II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 15 October 1990

relating to a proceeding under Article 85 of the EEC Treaty

(IV/32.681 — Cekacan)

(Only the German text is authentic)

(90/535/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulaton 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 Articles 4, 6 and 8 thereof,

Having regard to the notification made on 28 March 1988 by Akerlund & Rausing (hereinafter referred to as A & R) (Sweden) concerning a cooperation agreement concluded on 17 February 1987 with Europa Carton Aktiengesellschaft (hereinafter referred to as ECA) (Germany),

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

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

Whereas :

I. THE FACTS

(1) A & R applied for negative clearance or, alternatively, exemption under Article 85 (3) of the EEC Treaty of a cooperation agreement concluded with ECA concerning the use and marketing in certain Member States of the Community and in non-Community countries of a new method and a new type of packaging known as Cekacan. Cooperation lay essentially in the setting-up of a new company, Ceka Europe, of which 74 % was owned by A & R and 26 % by ECA.

A. The undertakings

(2) A & R is a Swedish group activities of which comprise packaging, chiefly for foodstuffs. It carries out research into new packaging systems based on materials composed of paperboard, aluminium and plastic, regarded as the new generation of packaging materials compared with traditional glass and metal.

A & R is owned by Swedish Match, a group recently purchased by the Swedish forestry group Stora.

In 1986, A & R achieved a turnover of ECU 250 million, whilst that of Swedish Match was ECU 1 500 million.

(3) ECA is a German company, the activities of which are chiefly in the paperboard and paperboard packaging sectors. It owns two paperboard mills, carton folding and printing plants and eight corrugated container plants in Germany, and one carton folding and printing plant in the Netherlands. ECA is owned by Consolidated-Bathurst Inc. of Canada, a group recently purchased by the US Stone Container Corporation.

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No C 293, 21. 11. 1989, p. 4.

ECA's turnover in 1986 was ECU 400 million, whilst that of Consolidated-Bathurst Inc. was in excess of ECU 1 500 million.

(4) Ceka International, a division of A & R, obtained ownership of the Cekacan patents, know-how and trade marks with its purchase in 1983 of the Swedish company Esselte Pac Aktiebolag (Esselte Pac), the inventor of the new methods.

(5) ECA contributed financially to the development of the machines based on the Esselte Pac inventions, having obtained in exchange the exclusive right to exploit this machine in Germany, under a so-called 'exclusive license' agreement signed on 1 April 1982. Following the purchase of Esselte Pac by A & R, ECA became the latter's licensee up until the signature of the cooperation agreement forming the subject of this application. In the event, however, of the cooperation agreement being terminated, an amended version of the 1982 agreement would come into force again.

B. The product and its marketing

(6) The product consists of a new type of airtight packaging made of paperboard laminated with plastic and aluminium materials, to be used chiefly for dry oxygen-sensitive foodstuffs, such as peanuts, powdered milk, cocoa, etc. The Cekacan packaging is a rigid box, consisting basically of a body, bottom and lid.

(7) The body and the bottom are made of the same materials : paperboard laminated with plastics and aluminium foil. The laminates are cut and printed beforehand according to customers' requirements and are in the form of sheets. The sheets are placed in the Cekacan machine where the body is formed and the base applied. The box is then filled by the usual methods, including the expulsion of air from the box, and the lid is then affixed in the Cekacan machine. The lid is composed of aluminium and plastics and comprises an easy opening mechanism. A second lid made out of plastic, enabling the package to be closed after use, is usually added for products in long-term use (e.g. for cocoa).

(8) The Cekacan package is designed to replace the usual aluminium, glass or plastic packaging, foil sachets and folded cartons lined with plastic. The chief characteristic of the Cekacan method is that it makes it possible to manufacture a paperboard package which is nevertheless completely airtight and does not requrie any inner lining.

The other features of the product are its potential to carry advertising, its ease of opening and of storage (stacking) before use, and of crushing after use. A used Cekacan package is a non-polluting, recyclable waste product.

As far as the parties concerned are aware, there is no similar product existing on the market. The Cekacan method, being a completely new product, has not, for the time being, any market share in the European Community, not even in Germany. The main competing firms are producers of tin cans and packages produced from aluminium, plastic and glass materials.

(9) Ceka International manufactures the Cekacan machines and the special lids. The lids and certain parts of the Cekacan machines are covered by patents (except in Portugal and Greece) which expire in 1997 in the Community countries.

(10) The 'laminates' are produced by A & R Flexible (division of Akerlund and Rausing) and can be manufactured by other firms having the necessary know-how. Europa Carton does not possess such know-how.

(11) The printing and cutting of the laminates can be carried out by any undertaking in the sector. A & R and ECA are competitors as regards the provision of this service.

(12) Cekacan packages are marketed through the lease or rental of Cekacan machines to customers and the possible supply of the products required to make the packages. Customers are, however, free to purchase the necessary materials from sources other than the supplier of the machines.

(13) Under the 1982 agreement, ECA had the exclusive right to exploit the method of and to purchase or hire Cekacan machines from the licensor for the German territory. The contract included a licence for the design rights and the trademarks.

ECA was bound to exploit the methods by leasing Cekacan machines to customers and supplying them with packaging materials. the lease/rental contract between ECA and customers included a so-called license to use the machines and sell products packaged in Cekacan containers. However, ECA was prohibited from leasing machines to customers outside the territory (Germany); all such enquiries from customers outside the territory were to be forwarded to the supplier. Nor could ECA re-lease machines returned by customers without informing the supplier thereof.

ECA used its best efforts to market the packages and could not market or produce any similar system to Cekacan without informing the supplier beforehand. Should it do so, the supplier could terminate the exclusivity.

The agreement was to remain in force until 31 December 1994, thereafter prolonged for periods of one year unless terminated by one of the parties.

C. Summary of the notified agreement

(14) The cooperation established by the notified agreement between the parties replaced the 1982 agreement. The parties set up, for an unspecified period, a limited liability company in Hamburg known as Ceka Europa, of which 74 % is owned by A & R and 26 % by ECA.

According to the articles of association, the company can be managed by one or two persons. In the latter case, the company is represented on a joint basis. The managers require the approval of the general meeting for operations of major importance exceeding the scope of normal business and involving a particular risk. The general meeting adopts decisions by simple majority, save in special cases where a qualified majority of 80 % of the initial capital is required. Special cases are the resolution on the annual budget, the resolution on the triennial commercial and financial plan, decisions on investments of more than DM 500 000, decision on the distribution of profits and on amendments to the articles of association.

(15) The new company will be responsible for marketing the method in question within a given territory comprising Germany, the Netherlands, Belgium, Luxembourg, France, Italy, Greece, Spain, Portugal, Austria and Switzerland.

Ceka Europe is responsible for marketing the product, leasing and installing Cekacan machines in customers' premises and, as sole distributor for A & R and ECA, for supplying the materials needed to manufacture Cekacan packages (if customers so desire) and providing customers with the necessary technical assistance.

(16) The two parties therefore undertake not to compete against Ceka Europe in the relevant territory by manufacturing and/or directly or indirectly selling the products under contract and/or Cekacan machines.

In the original version of the notified agreement. ECA was also prohibited from manufacturing or selling similar products or machines. Following discussions with the Commission, the parties agreed to abolish this clause.

(17) The materials and services necessary for the manufacture of Cekacan packages, for which Ceka Europe holds exclusive distribution rights from A & R and ECA, are divided up as follows under the agreement :

(a) machinery and spare parts (comprising installation and operator and maintenance services), lids and tapes ;

(b) laminates for body and bottom ;

(c) body and bottom printing and cutting.

Thus, to supply customers with the materials for Cekacan packages, A & R and ECA are obliged to go through Ceka Europe although in actual practice, deliveries are made directly by them.

(18) For each group, there are provisions concerning the supply of Ceka Europe.

(a) Ceka International supplies Ceka Europe with its total requirements for the products ;

(b) A & R Flexible has, until 1 January 1995, the right of first refusal to supply up to 100 % of Ceka Europe's requirements. After that date, Ceka Europe is free, in respect of new machine installations, to purchase products from other suppliers, although A R Flexible remains as preferred supplier ;

(c) under Article 6.3 of the main agreement, 'ECA shall up to 1 January 1995 have the right of first refusal to supply Ceka Europe with a large percentage of its requirements for printing and cutting' laminates for use as the bodies and bottoms of the packages manufactured in Cekacan machines. Thus ECA is entitled to supply a minimum quantity equal to 110 % of the volume actually supplied by Ceka Europe to German customers for use in Germany, provided that ECA's deliveries to customers outside Germany do not exceed 20 % of the total volume of blanks delivered to customers outside Germany ; Ceka Europe has the right to substitute orders for supplies addressed to ECA from countries other than Germany by orders of the same volume from Germany, whilst not exceeding 15 % of the total volume of supplies within Germany.

For the sale of its cutting and printing services for Cekacan packaging, ECA is limited in practice to Germany. However, if it receives orders, ECA is free to sell its services directly, without passing through Cekacan and in unlimited quantities, either to customers in Germany or to customers in other countries (passive competition).

After 1 January 1995, Ceka Europe will be entitled to obtain cutting and printing services from other suppliers for new machine installations, although ECA will remain a perferred supplier (6.3).

(19) The notified agreement, which entered into force on 1 March 1987, was concluded for an initial period of three years and is automatically renewed unless notice of termination of at least 10 months is served by one of the parties. As from 1 March 1990, the contract is prolonged for an indefinite period unless terminated by one of the parties subject to 10 months' notice. The agreement can also be terminated without notice if it proves impossible for shareholders to reach agreement on a matter defined as a 'major issue'.

(20) In the event of termination of the contract, cooperation between the parties is rearranged, under the 1982 agreement which is to be revived and amended; customers are shared out between ECA and A & R so that ECA is allocated customers domiciled in Germany and A & R takes over all other customers. A & R also has the right to purchase all ECA's shares in Ceka Europe.

(21) The planned amendments to the 1982 agreement included a new clause requiring ECA to purchase from A & R all its requirements in laminates for bodies and bottoms used for the products covered by the agreement.

Following discussions with the Commission the parties agreed to remove this clause.

(22) In the event of the revival of the agreement from 1982, ECA will be free to supply Cekacan packages to customers outside Germany, either actively, or passively (in response to unsolicited orders). Under the amended agreement, ECA will also have the right to respond to enquiries from countries other than Germany concerning the leasing of machines (passive competition).

(23) The Commission having made known its views, A & R and ECA agreed to make certain amendments to the notified agreement. The Commission was notified on 27 April 1989 of the duly amended agreement.

(24) On 4 January 1990 the Commission received observations of a technical nature from an interested party following the publication pursuant to Article 19 (3) of Regulation No 17. There was, however, no objection to a favourable decision being adopted by the Commission with regard to the notified agreement.

II. LEGAL ASSESSMENT

A. Article 85 (1)

(25) The setting-up of the new company, Ceka Europe, would not actually appear to constitute a project for the development of long-term cooperation between the two firms in respect of the use of the processes concerned but would rather appear to be aimed solely at cooperation in an initial phase for the purpose of introducing and marketing Cekacan technology in a number of European companies.

(26) ECA owns only a minority shareholding in Ceka Europe; according to the articles of association, this would empower it to block only really crucial decisions. The agreement was concluded for a period of only three years and may be freely terminated thereafter by either party, subject to 10 months' notice. In view of A & R's right to purchase the shares held by ECA in the event of the agreement being terminated, the situation is such that A & R may, from the third year, acquire full control of Ceka Europe, in which case ECA would revert to using the processes in German territory under the terms of the 1982 agreement.

(27) Moreover, the parties are also entitled, under the clause on a 'major issue', to terminate the agreement immediately without observing the 10 months period of notice. In addition, even in the present situation, it may be considered, first, that A & R effectually controls the new company, and secondly, that ECA's cutting and printing of laminates for use in the manufacture of Cekacan packaging will be largely limited to Germany. It may be concluded, therefore, that the object of the operation in question does not go beyond what is required to introduce Cekacan technology on a wider market.

(28) It is not surprising that A & R should wish to benefit from the support of ECA, which, having contributed to the cost of developing the technology, already has experience of using the processes in question in Germany, rather than try to introduce those processes on a wider market on its own.

(29) Furthermore, it is only normal that ECA should give up its exclusive rights in German territory in return for a share in Ceka Europe and a guarantee that the volume of its cutting and printing services for Cekacan applications will be maintained, particularly since it will retain the option of terminating the cooperation agreement and reclaiming its exclusive rights at short notice.

(30) Outside the framework of the 1982 agreement the parties cannot be considered as direct competitors for the purposes of using Cekacan processes or producing the basic materials (laminates) for Cekacan packaging. None the less, they must be considered as potential competitors in the use of methods similar to Cekacan methods and producing and selling laminates.

(31) For ECA is a major producer of corrugated and flexible paperboard. In order to be able to produce paperboard laminated with plastics and aluminium foil, it would merely need to acquire the requisite know-how and make the necessary investments or, alternatively, link up with a firm in possession of such know-how. The same applies to the use of packaging systems which could replace the Cekacan packaging.

(32) In any event, it is clear that A & R and ECA are direct competitors as regards the cutting and printing of laminates used in the production of Cekacan packages.

(33) Thus, despite the amendments introduced by the parties at the request of the Commission, the new cooperation established between the parties as a result of the setting up of Ceka Europe is likely to restrict competition as follows :

(a) *Exclusive rights clauses*

(34) A & R and ECA undertake to use the processes in the territory concerned only through Ceka Europe and will consequently refrain from engaging in competition against that firm in the area assigned to it. Within the framework outlined, those clauses do not have a restrictive effect as far as relations between A & R and Ceka Europe are concerned, and should be deemed to be intra-group relations.

(35) They do, however, have a restrictive effect on ECA in that they prevent it from freely developing its commercial policy as regards use of the processes in the territory assigned to it (Germany). The setting-up of the new company has in effect removed an independent competitor within the common market. ECA will no longer be able to maintain business relations with German customers or win new customers to whom it could hire out machines or provide cutting and printing services.

(b) *Supply clauses*

(36) Materials and services required in the production of Cekacan packaging are supplied by Ceka Europe, as the parties' sole distributor.

The clauses which require Ceka Europe to purchase exclusively from A & R and Ceka International have no direct restrictive effects on competition between those companies as they must be regarded as intra-group agreements.

(37) Where ECA is concerned, those clauses inevitably have a restrictive effect, because ECA is a potential competitor for the manufacture and sale of the materials covered by the clauses, even though they relate either to products which are partly patented, as in the case of Cekacan machinery, or to highly specific products which ECA does not manufacture and does not have the necessary know-how to manufacture (as in the case of the laminates used for the bodies and bottoms of packages). The clauses remove any incentive for ECA to become involved in the manufacture of such materials (laminates in particular), since it would not be able to sell them for Cekacan applications. That also restricts its competitive position in relation to third parties manufacturing such materials, which are free to market them to Cekacan customers.

(38) The object of the clauses requiring the purchase of certain minimum quantities of printed and cut laminates from ECA is not to establish any kind of specialization between the parties but is merely to guarantee that ECA maintains the volume of sales of cutting and printing services for Cekacan applications which it recorded on the date of the Agreement in Germany.

(39) Nevertheless, in restricting the volume of ECA's supplies outside German territory (dual restriction : first, to 10 % of the quantity supplied by Ceka Europe in Germany, and secondly, to 20 % of the quantity supplied by the parties outside Germany), the clause leads to a restriction of competition between ECA and A&R in the services sector, although that restriction is confined to sales in respect of applications for the manufacture of Cekacan packages within the context of the cooperation agreement through the intermediary of Ceka Europe. ECA's competitive position in relation to third parties which are free to supply cutting and printing services to Cekacan customers is also undermined, even though ECA is in theory free to meet orders for services which it receives direct in cases where customers refuse to go through Ceka Europe.

(c) *Revival of the 1982 agreement*

(40) The 'main agreement' clause which provides for the revival of the 1982 agreement also makes provision for a share-out of customers between A&R and ECA aimed at reverting to the situation prevailing prior to the setting up of Ceka Europe. This share-out is guaranteed by the agreement, which assigns ECA the territory of Germany (exclusive rights) and prohibits it from using the processes concerned (hiring of machinery) outside the territory assigned, except in response to an unsolicited request.

(41) Such a share-out of customers and maintenance of ECA's exclusive rights in German territory result in restrictions of competition between ECA and A&R. The business relations of A&R and Ceka Europe with such customers will be interrupted since those companies will be able to supply only ECA with machines in German territory and ECA will no longer be able to propose leasing such machines outside Germany.

(42) ECA is not actually prohibited from using similar processes. It is merely obliged to inform the supplier beforehand if it decides to sell similar processes. This obligation does not constitute a substantial restriction of competition since termination of exclusive rights will have the effect of promoting competition and loss of exclusive rights will prevent ECA from using another method only if it has reason to doubt the success of the new product, which it would be in a good position to launch.

B. Article 85 (3)

(43) The agreements notified fulfil the conditions necessary for the application of Article 85 (3) of the Treaty.

(44) The agreements will help to improve production and distribution of the products concerned and to foster technical progress in the foodstuffs packaging sector. Cekacan is a new product representing a substantial technological innovation which could reach a key position on the market concerned. Cekacan packaging has certain advantages over traditional methods and meets both the preferences of a section of consumers and a market requirement. The object of the agreements is to extend throughout the common market the use of this new packaging, sales of which were initially confined to Germany, through cooperation between the producer of the machinery and packaging materials and the firm which had been responsible for exploiting the processes in Germany. Introducing the process in other common market countries would be much more difficult if A&R decided to undertake the operation alone without the cooperation of ECA, a Community firm with experience in the paperboard and paperboard packaging sectors which already has the benefit of its experience in introducing the processes in Germany. The cooperation between the two firms should result in a more rapid increase in the number of Cekacan customers in the countries covered by the cooperation arrangement and, consequently, it will be possible for the new packaging process to be used everywhere in the best conditions as regards the provision of supplies and assistance.

(45) Users — the food manufacturer packaging its products and the final consumer buying the packaged products — will receive a fair share of the benefits deriving from the agreements. Firstly, both already benefit from the fact that a new product, which must be regarded as an appreciable technological innovation, is available on the market. Secondly, competition on the market in question (glass, plastic, metal, etc. packaging for dry oxygen-sensitive foodstuffs) will become keener on account of extensive marketing of the new methods, with foreseable effects on packaging prices.

(46) The agreements notified do not impose on the firms concerned any restrictions which are not essential in order to achieve the objectives laid down :

— Centralization by Ceka Europe of operations involving the hiring and maintenance of machines and supplies of basic materials to customers is necessary in order to pursue a satisfactory and rational commercial policy and strategy. Since the supply of packaging materials is an essential component in the operation of the packaging method, the fact that ECA is prohibited from proposing its cutting and packaging (or, in theory, laminate) services direct to Cekacan customers should not be considered excessive. In any case, it remains free to conduct passive sales.

— The clauses governing the provision of supplies to Ceka Europe by the parent companies (A&R and ECA), which will in practice restrict ECA's sales of its cutting and printing services to Germany and will at the same time guarantee ECA a minimum volume of such sales for Cekacan applications, must also be considered necessary. Without such restrictions, A&R would not have entered into a cooperation project with ECA but would have embarked alone on the process of introducing its technology in other countries, with all the extra costs and difficulties which that would have entailed. Without those guarantees, ECA would not have

agreed to give up the position which it held under the 1982 agreement, which guaranteed its sales in German territory. Furthermore, the option granted ECA of meeting orders from customers outside Germany who refuse to go through Ceka Europe, and exports of packaged finished products will also indirectly guarantee ECA's sales for Cekacan applications outside Germany.

— The possibility of terminating the cooperation agreement, as a result of which the licensing agreement would be reactivated and customers shared out between A&R and ECA, is a necessary safeguard allowing the two contracting parties to enter into the envisaged cooperation without too many risks. A&R may thus benefit from ECA's experience and collaboration in exploring wider markets for its methods without losing the possibility, as the holder of the patents and know-how and the manufacturer of the machinery and laminates, of maintaining control of the operation and, at the end of the initial three-year period, returning ECA to its position under the 1982 agreement and resuming sole responsibility for use of the processes in common market countries other than Germany.

In addition, ECA maintains the possibility of reverting to its previous position and regaining its exclusive rights in German territory should that prove preferable from an economic point of view; in that case it would have the option of competing with A&R outside the territory allocated, either passively as regards machine hire and maintenance, or both actively and passively as regards sales of packaging materials and of cutting and printing services.

(47) Since the market involved is the market for all packaging for dry oxygen-sensitive foodstuffs, including packaging in other materials such as glass, metal and plastic, the agreements cannot afford firms the possibility of eliminating competition in respect of a substantial portion of the products in question.

C. Articles 6 and 8 of Regulation No 17

(48) The agreement notified by A&R on 28 March 1988 contained a number of provisions which did not fulfil the conditions for granting an exemption, in particular those provisions relating to restrictions of competition, exclusive purchasing obligations and territorial protection.

As a result of the Commission's comments, the parties agreed to make a number of amendments to their agreement. Consequently, the date on which the exemption may come into effect is that of the notification of the amended agreement.

(49) In this case, in view of the highly competitive nature of the market concerned and the characteristics of the cooperation agreement, it would be appropriate to grant an exemption for a period of 10 years,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the Treaty, the provisions of Article 85 (1) of the Treaty are hereby declared inapplicable for the period 27 April 1989 to 26 April 1999 to the cooperation agreement concluded between A&R and ECA on 17 February 1987.

Article 2

This Decision is addressed to Akerlund & Rausing, Box 22, S-22100 Lund, Sweden and Europa Carton Aktiengesellschaft, Spitaler Straße 11, D — 2000 Hamburg 1.

Done at Brussels, 15 October 1990.

For the Commission

Leon BRITTAN

Vice-President