only convenient for users, but almost unavoidable, to buy all cans from the same manufacturer. In addition, it is necessary to use for the filling and closing of cans machinery and other apparatus provided by the manufacturer of the cans. Many of the cans manufactured by the undertakings of the Continental Group are made in such a way that they can only be filled and closed by a certain type of machine.

As far as this necessity does not arise from technical data, the undertakings of the Continental Group create it artificially by supplying machines and additional apparatus only on hire, and only on condition that they are used exclusively for cans manufactured by them. That is evident, for example, from paragraph 1 (b) of the standard hire contract used by SLW in Germany.

In addition, the claim that SLW manufactures no closing machines under licence from Continental is incompatible with SLW's annual report for 1969 and with the fact established during the examination of the case that of a total of 37 licensing agreements concluded with SLW, 7 referred to Continental closing machines.

Competition by substitutes: Recital B, 16 a

The *applicants* dispute the arguments that light metal packaging is not *interchangeable* with other kinds of packaging. It is, they say, not correct that the contents of metal packages can be sterilized or pasteurized after closure more quickly than is the case with glass jars. In the Federal Republic fruit is sold more frequently in jars than in metal containers. In Holland unsweetened condensed milk is practically only sold in glass jars. In the Federal Republic it is sold in metal containers as well, but these are made mainly by the sellers themselves. In addition, in the Federal Republic only 16·9 % of vegetable oils and fats are supplied in metal containers while chemicotechnical products are predominantly supplied in plastic containers.

The *defendant,* after pointing out that the applicants do not dispute that meat and fish preserves are predominantly packed in metal cans, goes on to say that no reference was made in the decision on this point to any particular national market. The claim of the applicants with regard to the packaging of edible oils and fats, moreover, does not refute the argument that olive oil is mainly sold in metal containers.

The *applicants* counter this last point by saying that there is no separate market for olive oil — which only represents 5 % of the total vegetable oil market — and that glass bottles are used alongside metal cans for olive oil, too.

Competition of major buyers: Recital B 18

The *applicants* express their astonishment at the conclusions reached by the Commission in this recital. It cannot, in their opinion, seriously be claimed that technological progress and favourable prices are 'prohibited as incompatible with the Common Market'. On account of these advantages, they say, the large-scale buyers prefer to obtain their cans from SLW and TDV, although they could on the basis of their market strength manufacture them themselves.

As is apparent, moreover, from (amongst other sources) a report of the British Monopolies Commission in 1970, the container industry, which is so dynamic and strong in Great Britain today, is built on technology imported from the United States. In this framework the granting of licences has been of inestimable value to the licensees.

The applicants go on to make the point that five customers take 27 % of SLW's meat can production and four customers take up to 53 % of its fish can production. Two of these customers have a greater market power than SLW,

and themselves manufacture packaging for other purposes. Here, it is stated, a development can be observed, which consists of a reduction in the number of customers and an increase in their proportional share of their purchases from SLW; this development will continue as long as the customers' demand increases.

The *defendant* counters on the first point that this paragraph of the decision by no means was intended to forbid technological progress and favourable prices as incompatible with the Common Market, but confined itself here to the objective listing of those elements which indicated the existence of a dominant position on the market.

In addition one must not under-estimate the significance of the contacts between Continental and its European licensees. A note made by Mr P. C. (correctly: R. C.) Hietink about a meeting of the Board of Directors of TDV on 15 October 1969 illustrates this.

On the second point the defendant remarks that while 27 % of SLW's production of meat cans goes to five customers, 23 % of this production is supplied to a large number of buyers, so that it is not possible to speak in this sector of a buyers' power of demand. And in the case of fish cans, too, where the situation is possibly somewhat less favourable, it could not be said that the buyers are in a particularly strong position, particularly as the remaining 47 % of the production was delivered to numerous smaller purchasers. On top of this, the applicants themselves continually rely on the argument that the market for fish cans is a shrinking and relatively unimportant one.

To this, the *applicants* counter that as far as the power of demand of SLW's buyers is concerned, Unilever, for example, the biggest customer for meat and fish cans, is in a position at any time to manufacture its own cans, which it does, incidentally, in other spheres. Both SLW and TDV can only supply their cans to Unilever if they satisfy Unilever's requirements and give that undertaking no grounds for manufacturing the cans itself. The same is true for the other customers. Even if only one of the five major buyers of meat cans from SLW were to stop purchasing them, that would endanger its whole production, to the disadvantage of all the other buyers, or in any case would make it more expensive. The applicants support this point with the percentages of the meat cans actually sold by SLW in 1969. And if the market for fish cans is contracting, this can only strengthen the power of customers' demand still further.

On this point, the *defendant* argues that Continental's technical lead in fact guarantees its dominant position *vis-à-vis* the buyers of the cans, who would in fact meet with very great difficulties if they were to try to engage in manufacture of their own cans.

The difficulties which, according to the arguments of the applicants, a manufacturer of cans would meet with, if he wished to change his supplier of tinplate (cf. on this point the arguments on Recital C set out later), would be much greater for a purchaser who wished to begin manufacturing his own cans, because he would not have the experience and the knowledge which the Continental Group has at its disposal for the manufacture of technically perfect cans. In face of these obstacles, even an undertaking with the financial power of Unilever is discouraged. In addition, this undertaking is not a particularly large purchaser of metal packaging, because it uses other forms of packaging for the major part of its products.

(b) Abuse of a dominant position

Potential competition between SLW and TDV: Recital C 25

The *applicants* argue that if the Commission includes fish cans amongst the three markets in which SLW is allegedly dominant, this category of products is not a valid criterion of evaluation in the case of TDV, because there is practically no market for fish cans in the Netherlands.

In addition the claims that SLW could have competed with TDV in the Benelux countries through the firm of Schuybroek in Antwerp, and TDV could have competed with SLW in Germany through the firm of Tedeco in Hamburg, are purely theoretical and unfounded. To begin with, SLW's share in Schuybroek only comes to 45 % and that of TDV in Tedeco only to 50 %. Such shares are not sufficient to make the partly-owned company sell products of the competing, even if shareholding, enterprise.

Another point which should not be overlooked is the fact that an American undertaking with independent powers of decision, the Illinois Tool Works, participates with a share of 50 % in the firm Tedeco, which operates in any case on a different market, that for plastic containers.

Secondly, it is stated, competition between TDV and SLW in the German market is not possible, simply because of the lack of standardization of dimensions and can specifications. In the case of meat cans the German production is almost entirely aimed at the home market, whereas more than 75 % of the cans manufactured by TDV are designed for export. In the case of fish cans, German consumers did not wish to use the types and specifications of TDV cans, and still do not wish to do so. In addition, competition between these undertakings in the Benelux market has been and is still difficult because, apart from any other circumstances, tinplate has been dearer for a long time in the Federal Republic than in those countries. To the remark of the *defendant* on this last point, that such a large consumer as SLW could obtain supplies also from other manufacturers in the Community, especially in the Benelux countries or in third countries (for example Japan), the *applicants* reply that this remark is not realistic. Modern technology requires for the manufacture of tinplate containers a very close cooperation between the supplier of this metal and the customer. To change suppliers would entail high costs for the manufacturer of the cans and a long period of adaptation would be unavoidable. Besides other factors, supplies from other countries (e.g. Japan) did not give any genuine possibility of alternative choice on account of the very close cooperation between supplier and processor which was necessary, quite apart from freight costs.

Besides, there has not only been practically no competition between TDV and SLW across frontiers before the merger, and there could not be even today on account of reasons not connected with the merger, but also no orders had come from other countries which were more favourably situated as regards transport, at least for part of the products, and such orders were hardly coming in even today (e.g. from France, Denmark or England).

If, on the other hand, the Commission laid such great value on potential competition, it should also have taken into consideration the potential competition after the enlargement of the Community, for example that from Metal Box for metal closures of the 'White Cap' type, in the case of which distances are of no consequence, and that of Haustrup (Denmark) for meat cans, because Denmark is so close to the relevant markets. The Commission contradicts itself by saying, on the one hand, that it does not expect any substantial competition in the future from manufacturers outside the Continental Group, yet it expects on the other hand that potential competition would arise in the case of a dissolution of the merger between SLW and TDV. Even the French firm Ferembal, which was not concerned in the agreements alleged by the Commission to be in restraint of competition, exports very little to Belgium and Germany, although its geographical position would have made this very possible.

To the *defendant's* objection that Ferembal, which moreover has a link with Carnaud, is trying to penetrate the

German market, but is only able to do so in certain areas in Southern Germany, the *applicants* reply that it is not obvious why Ferembal cannot penetrate further, since the Commission itself says that a distance of 1 000 km need not be any economic hindrance for the transport of packaging.

The *defendant* goes on to state that in view of the turnover achieved by TDV in the years 1967 to 1970 in the case of fish cans, it cannot be claimed that there is practically no market in the Netherlands for fish cans. What is decisive is the fact that TDV manufactures fish cans and could have entered into competition with SLW in this market in Germany, all the more because in the case of smaller packages, transport distances up to 1 000 km are economically possible.

In addition, the defendant maintains its position that competition could have arisen between SLW and TDV. It is of the opinion that SLW with the help of its share in the firm Schuybroek and TDV with the help of its share in Tedeco could particularly easily have become active in each other's sphere. This seems in particular plausible in the case of Tedeco, just because it is active in a quite different market from TDV, and is not in competition with it. TDV's share in Tedeco is admittedly only 50 %, but the remaining 50 % is only a financial share, which exerts no influence on business decisions. As far as the firm Schuybroek is concerned, this firm manufactures only crown corks and general line cans, so that only 44 % of SLW's production programme corresponds with that of Schuybroek. It is therefore conceivable that Schuybroek could have become active in the market in the Benelux countries for the remaining 56 % of SLW's production.

The weakness of competition in the packaging industry is caused by the fact that all the major enterprises are licensees of Continental and are linked with one another by various relationships and agreements. The smaller enterprises, on account of the superiority of the big ones, can work practically only in such areas and in such particular markets as the big ones leave accessible to them. As far as the possibility of any competition by the Group PLM-Haustrup is concerned, it was stated, this undertaking (Continental's licensee in Scandinavia) has up to now — and probably for the reasons indicated above — abstained from entering into any competition with SLW and TDV in the market for metal packaging.

The *applicants* refute the argument of the defendant as to the consequences which the system of licensing criticized has for competition in the packaging industry. Continental's licensees, it is said, have had quite different reasons for concentrating in the first place on their home markets, and have never been influenced in this respect by Continental, not even obliquely by means of licences. The reasons are mainly production specifications, packaging specifications, and consumer preferences. The smaller enterprises are not active only in markets which the applicants 'left accessible' to them, but competed even with the applicants with offers at cut prices.

The *defendant* maintains its viewpoint and remarks in conclusion, on the potential competition between SLW and TDV, that the argument based on the tinplate price in Germany is two-edged, because if SLW really had to pay more for tinplate than TDV, then it must be all the easier for TDV to enter into competition with SLW in the German market. The defendant goes on to remark that the figures given for the import and export of containers to and from Germany (part I of Recital J 1 c of the contested decision) prove that the claims of the applicants are very exaggerated, according to which the differing specifications and consumer preferences make the exchange of cans between different countries, and in particular between the Benelux States and the Federal Republic of Germany, practically impossible. If these claims were correct then neither the market

information system nor the 'Commercial Commission' formed in 1968 (part I of Recital D 4 b and c of the contested decision) would have been necessary for Continental. It had been the aim of these arrangements, it is argued, to limit or control international competition both between the participants and from third parties.

Self-manufacture by major buyers: Recital C 30 e

The *applicants* argue that it is not correct that — as is claimed in this recital — only the major buyers have the possibility *vis-à-vis* the SLW-TDV Group of manufacturing for themselves the packaging materials they require. The Belgian firm Talpe — a medium-sized undertaking producing tinned vegetables — began in 1971 manufacturing all its cans itself.

The *defendant* remarks that its statement is not weakened by the fact that in one individual case a medium-sized enterprise in the canning industry has begun to manufacture vegetable cans itself (quite apart from the fact that cans for vegetables are for technical reasons the easiest to manufacture). To this, the *applicants* reply that it is sufficient for a few of the larger buyers to change over to manufacturing their own cans to make SLW's plant unprofitable. (For further arguments, cf. above, Recital I, B, 18).

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 86 of the EEC Treaty 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 Communities* 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 Economic Community, 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 Community 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 Community. 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 Com-

mission, 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. Community law is applicable to such an acquisition, which influences market conditions within the Community. 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 Community law.

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

C — On Article 86 of the Treaty 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 86 of the EEC Treaty 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 86 of the EEC Treaty, 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 86, but also from a comparison of the EEC Treaty and the national legal provisions of the Member States. The examples given in Article 86 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 86 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 86 of the Treaty. The decision contested is, therefore, said to be void as lacking the required legal basis.

20 Article 86 (1) of the Treaty 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 86 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 86, 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 86 is part of the chapter devoted to the common rules on the Community's policy in the field of competition. This policy is based on Article 3 (f) of the Treaty according to which the Community'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 considers the pursuit of the objectives which it lays down to be indispensable for the achievement of the Community's tasks. As regards in particular the aim mentioned in (f), the Treaty in several provisions contains more detailed regulations for the interpretation of which this aim is decisive.

24 But if Article 3 (f) 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 2 of the Treaty according to which one of the tasks of the Community is 'to promote throughout the Community 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 Articles 2 and 3. 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 Articles 2 and 3 of the Treaty, Articles 85 to 90 have laid down general rules applicable to undertakings. Article 85 concerns agreements between undertakings, decisions of associations of undertakings and concerted practices, while Article 86 concerns unilateral activity of one or more undertakings. Articles 85 and 86 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 85, cannot become permissible by the fact that such behaviour succeeds under the influence of a dominant undertaking 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 85 certain decisions of ordinary associations of undertakings restricting competition without eliminating it, permits in Article 86 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 85, it sufficed to establish such close connections between the undertakings that they escaped the prohibition of Article 85 without coming within the scope of that of Article 86, 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 85 (3) (b) of the Treaty. Article 86 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 85 (3), 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 (f), results from the obligatory force of these objectives. In any case Articles 85 and 86 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 86 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 86 (2), 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 (f) of the Treaty. 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 86 of the EEC Treaty, 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 86 of the Treaty, 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 vary 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 specificially 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 establishing the European Economic Community, especially Articles 2, 3, 85 and 86;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

hereby:

1. **Annuls the decision of the Commission of 9 December 1971 on a procedure under Article 86 of the EEC Treaty (IV/26.811 — Europ-emballage Corporation)**

2. **Orders the defendant to bear the costs of the proceedings.**

Lecourt Monaco Pescatore

Donner Kutscher

Delivered in open court in Luxembourg on 21 February 1973.

A. Van Houtte — Registrar

R. Lecourt — President