COMMISSION DECISION

of 2 December 1985

relating to a proceeding under Article 85 of the EEC Treaty (IV/30.971 – BP/Kellogg)

(Only the English text is authentic)

(85/560/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

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 Greece, and in particular Articles 6 and 8 thereof,

Having regard to the notification submitted on 1 June 1983 by BP International Limited and the MW Kellogg Company concerning the joint development of a design for the construction of ammonia-making plant,

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

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

Whereas:

I. FACTS

The notification

1. On 1 June 1983 the Commission was requested by BP International Limited and the MW Kellogg Company to exempt under Article 85 (3) certain of their arrangements.

2. These arrangements concern the joint development of a design for the construction of ammonia-making plant.

The parties

3. BP International Limited (BP) is a company within the BP group. The principal business of BP is oil production, refining and trading. In the context of this business, BP has undertaken research and development into catalysts. BP is also a minor producer of ammonia. The MW Kellogg Company (MWK) is a substantial American process plant designer and contractor.

The product and the market

4. The goods or services affected by the arrangements are plant for the production of ammonia, designs for the construction of such plant know-how useful for the operation, construction, design and development of such plant, and catalyst for use in such plant.

5. Ammonia plant design is constantly evolving. There are a large number of designers of and contractors for such plant (at least 10 well-known names, among them MWK). MWK was responsible for the design of about 20 % of present capacity in western Europe.

The parties' interests in ammonia plant development

6. In the course of their R & D on catalysts for refining, BP discovered a catalyst possibly effective for the production of ammonia and have done a number of years further research on this. BP wish to exploit this both in plant operated by themselves and in plant to be sold to other ammonia producers. The catalyst cannot be used commercially until a process that will make use of it has been developed with the cooperation of BP's research and development staff. BP have no experience in the design, construction or commercial exploitation of designs for such a process. BP has, therefore, sought a partner. MWK has a small process plant development department which does not undertake research into catalysts, but which is willing to cooperate with BP's research and development staff in the development of such a process. They have, therefore, entered into the following arrangements.

The arrangements

7. BP and MWK will cooperate in the development of designs for the construction of ammonia plant using

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No C 224, 4. 9. 1985, p. 2.

BP's catalyst. A joint development agreement provides that each party shall remain the owner of their prior know-how, shall own severally (taking out patents as applicable) know-how developed by each individually, and shall own jointly any jointly developed know-how. Each has an irrevocable world-wide non-exclusive right to use and sub-license joint patents.

8. In pursuance of this agreement BP accepts the following restrictions:

8.1. not to disclose information about the catalyst for other development projects in the field of ammonia production;

8.2. not to supply the catalyst during the life of the joint development agreement (other than to MWK's customers for the new process, to companies in the BP group or to companies that might manufacture the catalyst) without MWK's consent (this restriction is the means by which BP gives MWK a limited exclusive right to exploit any new design);

8.3. to use its best endeavours, but not amounting to an absolute obligation to ensure that, if the first commercial plant using the new process for the production of ammonia is built for the BP Group, then the BP Group will use MWK as the design contractor.

9. MWK accepts the following restrictions:

9.1. not to carry out independently, or in cooperation with third parties, other research and development in the field of graphite-based ammonia synthesis catalysts;

9.2. not to spend more on developing other ammonia processes (with the exception of those using the traditional iron-based catalyst) without informing BP (this together with the next two restrictions constitutes the means by which BP is put on notice that it might wish to exercise its right to find another partner should MWK not promote the new process actively);

9.3. not to commercialize any new ammonia process using iron-based catalysts likely to be more commercially attractive than the process using BP's catalyst without informing BP;

9.4. not to bid for ammonia plants other than by way of offering the jointly-developed process without informing BP.

10. The joint development agreement contains the principles of a licensing agreement whereby MWK will exploit the process by licensing the right to use it to the owners or operators of plant, and pay BP a percentage of the fee it receives in respect of such licences. The joint development agreement contains provisions for MWK's fee to be fixed as a function of the cost saving that use of BP's catalyst is expected to make possible over existing designs of plant.

11. The duration foreseen for the joint development agreement is about six years – that is to say about a year after the first commercial plant using the catalyst becomes operational (the duration is defined as a fixed number of years following alternative stages in the development). There are provisions for earlier termination in a wide variety of circumstances, including project failure or if MWK develop a more attractive process. The licensing agreement is to last for 15 years, renewable.

The parties' submissions

12. The parties believe that the successful development of the process will represent a considerable technical advance making possible substantial energy savings which, in their turn, should be reflected in lower ammonia prices.

13. The parties submit that BP and MWK are not competitors and would be unlikely to become competitors.

14. They further submit that the development requires the commitment of substantial resources by both of them, and requires BP to divulge to MWK the fruits of many years of costly research effort. Restrictions, that otherwise would fall under the prohibition of Article 85 (1) of the Treaty, are necessary to bring these about. Without accepting the restriction at 9.1 above, MWK could not devote sufficient resources to the joint development nor ensure that any other firm with which it might cooperate did not benefit from the fruits of BP's earlier research. The restrictions at 9.2 to 9.4 above are the minimum necessary to allow BP to exercise its option to exploit the process without MWK should MWK not develop or market the new process actively. The restrictions at 8 above are the minimum necessary to allow MWK an adequate return from a successful development and follow earlier Commission precedents of what may be exempted in such cooperations.

Following the publication of a notice pursuant to Article 19 (3) of Regulation No 17, the Commission received no comments from interested third parties.

II. LEGAL ASSESSMENT

15. (a) The restrictions listed at 8 and 9 above, and more particularly the restriction on the supply of the catalyst by BP and the restrictions on the development or sale of other processes by MWK fall under the prohibition of Article 85 (1) since their freedom of commercial decision is thus restricted; if the product is succesfully developed, the restrictions could have an appreciable effect upon trade between Member States because ammonia is produced in the majority of those States;

(b) The agreement is not exempted by virtue 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 [1], since several of its clauses (see paragraphs 8.2, 9.3 and 9.4 above) go beyond the scope of the Regulation in so far as they give rise to restrictions on the exploitation of products and processes which have not been jointly developed by the parties to the agreement and which are not covered by Articles 4 and 5 of the Regulation.

(c) The successful development of the process will promote technical and economic progress, particularly energy saving, from which consumers will benefit; the restrictions listed appear reasonable and necessary for this purpose for the reasons given in paragraph 14 above and the undertakings will still be faced with substantial competitors (see paragraph 5). A decision pursuant to Article 85 (3) may, therefore, be taken.

(d) The foreseen duration of the joint development is about six years (see paragraph 11 above). The arrangements were notified to the Commission on 1 June 1983. It appears appropriate, therefore, pursuant to Articles 6 (1) and 8 (1) of Regulation No 17, to adopt such a decision for a period of 7 years with effect from that date,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable for the period from 1 June 1983 to 31 May 1990 to the joint development and related agreements for the construction of ammonia-making plant notified to the Commission on 1 June 1983 by the parties named in Article 2.

Article 2

This Decision is addressed to:

1. BP International Limited,
Britannic House,
Moor Lane,
UK-London EC2Y 9BU.

2. The MW Kellogg Company,
3 Greenway Plaza East,
Houston,
USA-Texas 77046.

Done at Brussels, 2 December 1985.

For the Commission
Peter SUTHERLAND
Member of the Commission

(1) OJ No L 53, 22. 2. 1985, p. 5.