

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 13 July 1990

relating to a proceeding under Article 85 of the EEC Treaty

(IV/32.009 — Elopak/Metal Box — Odin)

(Only the English text is authentic)

(90/410/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the Treaty establishing the European Economic Community,

Whereas :

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal, and in particular Article 2 thereof,

I. THE FACTS

A. Subject of the Decision

Having regard to the notification of the agreements hereinafter mentioned and the application for negative clearance jointly submitted on 1 August 1986 by Elopak A/S of Lierstranda, Norway (hereafter 'Elopak'), Elopak Ltd of Hertfordshire, United Kingdom, Metal Box plc of Berkshire, United Kingdom (hereafter 'Metal Box') and Odin Developments Ltd of Hertfordshire, United Kingdom (hereafter 'Odin') concerning the creation of a joint venture company, Odin, which agreements were made on 23 April 1986 and which mainly comprise a shareholders agreement relating to Odin, two know-how licences and two research and development contracts,

(1) This Decision concerns agreements between Elopak and Metal Box. The object of the agreements is to establish Odin, jointly owned by Elopak and Metal Box, which is to carry out the research and development of a container with a carton base and separate closure that can be filled by an aseptic process with UHT processed foods. Odin will also develop the machinery and technology for filling these new containers and if successful undertake production and distribution of the new containers and their filling machines.

Having regard to the summary of the notification published ⁽²⁾ pursuant to Article 19 (3) of Regulation No 17,

(2) The object of the notification was to benefit from the procedure provided for in Article 7 of Commission Regulation (EEC) No 418/85 of 19 December 1984 on the application of Article 85 (3) of the Treaty to categories of research and development agreements ⁽³⁾. Failing benefit of such procedure the parties sought, pursuant to Articles 2 and 4 of

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 215, 13. 8. 1987, p. 3.

⁽³⁾ OJ No L 53, 22. 2. 1985, p. 5.

Regulation No 17, negative clearance or exemption under Article 85 (3) of the Treaty.

B. The parties

(3) *Elopak*

The Elopak group of companies is Norwegian in origin and is engaged primarily in Europe but also in Africa, the Middle East and the United States of America in the manufacture and sale of cartons for use in packaging and distribution in the dairy and food industries. It also supplies and installs integrated systems equipment for filling, packaging and handling these cartons. Until comparatively recently Elopak did not manufacture the filling machines themselves but acted as a distributor for certain filling machine manufacturers. Elopak supplies primarily cartons for milk and to a lesser extent for juice, wine and water. Its milk cartons are almost exclusively for pasteurised (fresh) milk with a shelf-life of several days only. Elopak was a distributor for Liquipak International Inc. (USA) of machines capable of aseptically filling UHT treated milk, giving a shelf-life of several months. However, the distribution agreement has been terminated. In 1988 Elopak acquired Purepak, the packaging-machine division of Excello (USA), for which it acted as distributor for its fresh filling machines. Purepak had also been trying to develop aseptic packaging machines. The consolidated turnover of the Elopak Group (including Elopak Ltd) was \pm ECU 300 million in 1985. Elopak is presently negotiating with the British Technology Group (BTG) for a licence to use the new BTG technology which is ideally suited to sterilizing preformed cartons such as Elopak's gable top which was the technology used in the Liquipak machines⁽¹⁾.

(4) *Metal Box*

The Metal Box Group of companies, British in origin, is active in several industrial activities (packaging, central heating and security printing) on a worldwide basis. Its core business of packaging includes not only traditional cans for foods and liquids but also PET and polythene bottles, general plastic packaging, aerosols, metal and plastic paint cans, plastic packaging for toiletries and cosmetics as well as a variety of other packaging and closures and seals. Most food products in cans are filled by a sterilization process but Metal Box has an aseptically filled 'Milk Can' (polypropylene container with aluminium top) for long shelf-life liquids,

including milk. Metal Box has its own active R & D centre covering a variety of packing materials and processes. The consolidated turnover of the Metal Box Group was \pm ECU 1 520 million in 1985/86. In October 1988 the Commission approved a merger transaction between Metal Box and Carnaud of their packaging activities (metallic and plastic containers). A significant structural change in the European packaging industry occurred following this transaction by which Carnaud and Metal Box agreed to create a new major world packaging company to be called CMB Packaging in which each party will own 25,5 % of the share capital, the rest of the shares being mainly distributed to the public. The combined turnover of the new group is in excess of \pm ECU 3,1 billion. It will own 170 factories in 26 countries and employ approximately 35 000 people worldwide.

C. The agreements

The essential elements of the notified agreements which were made on 23 April 1986 are summarized below.

- (5) Elopak and Metal Box create for an indefinite period a 50/50 jointly owned company, Odin, to research, develop and if successful ultimately exploit (i. e. manufacture and distribute) a new form of paperboard-based package with separate closure (a laminated metal lid) and the filling and sealing machinery and technology associated with this new package. The new package will be for shelf-stable UHT-treated particulate foods (i. e. not liquids) filled aseptically. This new product and the new associated filling, sealing and handling machinery and technology constitutes the field of the agreement. Odin will be controlled by a board composed of equal numbers of Elopak and Metal Box representatives.
- (6) Metal Box and Elopak grant Odin licences to exploit anywhere in the world all their respective intellectual property rights (patented and unpatented) relevant for the field of the agreement. Both parents will grant a similar licence to Odin for any new intellectual property rights they may obtain. Odin will not use these intellectual property rights for any purpose other than in the field of the agreement and will keep such rights confidential. Odin will be the owner of any improvements made by it to the intellectual property rights.
- (7) Within the field of the agreements Odin shall have the exclusive right to exploit the intellectual property rights licensed from the parents and any improvements it may make. As Odin's exclusivity extends only to the field of the agreements it must be seen as a field of use exclusivity. If Odin decides

⁽¹⁾ See Commission Decision 88/501/EEC of 26 July 1988, relating to a proceeding under Articles 85 and 86 of the EEC Treaty [IV/31.043 - Tetra Pak I BTG Licence] (OJ No L 272, 4. 10. 1988, p. 27).

not to exploit the new technology in any particular country, the parents shall have the right to exploit the technology in that country when such opportunity is offered by Odin to third parties.

- (8) The parents can obtain from Odin a non-exclusive licence (without the right to sub-license) for any improvement made by Odin provided that:

— the use or exploitation of such improvements is unlikely to conflict with Odin (i.e. all uses outside the field of the agreement are permissible),

or

— Odin decides not to exploit this technology for the purposes of Odin.

- (9) Elopak and Metal Box are free to carry out R & D or exploitation either independently or with a third party in the field of packaging systems for shelf-stable particulate foods provided they do not use either the know-how of the other partner in Odin or any improvements made by Odin except as specified in the agreements.

- (10) In the event of deadlock, breach or disagreement as to how Odin should continue or exploit the new product, and where these disputes cannot be settled, arrangements are made for one of the parties to buy out the other's shares. In such events it is agreed that one of the parties (the choice determined both by the type of breach or disagreement) will make an offer of its shares to the other party. If this offer is not accepted, the offeror will be obliged to purchase the shares of the other party at the price contained in its original offer.

- (11) At such a break-up or sale of shares the following non-exclusive royalty free licences shall be made:

— Odin shall license the seller of the shares to use all of its improvements,

— the purchaser shall license its own intellectual property rights to the seller for use only in the field of the agreement.

Similar cross-licences will be granted to both parents on liquidation of Odin.

- (12) At such break-up, sale or liquidation, for a period of five years neither Elopak nor Metal Box shall use the proprietary know-how of the other party or any

improvements made by Odin with a competitor of that other party.

- (13) Except as laid down in the agreement neither party can sell or dispose of its shares in Odin without the consent of the other party. Even after break-up and sale described in point 10 above, the purchaser of the shares shall not for five years transfer any shares in Odin to any third party without first offering them to the original seller on the same terms.

- (14) All information received by Odin or by one party from the other under these agreements will be treated confidentially. Elopak and Metal Box will also carry out for a fee on a contract basis research and development work requested by Odin. Odin will be the owner of any intellectual property arising during such contract work. Elopak and Metal Box will keep confidential all information disclosed or developed under such contracts.

D. The products and the market

- (15) It is intended that the new product will be based on Elopak's gable-top carton, made from paper boards coated with polyethylene or aluminium, and will have a separate closure (a laminated metal lid). It will be capable of being aseptically filled and sealed so that it can be used to package UHT-processed food products containing particles. Also to be developed along with the new product are the associated sterilizing, filling, sealing and handling equipment which must all be adapted to suit the new product and the filling and sealing process yet to be developed. Foods packed in the new product will have a shelf-life of several months. It is expected that the UHT process will affect the quality of the packaged foods less than the sterilization used in canning. A prototype filling machine has in fact been developed and Odin intends to invite customers to submit the prototype to a trial.

- (16) The market for the product has not yet been developed nor has consumer acceptance been tested. However, uses for it might include soups, sauces, pie-fillings, fruit, vegetables, baby foods, pasta products and pet foods. That being so the new product, if successfully developed, could constitute an adequate technical substitute to metal cans principally, but also to glass jars and certain 'brick' type cartons capable of being filled with UHT-treated liquids or semi-solids by an aseptic process.

- (17) The markets for the packages with which the new products is likely to compete are oligopolistic in structure : for metal cans — Nacanco, Continental Can, American Can, PLM (Swedish origin), and CMB Packaging referred to above ; for glass jars — Owens Illinois, St Gobain and PLM ; for 'brick' type cartons — Tetrapak and PKL (Germany).
- (18) The cost of transport of metal cans and glass jars but not of 'brick' type cartons limits the geographical extent of the relevant market. The new product, like Elopak's current gable-top carton, will probably be transported as flattened blanks separately from closures. The distance over which it can be economically transported will therefore probably be greater than is currently possible with metal cans and glass jars. The existence of these other competitors even within the oligopolistic structure of the market and the fact that the transport costs of the new product will probably not limit severely the geographical extent of the relevant market means that the creation of Odin will not create any significant foreclosure effects.
- (19) The new product will not compete with Elopak's current gable-top containers used for fresh milk. On this market in any case there are several competitors including Tetrapak which possesses its own technology.

E. Observations of third parties

- (20) No written observations were received within the time period laid down in the Commission's notice published pursuant to Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

A. Regulation (EEC) No 418/85

- (21) The parties have applied to benefit from the procedure provided for in Article 7 of Regulation (EEC) No 418/85. However, the notified agreements do not fulfil the conditions necessary for this simplified procedure which does not apply to joint undertakings such as Odin which not only extend to production but also distribution. Furthermore, such an application presupposes that the agreements fall within the scope of Article 85 (1), which is not the case here, with the result that the requested compatibility of the notified agreements

must be stated by individual negative clearance decision.

- (a) Odin will undertake distribution of the new products and such joint distribution is not covered by Regulation (EEC) No 418/85 (see Article 1 (2) (d)). In addition Article 2 (e) obliges any joint undertaking charged with manufacture of the products to supply them only to the parties ; an obligation not fulfilled when Odin, and not the parents, is charged solely with distribution. Therefore, since the agreements do not fulfil the conditions of Article 2 the simplified procedure laid down in Article 7 of Regulation (EEC) No 418/85 cannot be applied.
- (b) For the reasons explained below Article 85 (1) is not applicable either to the creation of the joint venture (because the parents are neither competitors nor potential competitors) or to any of the individual provisions of these agreements. Consequently, the agreements do not need any exemption under Article 85 (3), rather the agreements can be granted a formal negative clearance.

B. Article 85 (1)

- (22) Odin is jointly and equally owned and controlled by both parent undertakings. As a result the joint venture must be considered under Article 85 (1).
- (23) Although at the time of notification the product as well as the market for it had yet to be developed it can be expected that the relevant geographical market is the Community. It is difficult to define exactly the relevant product market on which the new product will compete. It is considered that this product may constitute an adequate technical substitute for the packaging of shelf-stable UHT-treated particulate foods (including semi-liquids but not liquids) filled aseptically. Although the product will probably constitute a technical substitute for metal cans, glass jars and certain 'brick' type cartons, consumer preference may give rise to its own special market.
- (24) In this case for the reasons hereafter set out it will be seen that at the time of the conclusion of the agreements :
- Elopak and Metal Box were not competitors, actual or potential, in the relevant product market,
 - and
 - the development of the product by either party on its own was highly unlikely.

- (25) Elopak does not possess a complete range of its own or fully proven technology in the field of packaging UHT-processed foods with an aseptic filling for both machines and cartons. As a distributor of liquipak aseptic machines, it did not have access to the patented technology embodied in these machines which are solely for cartons containing liquids. Elopak's know-how which is principally for cartons containing liquids is not enough to permit it to develop on its own the new product for aseptically filled cartons with a separate closure for particulate foods. Even access to BTG technology will develop only its know-how regarding sterilization of cartons.

Metal Box has no experience with the type of board cartons to be used as the basis for the new product. Special know-how for cartons is necessary if they are to withstand the heat of the filling process whilst still retaining stability and giving a shelf-life of several months. These cartons must in any case be adapted to be capable of accommodating a laminated metal lid.

Neither party could in the short term enter the market alone as such entry would require a knowledge of the other party's technology which could not be developed without significant and time-consuming investment.

Both Metal Box's and Elopak's experience and resources are necessary to develop the new product which will be a combination of their respective technical and commercial know-how. The technical risks involved in carrying out research for a brand new product yet to be proven and which involves a whole new area of technology for each partner, and the risks involved in developing the new filling, sealing and handling machinery necessary, would realistically preclude each party from attempting to carry out research and development on its own. In addition, considerable commercial risks are involved not only in gaining final consumer acceptance for the new carton but also in persuading food processors/packers to reinvest in the expensive new packaging and sealing equipment that will inevitably be necessary for the new product. Moreover, Odin will have to provide a rapid after-sales and maintenance service for filling and sealing equipment which food processors require if they are to be persuaded to re-equip. Back-up services are essential if breakdowns and

delays, which can be very costly in terms of spoiled foods, are to be avoided.

Consequently, combining the know-how of each party reduces considerably the technical risks involved, thus diminishing the financial burden to be borne jointly.

- (26) In activities outside the field of the joint venture the parties are neither competitors nor potential competitors. Elopak is a manufacturer of cartons for fresh or pasteurized liquids — a market in which Metal Box has no interests. Consequently, the creation of Odin will not have any impact on any existing competitive or potentially competitive relationship between the parents. Odin may, however, become a competitor of Metal Box, a point which is dealt with below.
- (27) The creation of Odin is not likely to lead to foreclosure of similar possibilities to potential competitors. As has been stated, until the product is developed and successfully marketed it is difficult to say on which relevant product market it will compete most effectively. Notwithstanding this uncertainty, there are several other very large metal can makers in the EEC who have at least equivalent technical know-how to Metal Box's. In the market for cartons, Elopak is only one of several companies using Excello technology on a non-exclusive basis. In addition, Tetrapak in particular, with a much bigger market share, has not only its own technology equivalent to Elopak's for fresh milk, but also aseptic technology for 'brick' style cartons which are already used to a limited extent for UHT-processed foods. PKL also possess this latter technical ability.
- (28) As the parties could not realistically be regarded as competitors, actual or potential, and the creation of the joint venture entails no foreclosure risk, and the agreement does not involve the creation of a network of competing joint ventures, the agreements to establish Odin do not fall within the terms of Article 85 (1).
- (29) The specific provisions of the agreement must however be examined to ascertain whether such provisions restrict competition within the meaning of Article 85 (1), or whether they are no more than is necessary to ensure the starting up and the proper functioning of the joint venture. In particular, account must be taken of the fact that if successfully developed and marketed, Odin's new product may compete to some extent with Metal Box's current output.

Provision relating to the activities of the parents

closely related and possibly competing products.

- (30) The grant to Odin of the exclusive right to exploit the proprietary know-how in the field of the agreement (which is very narrowly defined to include only the highly specific product in question) is a guarantee to each party that its partner will devote its full efforts to the project. As the success of Odin depends on such efforts these provisions will make each of them willing both to bear the financial, technical and commercial risks involved as well as to divulge secret know-how. This is particularly important in this case where a significant proportion of the proprietary know-how involved is not protected by patents. A similar analysis applies to the provisions relating to the non-exclusive licence of improvements which may be granted by Odin to its parents and to those limiting the use of such improvements. These ensure that Odin will be able to exploit exclusively the proprietary know-how in the field of the agreement.

- (31) Even though the protection afforded to Odin by the exclusive right to exploit goes beyond any initial starting-up period for new technology and may extend for the life of Odin it cannot realistically be seen how, in view of the following circumstances, it might infringe Article 85 (1):

- both parents' proprietary know-how (and not just that of one parent) plus further R & D work by Odin are necessary to develop not only the new product but also the machinery and technology linked to it; they are also necessary to the manufacture and marketing of the product which, even if successfully developed, must still win consumer acceptance and, after that, be adapted to possible changes in consumers' demand, quality requirements and production technology;
- there are no explicit restrictions in relation to price, quantity, customers or territory placed on Odin's activities, even though its new product may compete to some extent with Metal Box's current output,
- the exclusivity is limited to the field of the agreement which is very narrowly defined; moreover the parents are not restricted in research and development or exploitation of

The exclusivity in this case cannot in the circumstances be compared to exclusive licences of proprietary know-how which is ready for technical exploitation either in a licensor/licensee relationship (see Boussois/Interpane Decision⁽¹⁾) or where the licensor is a partner in a joint venture with which it can compete directly (see Commission Decision Mitchell-Cotts/Sofitra⁽²⁾).

- (32) The grant to Odin of a non-exclusive licence to use its parents' know-how and the provisions for updating this know-how and keeping it confidential do not infringe Article 85 (1). These provisions do not restrict the possibility for the parents to conduct R & D in closely related and competing fields. In fact such R & D is expressly permitted as long as each party does not use the other party's know-how or Odin's improvements (although such improvements may be used outside the field of the agreement). These provisions, like those relating to secrecy do no more than guarantee the confidentiality of secret know-how, and prevent the other party from using Odin as a vehicle to obtain know-how to which it would not otherwise have access.

- (33) The parties' obligations in relation to licensing technology at dissolution or break-up do not infringe Article 85 (1). In such an event both parties will have access not only on an unlimited basis to improvements made by Odin but also to the use in the field of the agreement of the other party's know-how. Thus, on break-up of Odin or sale by one party, both parties are free to compete using all know-how including that of the other party in the field of the agreement and using their own and Odin's improvements in any field. The limit on the use of the other party's proprietary know-how to the field of the agreement is a necessary consequence of cooperation limited to a specific field of activities. In fact since a break-up or sale can be quite readily brought about by either party, this provision does no more than ensure such an eventuality will not be used as a pretext by one party to obtain the other party's know-how outside the highly specific field of the agreement.

⁽¹⁾ OJ No L 50, 19. 2. 1987, p. 30.

⁽²⁾ OJ No L 41, 11. 2. 1987, p. 31.

Ease of break-up or sale (with the associated access to know-how) also ensures that Metal Box cannot use its joint controlling position in Odin to prevent the new product being fully and actively exploited if it considers that such exploitation might harm the products it currently produces. Similarly Metal Box cannot impose any territorial restrictions on Odin's production or sales without either provoking a break-up if Elopak so wishes or without Elopak being entitled to seek the right to exploit the new product in the territory in which Metal Box opposes exploitation by Odin. Elopak in particular has no incentive to limit Odin's output or the geographical scope of its sales. Neither is there any reason to suppose that Metal Box will use its co-control in Odin in a manner incompatible with Article 85 (1).

- (34) Nor are the following restrictions caught by Article 85 (1): (a) the obligation on each parent, for five years after break-up of Odin (or sale by one party of its shares), not to allow a competitor of the other parent to use that other parent's know-how or improvements made by Odin, and (b) the provision giving the seller right of first refusal in the event of a further sale. Such provisions are a necessary result of the creation of Odin without which the two parents could not reasonably be expected to cooperate. In the absence of such provisions and especially in view of the ease with which a sale or break-up can be brought about, the possibility of a competitor obtaining know-how which is essential if Odin is to develop successfully the new products. Nor should a competitor have immediate access to Odin's improvements without bearing either the risk or the financial investment which each party has borne. Such protection of Odin's improvements is necessary to ensure the parties' willingness to allocate the necessary funds to Odin to develop the new product. A similar analysis applies to the ban on disposing of Odin shares without the other party's consent; this is also an expression of the wish of the parties to undertake a particular project with a specifically qualified partner.

Provisions relating to limitations placed on Odin

- (35) The provisions which relate to Odin's use of the parents' proprietary know-how and the obligation to keep such know-how secret are both necessary to avoid compromising or undermining Odin's purpose and existence. They are a necessary conse-

quence of the parents' desire to limit cooperation to a specific field and a reflection of the legitimate aim to keep know-how secret. Such provisions have in fact been recognised, in Article 2 of Commission (EEC) No 556/89 (7), as legitimate in the context of know-how licences. Finally, there are no explicit restrictions relating price, quantity or territory imposed on Odin. Consequently in the context of this case the provisions relating to the activities of Odin do not fall within the scope of Article 85 (1).

Implicit restrictions

- (36) The above analysis has shown that neither the establishment of Odin nor any of the detailed provisions fall within the scope of Article 85 (1). In fact the individual provisions are seen to be either:

— provisions not restricting competition in the sense of Article 85 (1),

or

— provisions which in other contexts might restrict competition but which in the context of the present case do not. Since such provisions cannot be disassociated from the creation of Odin without undermining its existence and purpose and since the creation of Odin does not fall within the scope of Article 85 (1), these specific provisions also fall outside the scope of Article 85 (1).

A final examination of any implicit or inevitable anti-competitive consequences is however necessary, particularly as a result of the new potential competition that may be created between Metal Box and Odin if this latter's new product is commercially successful. As explained above there are no explicit provisions limiting competition between Metal Box and Odin and in particular there is no geographical division of the EEC. As has been stated, Elopak in particular has no incentive to limit Odin's output or the geographical scope of its sales. Neither is there any reason to suppose that Metal Box will use its co-control in Odin in a manner incompatible with Article 85 (1). In a case such as the one under consideration there can be no implicit anti-competitive impact on the activities of the parents outside the joint venture because not only were the parties not even potential competitors at the creation of Odin but also

(7) OJ No L 61, 4. 3. 1989, p. 1.

neither party could have realistically developed the new product without the full and active participation of its partner. Finally, any dangers of implicit anti-competitive effects stemming from the potential competition created between Metal Box and Odin are further mitigated by the facility with which a break-up sale of Odin can be brought about and the wide post-term use possibilities for all parties that this implies (see point 11 above).

Conclusions

- (37) Consequently, it may be concluded that the agreements between Metal Box and Elopak to establish Odin and the associated agreements and transfers of technology described in this Decision do not have as their object or effect any appreciable prevention, restriction or distortion of competition within the common market within the meaning of Article 85 (1). It is not therefore necessary to examine whether trade between Member States may be affected. Consequently there are no grounds, on the basis of the facts in the Commission's possession, for action on its part under Article 85 (1). The Commission can therefore grant the agreements in question a negative clearance under Article 2 of Regulation No 17,

and associated with the creation of, Odin Development Ltd by Elopak A/S, Elopak Ltd and Metal Box plc.

Article 2

This Decision is addressed to :

Odin Development Ltd,
PO Box 66,
Stevenage,
UK-Hertfordshire SG1 2 LU,

Elopak A/S,
PO Box 523,
N-3412 Lierstranda,

CMB Packaging SA,
211 rue du Noyer,
B-1040 Bruxelles,

CMB Packaging (UK) Ltd,
Woodside, Perry Wood Walk,
UK-Worcester WR5 1 BQ,

Elopak Ltd,
Gunnels Wood Road,
Stevenage,
UK-Hertfordshire SG1 2BQ.

HAS ADOPTED THIS DECISION :

Done at Brussels, 13 July 1990.

Article 1

On the basis of the facts in its possession, the Commission has **no grounds for action** to Article 85 (1) of the Treaty in respect of the agreements for the creation of,

For the Commission

Leon BRITTAN

Vice-President