OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 21 NOVEMBER 1972 [1]

Mr President,

Members of the Court,

In the proceedings with which I shall deal today, the Court has for the first time to concern itself with a decision made by the Commission pursuant to Article 86 of the EEC Treaty, i.e., pursuant to the provision according to which 'any abuse by one or more undertakings of a dominant position within the Common Market or any substantial part of it shall be prohibited as incompatible with the common market, insofar as it may affect trade between Member States'.

As regards the facts at the base of these proceedings I must first of all say the following.

Continental Can Company Inc. of New York ('Continental') are internationally important manufacturers both of metal packages and of other packaging materials, as well as machines for manufacturing and using packages. They are the owners of industrial rights and have granted international licences for their exploitation. On 6 February 1969 they acquired a majority holding of the capital — and thus also control — in Schmalbach-Lubeca-Werke AG of Brunswick ('Schmalbach'), who are important manufacturers of light metal packages, of other kinds of packages and of can-sealing machines. This share was in the course of the same year increased to 85·8 % of the authorized capital.

After this operation Continental attempted further to extend their activities and influence within Europe. They drew up a plan, under which in collaboration with European undertakings in the packaging industry they would incorporate a company, into which to fit their European activities. Their suggestion was that a British producer of packaging materials, (the Metal Box Company Ltd. of London), as well as licensees of Continental having their registered offices in France and the Netherlands, should participate. This plan did not receive the approval of the companies that were approached and it accordingly could not be implemented. Thereupon Continental concentrated their endeavours in the direction of a close relationship with a Dutch licensee, Thomassen & Drijver-Verbliga NV of Deventer ('Thomassen') who produce metal packages and other packages. On 16 February 1970 Continental entered into an agreement with Thomassen, which provided for Continental to incorporate a holding company, Europemballage Corporation ('Europemballage') in Wilmington (in the State of Delaware, USA), and for the transfer to that holding company of the shareholding in Schmalbach. Pursuant to the agreement entered into with Thomassen, Continental was also to induce (and provide the means for) Europemballage to make an offer to the Thomassen shareholders (apart from Metal Box and Continental) to acquire shares in Thomassen for a payment of Fl. 140 per share. The Thomassen board agreed to recommend to their shareholders the sale of the shares to Europemballage. On 20 February 1970 there followed the incorporation of Europemballage which is 100 % controlled by Continental. As had been envisaged there were transferred to that company Continental's shareholdings within Europe, including that in Schmalbach. Europemballage opened an office in New York as well as in Brussels. On 16 March 1970 this holding company published the offer to purchase to the Thomassen

1 — Translated from the German.

shareholders. The offer of acquisition was also announced by the Thomassen board. On 8 April 1970, Europemballage acquired shares and convertible debentures from Thomassen for a total amount of 44·7 million units of account and thus increased their holding, which at first had amounted to 10·4 %, to a total of 91·07 % of the Thomassen capital.

All this attracted the Commission's attention. The Commission thought it right to raise objections, having regard to Article 86 of the EEC Treaty. Between March and April 1970 it sent appropriate communications to the interested parties, that is Continental, Thomassen, Schmalbach and Europemballage, by both letters and telex. These approaches on the part of the Commission not having resulted in a change of the arragements entered into, it decided on 9 April 1970 to institute proceedings against Continental and Europemballage under Article 3 of Regulation No 17 (OJ No 13, 21. 2. 1962, p. 204) by reason of its acquisition of a controlling share in the Thomassen capital. On 15 March 1971 Europemballage were served at their Brussels office with the objections of the Commission's Directorate-General for Competition. The parties replied on 9 August 1971 and were subsequently heard in oral proceedings.

Since the Commission was unable to observe in the course of these negotiations any narrowing-down of the opposing points of view, it made on 9 December 1971 a formal decision (OJ L 7, 8. 1. 1972, p. 25) which contains a legal assessment of the facts investigated by it and the consequences in law to be deduced therefrom. This decision contains the finding that through the medium of Schmalbach, Continental held in Germany, i.e., in a substantial part of the common market, a dominant position in respect of light packaging for preserved meat and fish, as well as metal caps for glass jars. By acquiring a majority shareholding in the competing undertaking Thomassen in the Netherlands, the dominant position had been reinforced to such an extent that competition had 'practically' ceased. Thus there existed an abuse within the meaning of Article 86 of the EEC Treaty. Since Thomassen and Schmalbach had been in a position to effect deliveries across frontiers, particularly into West Germany and in the Benelux countries, and since accordingly by reason of the merger the possibility of competition across frontiers had been excluded, one was forced to the conclusion that the combination of these companies was capable of affecting the flow of trade between Member States in a way that might be damaging to the goal of a unified market between the countries. On this basis, the Commission decided that Continental was obliged to cease the contravention against Article 86 that had been found to exist and to this end to submit proposals to the Commission before 1 July 1972.

In the course of further negotiations with the Commission the representatives of the companies attempted to find a solution acceptable to the Commission. Since Continental and Europemballage were however in principle of the opinion that the Commission had wrongly applied Article 86 in relation to their course of conduct, there followed on 9 February 1972 the institution of proceedings before this Court for the purpose of annulling the Commission's decision of 9 December 1971.

At the current, oral stage of the proceedings it is now my task to examine whether the decision arrived at by the Commission ought to be allowed to stand or whether on the basis of one of the applicants' arguments (which I shall deal with in detail) it ought to be revoked. Since the parties to the proceedings are at issue upon a vast number of factual and legal questions, I think it is right to preface my examination by indicating the order in which I shall deal with points. Thus I wish at first to say a few words on the subject of capacity to sue; I shall then

turn to the legal question whether Article 86 of the EEC Treaty can be applied at all to circumstances such as the present ones. Following upon this, there will be examinations of a predominantly economic kind, i.e., whether Schmalbach held a dominant position in the Federal Republic and what was the nature of the competitive relationships between Schmalbach and Thomassen. Finally, I shall also consider the problem whether the Commission has the power to make a decision in relation to a company resident in the USA and also whether that company can be made responsible for the acts of a subsidiary company. In this context it will also be necessary to deal with a numer of procedural criticisms.

1. As regards capacity to sue

The appeal against the Commission's decision was lodged by Continental, of New York. Nothing need be said in this respect, for in Article 3 of the decision it is expressly stated to be addressed to that company. Furthermore, in its wording it contains the finding that Continental has 'abused' a dominant position and that it is obliged to cease the contravention of Article 86 of the EEC Treaty and in this respect to submit suitable proposals to the Commission.

Apart from this however, there is also a claim by Europemballage (Europemballage Corporation, of Brussels) i.e. the subsidiary of Continental, which in its name had carried out the criticized acquisition of the Thomassen shares. In this connection, it is argued that the French version of the decision — according to the Commission's declaration the only binding one — expressly mentions in its title 'Europemballage Corporation'. Likewise, that the letter accompanying the decision was served on Europemballage Corporation and there too the case was called 'Europemballage'. No objection can in fact be raised against this view. No doubt Europemballage also is directly affected by a decision which complains that the acquisition of the shares had taken place through it.

It is therefore clear that both companies possess the capacity to sue. Since apart from this there appear to be no other objections to the admissibility of the actions, we can now without further preliminaries turn to a consideration of the matters in issue.

2. In this connection, as has been stated, we are first of all concerned with the question whether Article 86 can be applied at all to processes of concentration.

Admittedly this question needs first of all to be limited to some extent.

Firstly, it must be stressed that Article 86 certainly does not without any more ado permit control of mergers. In this respect, there is no dispute between the parties and it will suffice to make a comparison with the provision of Article 66 of the Coal and Steel Treaty (which came into effect at an earlier date and which contained extensive rules in regard to mergers) for us to realize that the authors of the EEC treaty did not in Article 86 wish to adopt the aims and procedures of Article 66 of the European Coal and Steel Treaty. It is on the other hand equally certain that there is no justification for the thesis that a change in the market structure by mergers of undertakings cannot ever be caught by Article 86. In this connection I would only refer to the view, recognized by legal authorities generally as well as by the applicants, that Article 86 takes effect when a dominant undertaking brings its market power into play and, say, by means of its price policy, exercises pressure upon a competitor for the purpose of forcing him to cease his competition and to force him to merge with the dominant undertaking. In such circumstances the application of Article 86 can be approved of, having regard to the fact that we are there dealing with the behaviour on the market of a dominant undertaking, the purpose of which clearly is to restrict competition.

On the other hand, one must add immediately that the last-mentioned possibility of interpretation does not play a part in the present case. Though there are certain indications on the part of the Commission which appear to hint in this direction (e.g., when the Commission considers that the ending of the licensing agreements existing between Continental and Thomassen and the necessity of negotiating new agreements could possibly have been of importance in connection with the decision on the part of the Thomassen board to advise the shareholders to sell). In the final result it is quite clear from the applicants' comments concerning the date of the negotiations on the licence and the course which these negotiations took, as well as the conditions attaching to the acquisition of the shares, that the Commission does not go so far as to maintain that the takeover of Thomassen by Europemballage (in connection with which, after all, the shareholders of Thomassen had the decisive word) involved the use of unfair means.

The only question of interest in the present case — that much is clear from the attempts at limiting the issues which have just been undertaken — is purely whether Article 86 also applies if an undertaking in a dominant position on the market, by means of the acquisition of another undertaking reinforces its position on the market, to such an extent that 'in practice' nothing remains in the way of competition of economic significance. As we know, this is the basic thesis of the Commission in the present context and precisely this point of view is emphatically under attack by the applicants.

To do justice to the central issues of the case thus set out, one has to examine a number of points.

In the first place it is clear that circumstances such as those envisaged by the Commission are not directly covered by any of the four instances enumerated in Article 86, second paragraph. That much emerges from a simple perusal of the instances of abuse there set out. This however is not the final word on the application of Article 86, for undoubtedly the cases of abuse mentioned are only examples and not an exhaustive enumeration — that already emerges from the use of the term 'in particular'.

Going on, one must also concede that the wording of Article 86, first paragraph, with its expression 'abuse ... of a dominant position within the Common Market', appears to hint that its application can be considered only if the position on the market is used as an *instrument* and is used in an objectionable manner; these criteria are therefore essential prerequisites of application of the law. If this is indeed so, then the application of Article 86 to the present case must certainly be excluded since, as has already been stated, even the Commission takes the view that the applicant Continental did not in connection with the acquisition of the Thomassen shares use their market strength acquired through Schmalbach, as an instrument.

As against this however, the Commission argues that the factor mentioned (the use of market strength) admittedly does play a part in the case of the examples mentioned in Article 86, second paragraph (a) (c) and (d), but in the case of the example quoted under (b), it clearly recedes as a factual characteristic to a considerable extent. Under this provision there is also to be treated as an abuse the 'limiting of production, of markets or technical development to the prejudice of consumers'; i.e., there enter into consideration internal events, in relation to which market strength is not relevant, provided only that there is a case of harm to the consumer, i.e., the occurrence of a certain *effect* upon the market. Proceeding from this basis, the Commission is above all intent upon justifying its theory previously outlined, which leans upon Article 86, second paragraph (b), and upon applying the term 'abuse' to a diminution of competition by reason of an increase in

market strength, because in such a case the limitation of choice for the consumer could result in his interests being jeopardized. It is in the Commission's view important to refer back to the principles and aims of the Treaty, such as those that can be gleaned from the Preamble to the Treaty (ensuring 'fair competition') and Article 3 (f) 'the institution of a system ensuring that competition in the Common Market is not distorted'. From Article 85 (3) (b) the Commission furthermore deduces a basic principle applicable to the law on competition contained in the Treaty, that is the principle that there must not be an elimination of competition 'in respect of a substantial part of the products in question'.

Thus the decisive questions of the case are really narrowed down to whether we are able to follow the Commission in these deductions or whether — as the applicants think is the case — they give rise to grave objections. After weighing up all relevant aspects I have come to the conclusion — and here I shall mention the result of my considerations at the very outset — that there are serious objections as regards the soundness of the theories put forward by the Commission.

It is quite clear that the Commission is attempting to interpret Article 86 *extensively* by equating the damage to consumer interest which occurs when competition ceases to exist, i.e., when there is a limitation of possibilities of choice, with damage to the consumer consequent upon a limitation of production as a result of a dominant position. As a matter of principle, this interpretation must be subject to doubt in the face of a provision as drastic as that contained in Article 86 which constitutes a prohibition (probably having as a consequence nullity in civil law) and for the infringement of which a penalty is provided. In the light of this, there is a great deal to be said for the theory that one ought to give a narrow interpretation, i.e., that one ought to be cautious in attempting analogies and that one ought to demand — as the applicants consider correct — that there must be a case of an infringement of at any rate the *kind* enumerated in the examples set out in Article 86, paragraph 2 (a) to (d). Put into other words therefore, one ought in this connection to proceed from the principle 'in dubio pro libertate', as that principle was emphatically underlined by well-known authors in relation to the relevant regulation of paragraph 22 of the German law against restriction on competition, with the object of adhering closely to the text of the provision.

Indeed, it cannot be denied — and I say this with reference to the important requirement of legal certainty — that harm to the consumer within the meaning of Article 86, second paragraph (b), the only relevant norm in the present context, represents a rather more precise element than the limitation of possibilities of choice for consumers by the elimination of a competitor, which only *may* lead to harm. The present case itself emphasizes how difficult the economic assessments to be undertaken in this connection are and to what extent there is, on the basis of the theory put forward by the Commission, a lack of foreseeability of the legal consequences. In the face of this, it likewise does not help to refer to the possibility of obtaining a negative clearance under Article 2 of Regulation No 17, since, apart from the time taken by such procedures, it is clear that no validating effect would result from such clearance.

Insofar as the Commission, for the purpose of providing a foundation for its point of view, refers to principles and objects of the Treaty that may be deduced from the Preamble to the Treaty and its introductory Articles, one must counter this with the following. It is probably agreed that the provisions under discussion amount to declarations and rules which are not suitable for direct applicability. That emerges above all from the text of Article 3; this obviously provides in many respects for the promulgation of implementing rules

by the Member States or the Council, or — as is shown by the term 'as provided in this Treaty' — there are references to the more detailed provisions contained within the Treaty itself. With reference to Article 3 (f), the provision of interest in the present context, such a result emerges, if only because of the indefinite nature of the terminology used. Indeed, it is just as difficult to deduce from it what is meant by 'distortion of competition', as it is to deduce from the Preamble to the Treaty a precise test for the expression 'fair competition'. Rather is it necessary in this respect to refer back to the specific Articles 85 and 86 of the Treaty. One can however roughly deduce from Article 85 that a restriction of competition, i.e., a breach of the principle of undistorted competition, is indeed acceptable, provided that the conditions of paragraph 3 are complied with. It further follows from Article 86 that the Treaty will even accept the total absence of any competition, i.e., a complete monopoly. One is in my opinion entitled to say this, because Article 86 clearly does not distinguish between different degrees of domination of the market and because it does not declare to be prohibited even an attempt at creating a monopoly situation, as was done by Section 2 of the Sherman Act, well known to those who drafted the Treaty. Furthermore, it is significant that Article 86 of the EEC Treaty, contrary to Article 66 of the ECSC Treaty and Article 85 (3) (b) of the EEC Treaty, does not contain the proviso that 'effective competition' must not be hindered (Article 66 of the ECSC Treaty), or that there must not be a possibility of eliminating competition in respect of a substantial part of the products in question (Article 85 (3) (b) of the EEC Treaty).

If therefore reference to the basic Treaty Articles does not show anything to support the Commission's thesis, one might finally refer to two further not unimportant considerations which further militate against its soundness. Firstly, one must not forget that Article 86 sets out a prohibition without exception, i.e., no possibility of validation is provided. If therefore one were to apply it to cases such as the present one, then this interpretation could under certain circumstances result in very undesirable consequences from the point of view of industrial policy. Furthermore, to adopt the Commission's thesis, by which it would like to get a grip on at least the worst cases of undesirable mergers, could result in attention being distracted from the general problem of the control of mergers. This too would surely be undesirable. In the light of this, it is in my view, in the interest of bringing about a healthy system of competition within the Community, more sensible to say that in principle, Article 86 is not suitable for the purpose of controlling mergers; not to make it appear that the important problem of preventing mergers could be solved, at least partially, by bringing within the terms of the law, by means of a wide interpretation of Article 86, cases where in any event an insignificant vestigial remnant of competition is destroyed, and which, from the point of view of the law of competition, are not therefore of the most important kind. Admittedly, all this represents merely some ideas on the policy of the law, without decisive importance. However, in judging the problem as a whole, one cannot neglect them altogether.

Thus, in coming to the end of my arguments as to the central issues of the case, I can only conclude as follows. I am convinced that the applicants' arguments, deduced from the wording and system of the competition provisions of the Treaty, accompanied as they are by comments on the previous history of the Treaty and by opinions of eminent men of learning, are so woighty that thereafter the Commission's thesis on the interpretation of Article 86 and its application to cases of increase in market strength without the use of any unfair means, no longer seems well founded. Accordingly, the contested decision

ought to be annulled on the grounds that it has no legal basis in Article 86 of the Treaty.

3. As I have already said, I shall not after this finding break off my examination. I would now rather like to go further into the question whether the Commission's finding that Continental, via Schmalbach, had a dominant position on a substantial part of the Common Market, is justified. I shall further examine whether the Commission has correctly evaluated the effects upon the competitive conditions in the Common Market flowing from Schmalbach's merger with Thomassen into the holding company Europemballage. In this connection it is admittedly not my object — a fact which may be understandable in the light of my conclusions so far — to be exhaustive in my examination of the questions, which are somewhat complex and of a predominantly economic kind. My intention is purely to point to some of the problems that arise and to attempt a summary appreciation thereof.

(a) Firstly in relation to the question of Schmalbach's dominant position.

In the course of examining this, the Commission proceeds from the assumption that a dominant position exists when there is a possibility of adopting an independent course of action, when one is able to act without particular regard for competitors, customers or suppliers. To this extent the Commission is obviously in agreement with the prevailing opinion and with tests legally laid down (such as those that can be extracted from paragraph 22 of the German 'Gesetz gegen Wettbewerbsbeschränkungen' (Law against restrictions on competition) and Article 66 of the ECSC Treaty). The applicants too agree with the Commission in this respect. Accordingly it is important that the Commission does not consider an appreciable influence on the market to be sufficient, as is advocated by some, precisely in regard to mergers, in the interest of a wide application of Article 86. That this basic assumption is in fact correct is demonstrated, not least by the examples of conduct amounting to abuse in Article 86. In reality they can only be imagined to exist in the case of a strong position on the market within the meaning of the definition previously given.

In the contested decision, the Commission then goes on to state that there is a dominant position when on the basis of the share in the market, or on the basis of the share in the market coupled with technical knowledge, raw materials or capital, there exists the possibility of fixing prices or controlling production or distribution in respect of a significant proportion of the products. Proceeding from this, the Commission first examined the share in the market held by Schmalbach in the Federal Republic in the field of light packaging for meat and fish as well as metal caps for glass jars. It considered it possible in this way to arrive at the following conclusions:

(i) That Schmalbach, in the face of a very limited competition by substitutes, held in the market for meat cans a share of German consumption amounting to 70 to 80 %.

(ii) That besides, in the case of fish cans, where the share of glass jars and plastic containers was not so great, Schmalbach held a share of German consumption of 80 to 90 %.

(iii) That finally, Schmalbach as the only licensee of caps of the 'White cap' variety for Germany, hold in the case of metal caps a share in the market of between 50 and 55 %.

Furthermore, in the Commission's opinion, it must also be borne in mind that Schmalbach also produce machinery for the production and utilization of metal packings, that this undertaking had a technological advantage, secured by patents, know-how and exchange of information with other licensees of Continental and that their production

programme showed a wide spread. Finally — this is also said in the decision — if one took into account the economic importance of the group as this appeared from a comparison with the biggest German competitors, as well as its possibilities of access to the capital market, then there could be no doubt that in Germany, Schmalbach held a dominant position in the markets already mentioned.

However, the applicants deny this emphatically. They have objections in relation to the estimate of the share in the market, both as regards the markets in the Federal Republic of Germany and as regards the substitute competition to be taken into account, as well as to the relevant geographical basis, particularly the inclusion of imports into the Federal Republic of Germany. They further point to the importance of market demand, as well as the fact that it is open to the packing industry to arrange its own manufacture; they also point out (without this constituting a complete list of their arguments) that strong factors against holding Schmalbach to have had a dominant position emerge from their behaviour in the market and by the development of their profits.

Let us therefore also consider what can be said about these arguments.

If in this connection we begin with the shares which the Commission ascertained in relation to the German market, then it will soon be seen that there are no problems as regards data for the market for fish and meat cans; at the most they may exist in respect of data for metal caps. In fact, the applicants, if I understand them correctly, do not dispute the calculation of the share for fish cans. As regards the share attributable to meat cans, the applicants admittedly argue that it diminishes to 65 % if — and it is said that this was not been done by the Commission — one has regard to a number of other German producers, as well as to imports. In the course of the proceedings, however, it became clear that the other German producers mentioned by the applicants were indeed included in the Commission's computations and also that imports had not been ignored. That the latter did not in the final resort have an effect upon the computation can be explained simply by the fact, that they attain approximately the level of the exports and naturally, in ascertaining the share in the market in metal caps. In this taken into account, this time by way of deduction. Further remarks are now therefore called for only in regard to the share in the market in metal caps. In this connection it is not an amount of between 50 and 55 % but only 42 % that in the applicants' opinion can be justified, bearing in mind that due to an error in transmission on the part of one of the Schmalbach works, too low a total production figure was included in German statistics. The situation has not however as yet been fully clarified. The Commission considered that the applicants' argument was not very credible because, considered on the basis of Schmalbach's undisputed share in the market in metal caps as a whole, this resulted in Schmalbach accounting for a percentage in the market for 'crown corks' that seemed untenable. The applicants on the other hand, in the course of the oral proceedings adhered to their contrary contention. Having regard to the figures in dispute, some further clarification on this point seems called for unless one takes the view that in any case the values in dispute are sufficient for arriving at an assessment, because they do not in any event show an important share in the market.

As regards the computation of the share in the market, the applicants claim that a further reason for the picture being inaccurate arises from the fact that the Commission only referred to the situation in the Federal Republic and did not therefore take account of foreign trade; likewise it had left out of account competition arising from substitute products. In this respect one can in my view say this: As regards foreign trade in meat cans, I have already shown why in

the present context it does not carry weight. The same considerations apply — if I understand it correctly — to the market in fish cans, in which apparently there is only a modest export trade. Only in the case of metal caps could the foreign trade figures be of significance. It is a fact that in this case delivery distance does not have the same importance as in the case of meat cans and fish cans; likewise one ought not apparently to attach any importance to the fact that they are produced under licence (at any rate as regards caps of the 'White cap' variety) since the various licensees are not subject to territorial restrictions in regard to delivery. On the other hand, it would appear (as indeed appears from the very decision, which is the subject matter of these proceedings) that imports from French, British and other manufacturers show a considerable volume. Since, they are appreciably higher than exports from the Federal Republic, one would be justified on this point in proceeding on the basis of some geographically relevant market other than that used by the Commission and possibly in assessing the share in the market at an even lower figure than that resulting from the correction which the applicants desire. Equally, what the applicants have stated as regards competition by substitute products made of glass or plastic — particularly as regards the market in meat and fish cans — does not seem wholly irrelevant. Indeed, one cannot resist the impression that too little weight had been given in the decision to this aspect. At any rate, we are given food for thought by what the applicants have stated on the question of the investments required for a change-over from one kind of packaging to another and in relation to the fact that a number of packers in any event have at their disposal filling machinery for all kinds of packaging. Furthermore, the statement of the United States Supreme Court on the question of competition between glass and metal containers (which the applicants have quoted on page 36 of their reply to the statement of objections, without meeting any contradiction), is noteworthy. We are given further food for thought by what the applicants have submitted (with supporting data) on the increasing tendency by powerful undertakings to substitute other packaging and to develop plastic packaging. In my view, one cannot simply ignore this, even though doubtless all kinds of factors put a limit to competition by substitute products. Seen in this way, it is however possible to imagine a situation where closer market research, which is lacking in the decision, would lead to the conclusion that the data as regards market shares which were previously mentioned, need to be corrected, thus reducing still further their already limited evidential value.

When examining the existence of market power one has in the applicants' view also to bear in mind that big buyers hold a considerable buyer's power and that the threat of undertaking one's own production (as has occasionally happened) will have a moderating effect upon suppliers. In this connection it must be said that the figures mentioned by the applicants, as well as the explanation given, certainly cannot be denied a certain importance. In the final resort, however, they have only a limited evidential value. In fact, these arguments fail in the case of the undoubtedly large number of small customers, who do not necessarily benefit from the buying power of the big buyers due to lack of market transparency, and who for obvious reasons cannot, without difficulties, change over to arranging their own production. I am therefore of the opinion that on the basis of the arguments just mentioned, if there should be a position of power on the market, then one cannot categorically deny the existence of a dominant position and I shall therefore refrain from dealing in detail with the applicants' objections in their details, some of which are contested.

If the calculation of shares in the market undertaken by the Commission has been

shown not to be entirely free from doubt, and if one bears in mind that the mere consideration of market shares will only rarely yield conclusive findings as to the existence of power on the market, it becomes clear that in the present context all the more importance must be attached to the Commission's further arguments tending to substantiate a dominant position on the part of Schmalbach. These are the arguments that a contributory factor in Schmalbach's power on the market is that they also produce machinery of interest to the packaging sector and that the group's technologically advanced position, as well as the existence of agreements restricting competition, have to be taken into account.

However, once more it soon becomes apparent that the applicants can also raise objections of substance against these arguments, not the least important of these being arguments that refer to the last mentioned point, i.e., restrictions on competition that are said to have been brought about by means of licensing agreements, by a market information system and by a 'Commercial Commission'. Indeed, according to the applicants' arguments that dispute this, it is not quite clear what effects upon the market occurred and continue to occur by reason of the factors referred to. One might also hold that they have nothing to do with the present proceedings since Article 85 of the Treaty provides the means of taking action against the acquisition of such a position of power. In relation to the problem of a technologically advanced position, the question was rightly raised whether the Commission has reasoned its opinion with sufficient clarity. In this context one ought naturally to look closely into the importance of relevant patents and licensing agreements of the group, and the detailed position as regards technical know-how, which in this industry is apparently of particular importance. Finally, as regards the manufacture and distribution of machinery for production and closure of packaging materials; before one can draw compelling conclusions from this factor in relation to the present case, one will have to be clear as to the importance to attach to leasing contracts for packing machines, containing clauses that provide for the use of particular packing materials, and also what possibility there is — here I am dealing with the applicants' arguments under this heading — of obtaining such machines from numerous other sources. Here too, in the important further field just dealt with, one might therefore get the impression that the Commission did not pursue the necessary investigations to a point that would in fact permit one to arrive at an unassailable judgment, based upon reliable data on the question of market power.

Finally, we still have the fact that the Commission was unable to show in relation to Schmalbach the kind of behaviour on the market, from which one could have deduced a dominant position. This proof is admittedly not indispensable for an application of Article 86; in the case of facts such as those in the present case it would, however, have had great value as circumstantial evidence. To the extent that the Commission in this context relies upon arguing that Schmalbach's competitors had in general followed the latter's price policy, the proceedings showed — surely a point of importance — that the applicants were able without contradictions to produce instances of behaviour deviating thereform. It is also interesting to note what has emerged in relation to Schmalbach's profits and to the way they developed over a period of many years. The fact that one cannot from these data, and in particular from a comparison with profit figures of other producers of packing materials and industrial undertakings of comparable size, derive indications of market-dominating behaviour, cannot surely be unimportant in connection with a total appreciation of the facts.

Furthermore, since the Commission also apparently did not undertake a market

survey extending over a longer period (which in relation to Article 86 would appear indispensable) and in particular, since it apparently tried to ascertain the developing tendencies of a quickly-changing market (including new entrants to the market), it must at the end of the day be placed on record, that it seems very doubtful whether the Commission has succeeded in proving a dominant position in relation to Schmalbach.

(b) As has been previously said, in the Commission's view the abuse of a dominant position can be seen in the fact that subsequent to the acquisition of Thomassen shares by Europemballage, there was in practice a cessation of all competition on the relevant markets. I would now also like to say a few words in relation to this part of the economic investigations by the Commission. Here the following picture emerges.

In the applicants' view one has to proceed from the question whether, before Europemballage's acquisition of the Thomassen shares, there was in fact a competitive situation between Schmalbach and Thomassen of such a degree, that its cessation would entitle us to speak of a noticeable — that is, relevant — change in competitive conditions. On the facts that have become known, considerable doubts must however be expressed on this point. In fact, not only the figures contained in the decision itself, but also the replies to the Court's questions, show a picture of extraordinarily modest foreign trade in both directions between the Netherlands and the Federal Republic in the fields at present of interest, especially as regards the participation in this trade by the undertakings in question. It is my impression that this is so, at any rate in the case of meat and fish cans. Only in the case of metal caps, that is in a field in which Schmalbach's share in the market in any event hardly justifies us in assuming the existence of a dominant position, did the trade across borders attain any significance.

Now if in the light of these facts the Commission takes the view that in reality agreements restricting competition had been the cause of the modest dimensions of the foreign trade previously mentioned, then one might well reply that the few clues supplied by the Commission (which anyhow only give rise to a suspicion) do not on this crucial point permit an adequate judgment. On the other hand, in the light of what has been submitted to this Court, one cannot without more ado reject the argument that the modest foreign trade is explained by the differing specifications (specific characteristics of the products, such as size, shape, weight as well as material used), of can manufacturers in various countries. Thus — as the applicants have argued — in the field of meat cans there is on the German market a greater emphasis on tinned sausage; whilst in the Netherlands it applies more to tinned ham, intended specially for export and having special characteristics and dimensions. It may also be of importance to note that the Dutch market in fish cans is only modest and is showing a downward trend; this being the case it is naturally not suited to induce foreign competitors to enter this market. At any rate — and this much can certainly be said — further investigations in this respect might have produced greater clarity. They would not only have established what was the effect upon current competition arising from the criticized merger — they would at the same time have presented a reliable picture about the *possibility* of competition between Schmalbach and Thomassen, upon which in the final resort the Commission laid the main stress.

By the way, on this question of potential competition one might, on the basis of the applicants' comments, add that it does not appear to have clearly emerged whether it could have come about in the way envisaged by the Commission, that is by selling via companies in which

Thomassen and Schmalbach were in each case participating and which had their place of business in the territory of the potential competitor. In this respect at any rate, we are given food for thought when we realize that the firms mentioned can hardly be regarded as dominated by Thomassen or Schmalbach. Besides, a readiness to sell on behalf of Schmalbach and Thomassen would to some extent depend upon their own production programme. Excessively strong duplication of production can in this case no doubt be just as harmful as excessive divergence.

Finally — and here too one has to agree with the applicants — if one attributes a decisive importance to potential competition then there ought to have been extensive investigation in this certainly difficult field and one should have weighed up how, proceeding from the at any rate still existing competition and having regard to recognizable developing tendencies (e.g., the import trend or that of new entrants on the market) the future development might have shaped on the market which is of interest in this case. After all, it is argued in this respect that considerable quantities of metal caps from France and England had been exported to the market in question and that there had been deliveries of meat and fish cans from France and to some extent even from Denmark. It certainly should have been part of a comprehensive survey of the problems before the Commission to pay attention to this and to consider what increase of the competition on the market with third parties might reasonably be expected in the light of the increasing attainment and expansion of the Common Market, even after the Schmalbach-Thomassen merger.

Likewise, in relation to the problem of change of competitive conditions, one cannot avoid the impression that the Commission's findings have not been proved beyond doubt, and accordingly on this aspect of the economic appraisal it is hardly a case of the Commission's decision being based upon a certain and unassailable foundation.

4. Two further objections by the applicants, with which I shall now deal in a cursory fashion refer solely to Continental's legal position.

These objections relate to the fact that the criticized acquisition of shares had been undertaken by Europemballage, a subsidiary of Continental, having its own legal personality. In this situation however it was doubtful whether the subsidiary's conduct could without more ado be attributed to the parent company, i.e., whether one was justified in treating the Continental group as a unit. Furthermore, it is argued that Continental is not engaged in business with the Common Market and, following international practice in these matters, one had to assume that the Community authorities had no jurisdiction over them.

In my view, one can without the need for long discourses show that these objections are not really well-founded.

(a) Indeed, as far as the first point is concerned, one does not need to refer to the national legal systems (including United States law) to realize to what extent one is entitled to take the responsibility of dominant undertakings for their subsidiaries' actions for granted and to what extent, particularly in the law on competition, conclusions may be based on the fact that parent companies and subsidiaries constitute economic entities. One might in this connection especially refer to the Court's previous decisions, e.g., the judgment in Case 22/71 as well as the dye stuffs judgments, concerning undertakings from third countries. In fact, both show the same tendency. The conclusion that this line should now also be followed, that is, that — contrary to the applicants' view — one ought to proceed from the assumption that Europemballage did not show independent behaviour, and did not at the time in

question possess economic independence, in my view follows already from the fact that Continental had provided the finance for the acquisition by Europemballage of the Thomassen shares as well as from the fact that at the time in question, when Continental induced Europemballage to make an offer to purchase, the latter company had not yet been fully organized. The possibility of Europemballage having an independent position in law was therefore rightly ignored by the Commission.

(b) The Court's case law likewise permits a clear solution of the problem of the Court's jurisdiction, which was raised by the applicants. For according to the case law it is sufficient, to enable the Community authorities to take action on the basis of Community law on competition, that a certain type of behaviour becomes apparent within the Common Market (Case 52/69, Rec. 1972, p. 787), that the effects of actions by undertakings in third countries had become apparent within the Common Market (Case 22/71, Rec. 1971, p. 949). Because however the Commission likewise refers to the acquisition of the Thomassen shares within the Common Market and the changes in competitive conditions within the Common Market caused thereby, one cannot, looking at the matter in this way, deny it the power to intervene even in relation to an American undertaking, which caused these changes.

5. There finally remains a series of criticisms of both form and procedure on which a few words will also have to be said.

(a) Two of these at any rate can be rejected without difficulty, i.e., one which claims that the title of the case had been incorrectly quoted in the Official Journal of 8 January 1972, and another which argues that the service of the decision upon Continental should have been effected through diplomatic channels.

It is obvious that these criticisms are not relevant since they are concerned with occurrences subsequent to the making of the decision and which cannot therefore have any influence upon the validity of the decision.

(b) Just as brief can be my comments on the criticism of lack of reasons, where the Commission is criticized for not giving the reasons for its legal views on Article 86 and also for having practically failed to deal with the applicants' comments on the statement of objections, but having in essence limited itself in its decision to a repetition of these objections.

As regards this, it is quite apparent that the decision does deviate from the statement of objections to a not inconsiderable extent, which proves that the Commission did indeed pay attention to the applicants' arguments. Likewise, even though the decision does not contain dogmatic elaborations, it clearly shows the legal interpretation adopted by the Commission in deciding the present case in relation to Article 86 of the Treaty. Finally, since on the case law it is also clear that in giving the reasons for a decision, it is not necessary specifically to reject differing views of the law (cf. Cases 56 and 58/64, Consten-Grundig v Commission, Rec. 1966, p. 429), one is thus able to say that the plea of lack of reasons really has no substance.

(c) As for the argument that the Commission in making its decision disregarded the Regulations as to the adoption of the correct language, i.e., Article 3 of Regulation No 1 of 15.4.1958 (OJ No 17, 6.10.1958, p. 401) one must say that it is precisely the Regulation cited which enables us to conclude that the Commission is free as to which language to choose when it addresses a decision to an undertaking having its registered office in a third country. Besides, since the firstmentioned applicants have an office in Brussels and the comments upon the Commission's statement of objections

had partly been expressed in French, it follows that one can hardly criticize the fact that the decision also was expressed in French.

(d) There thus only remain some criticisms as to the kind of hearing which the applicants had received prior to the making of the decision, or to put it more precisely: they deal with questions as to whether the statement of objections was sufficiently detailed, whether the oral hearing was correctly conducted and also whether Continental had its rightful part in the proceedings.

As regards this, one can in my view make the following brief remarks:

(aa) The case law makes it clear that the statement of objections that must be served upon the parties concerned in cartel proceedings need only contain the essential facts in a concise form (Case 41/69, Chemiefirma v Commission, Rec. 1970, p. 661, p. 687). This requirement — and this will emerge from reading the statement of objections — was in the present case complied with, even if the statement of objections does not set out all the economic data (e.g., Schmalbach's production programme) and even if, going beyond this, it also does not explain in detail the legal views which the Commission took in relation to Article 86.

(bb) As regards the applicants' further criticism that the Commission's representatives and those of the other authorities did not at the oral hearing put any questions, one has to bear in mind that under Article 7 of Regulation No 99 the purpose of the oral hearing is the completion and explanation of written arguments and that where the written comments are very detailed, the hearing itself can take place in a shortened form. Since this is what happened in the present case, it is easy to understand why further questions were dispensed with in the course of the oral hearing. Accordingly, there are no reasons for complaints against the Commission on this point.

(cc) Finally, on the question whether Continental in the course of the administrative proceedings had received a sufficient opportunity for placing its position on record, the Commission was able to prove that constantly in the course of the administrative proceedings letters had likewise been addressed to this company. I would in this respect refer to the detailed comments contained in the defence. Besides, since in a letter dated 14 May 1970 the applicants' present representative addressed to the Member of the Commission who at the time was in charge of questions of competition, a request that the Commission should address its questions in connection with the acquisition of the Thomassen shares not to Continental but to Europemballage, and since the Vice-President of Continental had also participated in the oral proceedings, one feels entitled not only to assume that Continental had throughout been informed of the objections but that, quite generally, it had received sufficient opportunities for making known its position. The aspects just mentioned would therefore also not add anything by way of substantiation of the claim.

6. After having said all this, allow me to summarize my views for the purposes of this opinion.

Bearing in mind my point of view on the question of principle, which relates to the application of Article 86 to events such as those before the Court, but also because the economic material submitted by the Commission on the problem of the dominant position and the change in competitive conditions

does not appear to be completely sound, the action brought by Europemballage and Continental must be declared well-founded. The Commission's decision of 9 December 1971 should accordingly be annulled. Further, in accordance with the applicants' claim, the costs of the proceedings should be awarded against the Commission.