

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 23 November 1977

relating to proceedings under Article 85 of the EEC Treaty (IV/29.428 : GEC-Weir Sodium Circulators)

(Only the English text is authentic)

(77/781/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof,

Having regard to Council Regulation No 17 of 6 February 1962⁽¹⁾, and in particular Articles 4, 6 and 8 thereof,

Having regard to the notification made to the Commission on 14 March 1977 pursuant to Article 4 of Regulation No 17 of an agreement made on 21 March 1977 and amended on 30 September 1977 by The General Electric Company Limited of London, United Kingdom, and among other parties The Weir Group Limited of Glasgow, United Kingdom, which notification included in the alternative an application for negative clearance,

Having regard to the Commission Decision of 18 July 1977 to initiate proceedings in this case,

Having heard the undertakings concerned in accordance with Article 19 (1) of Regulation No 17 and with Commission Regulation No 99/63⁽²⁾,

Having regard to the summary of the agreement published pursuant to Article 19 (3) of Regulation No

17 in a Notice in the *Official Journal of the European Communities* No C 188 of 6 August 1977, in respect of which Notice no observations from third parties have been received by the Commission,

Having regard to the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions delivered pursuant to Article 10 of Regulation No 17 on 20 October 1977,

I. THE FACTS

1. Subject matter

This case concerns a joint venture agreement entered into for the purposes of joint development, production and sale by the parties of sodium circulators and for the allocation between the parties of work for the development and production of such circulators.

2. The parties

(a) The signatories of the joint venture agreement, all of which are incorporated in the United Kingdom, are :

(i) Weir Pumps Ltd,

(ii) The Weir Group Ltd which owns and controls Weir Pumps Ltd,

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

(iii) The English Electric Company Ltd, acting through its subsidiary company GEC Reactor Equipment Ltd,

(iv) The General Electric Company Ltd which owns and controls the English Electric Company Ltd.

(b) For the purposes of this case and where appropriate, the companies mentioned in (a) (i) and (ii) above are herein collectively called 'Weir' and the companies mentioned in (a) (iii) and (iv) above are collectively called 'GEC'. The expressions 'Weir' and 'GEC' also include, where appropriate, respectively the other subsidiary companies of The Weir Group Ltd and of the General Electric Company Ltd and Weir and GEC are taken to be and are herein referred to as the two parties to the joint venture agreement.

(c) The Weir Group Ltd has a paid-up equity capital of £ 6 234 000. It has interests, partly through its subsidiary companies, in the development, manufacture and sale of *inter alia* pumps, steel foundry products, in particular, high precision steel castings and of desalination plant and associated products, hydraulic and pneumatic sealing systems and aircraft equipment.

The Weir Group Ltd has subsidiary companies in the United Kingdom, in other Community countries and elsewhere.

The total consolidated turnover of Weir during 1976 was £ 138 121 000.

(d) The General Electric Company Ltd has a paid-up equity capital of £ 137 174 549. It has interests, partly through its subsidiary companies, in the development, manufacture and sale of electrical and electro-mechanical machines and products, notably in the field of power generation and distribution and also in industrial engineering (including pumps), telecommunication, aircraft instrumentation and consumer products. GEC is a user of foundry products and of high-precision steel castings.

The General Electric Company Ltd has numerous subsidiary companies in the United Kingdom, in other Community countries and elsewhere.

The total consolidated turnover of GEC for the year ended 31 March 1977 was £ 2 054 600 000. A substantial proportion of this turnover, namely some £ 306 000 000, was attributable to sales and services in the power engineering field, including sales of and services in relation to equipment for nuclear reactors.

3. The joint venture agreement

(a) The agreement was entered into on 21 March 1977 and notified to the Commission on 14 April 1977. Its stated purposes are : (i) to establish a joint venture between the parties ; (ii) for the joint venture to obtain an award from the Nuclear Power Company (Risley) Ltd ('NPC') of a development contracts ('development contract') for the development of sodium circulators for commercial fast reactors to be constructed in the United Kingdom, subject to the considerations outlined in 4 (g) of I below ; and (iii) thereafter to develop and, following successful development, to manufacture and sell sodium circulators in joint venture between the parties. NPC is controlled and wholly owned by the United Kingdom National Nuclear Corporation Ltd and pursues its activities in accordance with government policies. [The National Nuclear Corporation Ltd is owned as to 35 % by the United Kingdom Atomic Energy Authority (a wholly government-owned and controlled corporation), as to 35 % by British Nuclear Associates Ltd (owned by industrial companies with interests in the power engineering field) and as to 30 % by The General Electric Company Ltd.]

(b) The agreement provides also for the attribution to the parties of specific areas of interest to each, from which each is to contribute to the joint venture its own specialized expertise, work and components ; Weir primarily from within the field of pump technology and hydraulics and GEC primarily from within the field of nuclear reactor technology, instrumentation and mechanical and electrical engineering. Following notification and on the initiative of the Commission, the parties have on 30 September 1977 amended certain provisions of the agreement which relate to these separate areas of interest. The relevant provisions and amending provisions are referred to in 3 (e) (vi), (vii) and (ix) of I below.

(c) The sodium circulators which are the subject of the agreement are defined as centrifugal mixed and axial flow sodium circulators for primary and secondary circuits for use in commercial fast reactors. Sodium circulators are more particularly described in 4 of I below.

(d) The joint venture arrangements between the parties are made wholly by agreement and do not depend for their validity or enforcement on the joint control or ownership of a distinct incorporated company. However, the contractual disposi-

tions made by the parties have all the most essential characteristics of a joint venture, commonly so called; in that they provide for the unified, joint and equal control by the parties of all their activities relating to sodium circulators, including planning, financing, research, development, construction and sale.

(e) The relevant terms of the agreement are to the following effect:

- (i) Each party takes a half share in all the assets, profits, property, losses and liabilities of the joint venture.
- (ii) The parties make available to the joint venture the pre-existing and future documents, information, designs, property, assets and rights which are or will be in their possession and concern the sodium circulators to be developed for NPC. The parties each license the joint venture non-exclusively to use their applicable pre-existing information and inventions whether patented or not which concern sodium circulators. All resultant expenses are chargeable to the joint venture.
- (iii) All necessary financing of the joint venture is to be provided by the parties in equal amounts and on equal terms as to interest, repayment or otherwise. All surplus funds from time to time available to the joint venture are to be paid out equally to the parties and on like terms.
- (iv) The joint venture is controlled by a committee on which the parties are equally represented. Decisions must be unanimous. The joint venture is managed by a manager appointed by the committee.
- (v) Agreed numbers of each of the parties' personnel are seconded to the joint venture, but remain on the original employing party's payroll and under its administrative control.
- (vi) The joint venture is to have total responsibility for the design, development and supply of sodium circulators. All rights in any technical information, designs and patents which results from the development or manufacture of sodium circulators pursuant to the agreement are, subject only to any third-party rights, to belong to the joint venture.

According to the original notified text of the agreement, the necessary engineering and production work, whether as part of the development or of the subsequent manufacture, was allocated directly to be carried out in pre-established distinct parts, by the joint venture itself and under subcontract from the joint venture, by each of the parties. Following amendment as requested by the Commission, the agreement now attributes a field of primary responsibility to each of the parties, but without rigidly pre-determining exclusive areas of work for each party for the duration of the agreement. The amendment leaves more open a possible future division of contributions, to be decided in the light of any changes in circumstances. The tasks which are within the field of primary responsibility of Weir include in general the hydraulic work and components; those within the field of GEC, the mechanical and electrical work and components.

- (vii) The text of the agreement as originally notified also provided that, if one party was unwilling or unable to perform a development or production task subcontracted to it by the joint venture, then the other party should be given a first option of refusal to undertake that task. On the initiative of the Commission the parties have modified the relevant provisions, to the effect that in such circumstances of unwillingness or inability of one party, the other party is to be given an opportunity to undertake the task in question. Accordingly, the text as amended now provides better openings for subcontracting such tasks also to qualified third parties.
- (viii) The joint venture work is carried out at factories and facilities of each of the parties but so that, as far as sodium circulators are concerned, each party becomes knowledgeable and gains experience in the field of expertise of the other. Both parties fully exchange between each other all experience they gain during the course of the work.
- (ix) The parties undertake for the duration of the development contract awarded by NPC and for five years thereafter not to engage in activities which are competitive with the stated purposes of the joint venture in the development, manufacture or supply of sodium circulators. This non-competition provision does not continue in effect following expiry of the

agreement or of the joint venture. While it is in force, the restriction is subject to either party's freedom to act independently, if a potential customer declines to contract with the joint venture, or if the other party declines to support the joint venture in the acceptance of a contract for sodium circulators. The notified text of the agreement provided that in either of such two events, the party which accepted the contract in question would however subcontract to the other party the tasks which had been apportioned to that other party under the original terms of the agreement. After discussions with the Commission, the parties amended the agreement to the effect that in these circumstances the party which accepted the contract would give to the other an opportunity, but not the absolute right, to undertake the work within the other's field of primary responsibility. The amended text is more flexible in affording greater possibilities of having such work performed also by qualified third parties.

- (x) If one of the parties receives a contract for the manufacture of sodium circulators in the circumstances (referred to in 3 (e) (ix) above) in which a customer has declined to support the joint venture, then the party which receives the contract is to be entitled to all necessary licences on terms to be established between the parties or, in the event of disagreement between them, to be fixed by arbitration.
- (xi) Subject to provisions for early termination due to breaches of agreement, liquidation, impossibility of performance or similar reasons, the agreement and the joint venture are to continue for the duration of the development contract awarded by NPC and thereafter for such additional period as is required to perform any orders for sodium circulators accepted by the joint venture within 10 years from the date of the agreement (21 March 1977). This additional period is not expected to exceed, at the most, a further two years beyond the 10-year term. The total duration of the agreement and the joint venture, unless renewed, would accordingly be unlikely to extend beyond mid-1989.
- (xii) An order from NPC offered to the joint venture for the first phase of the development contract is dated 31 May 1977. Together with its succeeding phases, the

development contract is estimated by the parties to continue for a period of about seven years, that is to say, until about mid-1984.

- (xiii) On termination of the agreement and the joint venture each party is to have unrestricted non-exclusive licences with the right to grant sub-licences, for the independent development, manufacture and sale of sodium circulators developed by the joint venture. These licenses are to be subject to payment between the parties of royalties, at rates which will reflect the fair commercial value of such licences. In the event of disagreement, the rates are to be settled by arbitration.
- (xiv) All disputes arising out of the agreement which cannot be amicably settled between the parties are to be referred to arbitration.

4. Sodium circulators : their development, manufacture and sale

- (a) The function of sodium circulators, when developed, manufactured and installed, is to pump and circulate liquid sodium coolant through the high-power density cores of fast nuclear reactors which are constructed for the generation of electric power. The core of a reactor is its central region where the nuclear chain reaction takes place at very high temperatures. Water or organic fluids were adequate as coolants for more traditional types of reactor, but in fast reactors these would have to be kept at such high pressures that a sudden depressurization could release very large amounts of energy, the effects of which could be highly damaging. This would be accompanied by a sharp drop in cooling ability. Sodium is likely to prove the most useable of the known effective coolants for the compact cores of fast reactors since its use avoids problems of high-pressure containment and since it has a sufficient heat capacity to maintain a high rate of heat removal by natural convection. However, the use and circulation of sodium as a coolant present considerable technological difficulties.
- (b) The performance characteristics and design features of sodium circulators are determined in precise detail by the mode of operation of the particular reactor in which they are to be installed. Accordingly, sodium circulators may need to be developed with different configurations and to different specifications for different reactors. Their

development and construction put severe and varied demands on the expertise and resources of manufacturers. The relevant disciplines include metallurgical, high-precision engineering, hydraulic and control and measurement techniques. The circulators need to be machined to fine tolerances of accuracy to push the coolant against the resistance of its natural flow within the circuits. The specified reliability of performance, so as to avoid, for example, pump seizure and problems associated with cavitation in the coolant, may have to be maintained for some 25 years of operation.

- (c) It is likely, subject to the considerations outlined in 4 (g) of I below, that an initial commercial fast reactor will be built in the United Kingdom, with a start date in or about 1980. Such a reactor would have an output of about 1 300 MW and would require sodium circulators of the type which are the subject of the development contract for its primary and for its secondary cooling circuits. The required total pumping power, shared between the primary and secondary pumps, will be in the region of 50 MW. The total production cost of these circulators is likely to be of the order of £ 20 million, with a prior development cost of some £ 10 million.
- (d) The period to substantial completion of development of these circulators would be likely to last some eight years and extend for some time, possibly one or two years, beyond the formal duration of the development contract awarded by NPC (referred to in 3 (e) (xii) above) and well into the production phase. It cannot be reliably predicted that even this period would mark the end of an exhaustive and definitive development because of the likely continuing need to assess and by re-design to remedy any problems which may become apparent during testing, production or early operation of the prototype circulators. Accordingly, the provisions of the agreement, so far as they concern the production and other post-development activities of the parties, are unlikely to be capable of full implementation before about mid-1985, that is to say, less than four years, at the earliest, before the expected expiry of the agreement in 1989.
- (e) Some 25 Community based companies are known to specialize in equipment for sodium circuits and in circulating pumps for nuclear reactors⁽¹⁾. These companies include GEC which prior to the agreement had supplied pumps and sodium circulators for a now existing experimental fast reactor in the

United Kingdom. Weir also has extensive experience in the supply of pumping equipment *inter alia* for fast reactor power stations and had earlier tendered for fast reactor sodium pumps. Fast reactors which are, or are to be, equipped with sodium circulators are in experimental operation or planned in the United Kingdom, France, Italy, the Netherlands, the Federal Republic of Germany, the United States, Japan and the USSR. All these countries have sodium circulator systems at some stage of development, but there is little publicly available information on the degree of achievement which has been reached in the different countries. There is, however, a significant potential for competition within the Community in respect of sodium circulator technology.

- (f) Certain features of sodium circulators which had previously been supplied by GEC for experimental fast reactors in the United Kingdom were found to require further extensive development for use in any full-scale commercial fast reactor system. Accordingly, the United Kingdom Atomic Energy Authority and NPC caused GEC to undertake further development work together with a specialist pump supplier, with a hydraulic development capability, namely Weir. This cooperation was approved by the United Kingdom Atomic Energy Authority and is to involve a 'programme of re-design, development and testing to be carried out over a period of several years'⁽²⁾.
- (g) Fast reactors are at a relatively early stage of development. National programmes have been hesitant and subject to interruptions. This has been due to uncertainties over design solutions in a rapidly developing technology, delays in obtaining licences from public authorities, social and political considerations and technical problems and failures. So far as the United Kingdom is concerned 'There is ... no present [firm] commitment to [a fast reactor] programme. The next major step in their development in this country and others is the design and construction of a first commercial scale fast reactor ... which is needed in order to establish, among other things, whether the safety problems can be adequately resolved for commercial exploitation to be feasible. This development could well take a decade or more ...'⁽³⁾. The authorities in the United Kingdom are currently considering the plans for such future development which may be subject to the outcome of an official inquiry before definitive decisions on full-scale commercial fast reactor programmes are taken.

⁽¹⁾ The Nuclear Power Industry in Europe, 1974 (Deutsches Atomforum e.V.).

⁽²⁾ United Kingdom Atomic Energy Authority Statement, 14 June 1977.

⁽³⁾ Paragraph 516, Royal Commission Report (United Kingdom) Sixth Report: Nuclear Power and the Environment. September 1976. Cmnd. 6618.

II. APPLICABILITY OF ARTICLE 85 (1)

Article 85 (1) of the Treaty prohibits as incompatible with the Common Market all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market.

1. The parties are undertakings and the notified agreement is an agreement within the terms of Article 85 (1).

2. The agreement restricts competition as follows :

(a) (i) Even in the absence of express provisions, the creation of a joint venture generally has a notable effect on the conduct of parent parties who have a significant holding in the joint venture. Within the field of the joint venture and in related fields such parties are likely to coordinate their conduct and be influenced in what would otherwise have been their independent decisions and activities. Where the parent parties are actual or potential competitors, their participation in a joint venture is accordingly likely to impair free competition between them, regardless of the existence of explicit restrictive provisions to that effect. The fact that a joint venture is not, as it is not in this case, a distinct incorporated company, but is created solely by contract, is not a difference of substance, but one of legal form only and does not affect the foregoing conclusions.

(ii) Prior to the agreement which created the joint venture in this case both parties were active and had experience relating to the development and manufacture of pumping equipment for fast reactors. (See 4 (e) of I above.) Weir had supplied pumps other than sodium circulators for operations in fast reactors and had tendered for an earlier design of sodium circulators. GEC had developed and supplied electro-magnetic and rotating pumps as sodium circulators built to a previous specification and GEC has been and is an important supplier of other major reactor equipment and of power plant in general. Each party has considerable background experience within the field of the joint venture and technological versatility in related areas. Each has a considerable industrial base and financial resources and is established through subsidiary companies throughout the Community. Prior

to the agreement both parties were therefore competitors for the development and production of the sodium circulators which are within the field of the joint venture. Accordingly, the cooperation between them in the field of the joint venture reduces competition.

(iii) The notified agreement exemplifies and strongly reinforces the given restrictive effects referred to in 2 (a) (i) of II above. It confers equal control of the joint venture upon each party so that neither can make independent business decisions on any matter of importance relating to sodium circulators. The effect of the joint venture and of the agreement is to change each party's position of autonomy in this respect to one of joint activity concerning planning, financing, research, development, production and sale and each party abandons its individual freedom of action in relation to these activities.

(b) As a result of the foregoing, two parties who were, prior to the agreement, independently available for the development, manufacture and sale of sodium circulators are for the duration of the agreement replaced by one ; namely the joint venture. While the agreement is in force, customers' demand will therefore be met by the designs and prices of the joint venture, rather than the possibility of alternative designs and prices from the parties independently.

(c) Parent parties will not in general compete with the activities of joint ventures in which they hold substantial stakes, even if they are contractually free to do so. In this case in particular, neither party would, within the context outlined in 4 of I above, be likely to devote its resources separately to an individual development effort over and above that required by the joint venture. This effect is here made explicit and ensured by an agreed express non-competition clause. Save in the exceptional circumstances referred to in 3 (e) (ix) of I above, neither party is free to act independently or to enter into agreements with third parties in relation to any activity which is competitive with the stated purposes of the joint venture. Neither party is available, save in exceptional circumstances, to cooperate independently in the development of sodium circulators with third parties, to disclose technical information to third parties for this purpose or to tender independently to customers for the supply of sodium circulators.

(d) The sharing between the parties of all development results has the effect that while the agreement is in force both parties maintain the same level and character of sodium circulator technology, so that neither party can obtain a technological advantage over the other in relation to sodium circulators or applicable production methods.

(e) In circumstances such as in this case, the existence of a joint venture in one field is likely to provide opportunities and inducements to parent companies, who each have related interests also in other areas, to enlarge their common activities and impair free competition between them in those other areas. Here each of the parties has highly diversified industrial interests. Apart from their joint activity in the field of the joint venture, the parties have other overlapping, related and competitive activities. By way of examples, both are manufacturers of pumps other than sodium circulators, specifically for power engineering and oil-pipeline applications, and, as to foundry products and high-precision steel castings, Weir is a major producer and supplier and GEC is a major user. The parties have therefore not only horizontally competitive but also vertically related activities in other areas. Senior employees of both parties are seconded to the joint venture, but remain on the original employing party's payroll and under its administrative control. These employees retain interests in their employers' activities outside the field of the joint venture. Through their continuing association with each other within the joint venture, the coincidence of interests of the parties in other areas can be expected to lead to an impairment of competition between them also in these other areas.

(f) The agreement attributes to each party a separate share of responsibility and work to be contributed to the joint venture. The provisions as originally notified gave to each of the parties for the duration of the agreement substantially unqualified rights to perform the work not only in its own defined field, but also in the field of the other party whenever the other was unwilling or unable to perform its part. These original provisions restricted competition through their effect of reinforcing the exclusivity of the cooperation between the parties and of practically ruling out any likelihood of access to the work by any qualified third parties.

(g) All the foregoing restrictive effects are significantly underlined by the considerable importance of the parties on the affected market.

3. The agreement may affect trade between Member States in respect of all the restrictions referred to in 2 of II above and, in particular, as follows :

(a) Sodium circulators are in operation or planned in the United Kingdom, France, the Federal Republic of Germany, Italy and the Netherlands. Companies which specialize in equipment for sodium circuits and in circulating pumps for nuclear reactors exist in all these countries. Each of the parties has a substantial base in the United Kingdom, has trading activities elsewhere in the Community and specifically each party has expertise relating to sodium circulators. There is a known requirement for such expertise also in Member States other than the United Kingdom. (See 4 (e) of I above.) In the absence of the notified agreement, either party would have been free :

(i) independently to develop, make or sell sodium circulators also for use in other Member States ;

(ii) independently to cooperate in the development of sodium circulators with third parties also in other Member States.

By virtue of the agreement and the existence of the joint venture, neither party can choose to engage in any such independent development, manufacture or sale or cooperation.

(b) There are within the Community some 25 companies which specialize in equipment for sodium circuits and in circulating pumps for nuclear reactors. (See 4 (e) of I above.) The cooperation between the two parties who are of considerable importance on the affected market in the United Kingdom will have the effect of making it more difficult for manufacturers of sodium circulators in the other Member States to sell sodium circulators in the United Kingdom and of making it more likely that any sales by the parties in other Member States will be joint rather than independent.

4. The effect of the restrictions on competition is likely to be appreciable because both parties are groups of significant industrial importance, both have considerable financial resources, both are established throughout the Community and the products of the joint venture are very costly and of substantial consequence.

5. Article 85 (1) therefore applies to the notified agreement.

III. APPLICABILITY OF ARTICLE 85 (3)

Under Article 85 (3) of the Treaty, the provisions of Article 85 (1) of the Treaty may be declared inapplicable in the case of any agreement which contributes to the improvement of the production or distribution of goods or to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

1. The agreement and the joint venture contribute to the improvement of the production and distribution of goods and to the promotion of technical progress as follows:

- (a) The products of the joint venture are technically very sophisticated. They are circulators for a liquid metal coolant which are to operate in an intensely reactive and potentially hazardous environment at very considerable temperatures. Their development is costly and requires highly specialized contributions from widely different technological skills. Possibilities of metal corrosion and erosion pose metallurgical problems. Likely cavitation effects in the coolant pose hydraulic-type problems. Safe operational performance over long periods requires minutely engineered tolerances. This implies considerable effort and involves risks which the parties are to overcome by contributing to the joint venture their differing but complementary skills and facilities. Neither party could with its own resources and capabilities alone, develop entire sodium circulators which incorporate all specified characteristics as effectively, economically, or quickly as both parties jointly.

- (b) The only customers in the United Kingdom for the products in question are NPC for the development, and the Central Electricity Generating Board, which is wholly government-controlled, for the finished products. NPC and also the United Kingdom Atomic Energy Authority, which together are responsible for establishing the design of the products in question, encouraged and have approved the cooperation of the parties in the development of sodium circulators in joint venture. The sole customers in the United Kingdom therefore knowingly and deliberately forgo the benefits to them of competition for the compensating advantage of a composite technical solution from the joint venture to which the parties are to contribute their separate but complementary specialized expertise.

- (c) The agreement and the joint venture are of a short-term duration if considered in relation to the complexity of development and the projected long-term future of fast reactor programmes. Following the completion of the joint development and expiry of the agreement, each party will be stronger in the field of expertise of the other and will have enhanced its competence and technical versatility in the independent and competitive development, construction and sale of sodium circulators which are capable of meeting full operational requirements.

- (d) Pursuant to the agreement, Weir in particular is likely to strengthen its position as a supplier of equipment for power engineering uses and specifically in relation to sodium circulator technology GEC, with a very substantial proportion of its turnover (currently £ 306 million) attributable to power plant equipment, has been a far more considerable force than Weir in this respect. While this balance is not likely to change dramatically the agreement will nevertheless have the likely effect that, relatively, Weir will significantly enlarge its own competitive position in this sector.

2. A fair share of the foregoing benefits will become available to consumers:

- (a) Apart from leading to improved and more rapidly achieved technical solutions, the temporary pooling of the parties' pre-existing production, test and other facilities and skills will avoid a duplication of effort and employment of resources and will therefore also achieve savings. Neither party, and accordingly neither party's customers, will need to fund that part of expenditure which would, in the absence of the joint venture, be attributable to the acquisition of necessary tech-

nical information or of facilities not available to that party and which is, by virtue of the joint venture, contributed by the other party. Moreover, neither party could independently achieve the required development result as quickly as the parties within the context of the joint venture. These benefits are acknowledged by the sole customers in the United Kingdom for sodium circulators (see 1 (b) of III above) who, by virtue of being the sole customers in the United Kingdom, are able to negotiate from a position of strength.

- (b) The mentioned benefits will not be confined to purchasers of sodium circulators and will apply more generally also to customers with requirements for liquid metal technology and, in particular, liquid metal circulation systems.
- (c) Through their association in joint venture, each party will intensify and accelerate its acquisition of a comprehensive expertise in sodium circulator technology. On completion of the development and after expiry of the agreement, the more effective competitive position of each of the parties towards the other will give to customers a better choice of more capable suppliers.

3. The agreement (as amended) and the joint venture do not impose upon the parties any restrictions which are not indispensable to the attainment of the benefits mentioned in 1 and 2 of III above.

- (a) In the light of the technical problems outlined in 4 (a) and (b) of I and in 1 (a) of III above and having regard to the parties' complementary skills, a cooperation between the parties within the context of a joint venture provides better practical pre-conditions for achieving acceptable, timely and safe technical solutions than the free play of competition between the parties.
- (b) The state of technical attainment of the parties individually prior to the agreement was such that NPC was not willing to place a development contract with either of the parties independently or to invite them to tender in competition with each other. In the event, NPC encouraged the parties to cooperate and welcomed their joint venture.
- (c) A more independent and looser form of cooperation than a joint venture could not in this case be expected to lead to so coherent or comprehensive a development. A cross-licensing and disclosure of information agreement, for example, would not result in a sufficiently close sharing between the

parties of all their complementary skills and facilities. A specialization agreement would not give to each party sufficient experience of or insight into the work of the other. Neither type of alternative agreement could as adequately provide for the continuous feedback and solution of interface problems between the contributing technologies or bring about the benefits set out in 2 of III above.

- (d) For years past, GEC has been a far more considerable supplier than Weir of products and services within the field of power engineering in general and for nuclear reactor installations in particular. Accordingly, GEC is in a significantly stronger market position than Weir for products of the kind in question. Weir could therefore not have been expected to forgo, and was not willing to forgo, the opportunities of full and equal participation which are offered through its participation in a joint venture. Such opportunities could not have arisen for Weir through a looser form of association.
- (e) So far as the non-competition effect of the joint venture and the non-competition restrictions of the agreement are concerned, the following applies. Neither party could reasonably have been expected in the circumstances of this case, in which each of them commits all its existing and future applicable facilities and expertise to the joint work, to give to the other party unreserved rights to exploit the results independently or in association with third parties. The agreement between the parties here has non-competition restrictions which do not continue in effect after expiry of the agreement or the life of the joint venture. Moreover, the restrictions are qualified. They are subject to either party's freedom to act independently where a potential customer declines to contract with the joint venture or where the other party declines to support the joint venture in the acceptance of a particular order. For the reasons outlined above in this paragraph, the parties could not have been expected to establish the joint venture with less severe restrictions in this respect.
- (f) The originally notified text of the agreement contained some restrictive provisions which were not indispensable to the attainment of the mentioned benefits. These provisions are referred to in 3 (e) (vi), (vii) and (ix) of I above. They resulted in too rigid an apportionment of work between the parties for the duration of the agree-

ment and gave far-reaching rights to each party to perform work which the other was unwilling or unable to undertake. At the request of the Commission, the parties have amended these provisions to allow for alternative allocations of future work and to afford greater possibilities of subcontracting work also to qualified third parties.

4. The agreement does not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

(a) Sodium circulator systems are currently in early or experimental operation or under development in France, Italy, the Netherlands, the Federal Republic of Germany, the United States, Japan and the USSR. There has also been a previous separate third-party development of a sodium circulator in the United Kingdom, for assessment in a high-temperature test loop operated by NPC. The availability of sodium pump technology to a reasonable number of other companies (see 4 (e) of I above), within and outside the Community, ensures a potential of competition from third parties.

(b) Following expiry of the agreement, both parties will be competitors at arm's length with enhanced technical versatility and competence.

5. The agreement, as amended, satisfies the tests of exemption of Article 85 (3), subject as hereinafter appears.

IV. APPLICABILITY OF ARTICLE 8 OF REGULATION No 17

Under Article 8 (1) of Regulation No 17, a decision in application of Article 85 (3) shall be issued for a specified period and conditions and obligations may be attached thereto.

1. The agreement, as amended, and the joint venture can be authorized under Article 85 (3) from the date of notification, namely 14 April 1977, and until expiry of the agreement, which is likely to occur about mid-1989 (see 3 (e) (xi) and (xii) of I above). If the agreement should not then expire in accordance with its terms, the exemption can continue for the remaining life of the agreement, but will cease to have effect not later than 31 December 1989.

2. The conditions for exemption are fulfilled for the stated period, solely in the light of the special circumstances in this case, as outlined herein. The

conditions for exemption would probably not have been satisfied for the stated period if the parties had been able to engage in joint production or joint sales of sodium circulators for the entire time or for a significantly long time during the currency of the agreement. It is clear in this case that the practical development to substantial completion is unlikely to terminate until some one or two years after the end of the development contract awarded by NPC, that is, until about one or two years after mid-1984, say, mid-1986. Although some initial production is likely to start before this date, there will be a continuing need at that stage to monitor and, through further corrective development, to remedy any problems which then become apparent (see 4 (d) of I above). Accordingly, questions of effective joint production and of joint sale within the context of the joint venture are likely to arise only during the last three-and-a-half years or so of the agreement. The period of exemption in this case, particularly so far as it relates to joint production and sale, is justified only by the foregoing considerations, by the complexity of the development and by the likely long-term future of fast reactor programmes.

3. The exemption relates solely to the notified agreement, as amended on 30 September 1977, and does not cover any extensions or changes in structure or enlargement of activities of the joint venture beyond those defined in the agreement. To enable the Commission to assess the operations of the joint venture and the position of the parties in this light, the Commission requires to be informed by the parties of the following matters promptly from the occurrence of any relevant event; namely:

(a) The date when the development contract awarded by NPC becomes effective (see 3 (e) (xii) of I above).

(b) The effective date and nature of any contracts placed during the period of the notified agreement with the joint venture or the parties, or any of them, for the development or production of sodium circulators, other than further development contracts placed by NPC or the United Kingdom Atomic Energy Authority.

(c) The admission of any third party, other than NPC or the United Kingdom Atomic Energy Authority, to the development activity of the joint venture, except as suppliers or subcontractors for minor items or as purchasers laying down their own specifications.

- (d) Arbitration awards or settlements arising out of arbitration proceedings in relation to the matters referred to in 3 (e) (x), (xiii) and (xiv) of I above, or otherwise.
- (e) The grant of any licences in pursuance of 3 (e) (xiii) of I above, together with the terms thereof;
- (f) The conclusion between the parties during the period of the notified agreement of any agreements for joint cooperation between them in the development, manufacture or sale of any product of whatever kind within the fields of power engineering and/or liquid metal technology, but not (unless otherwise notifiable) such agreements principally relating to foundry processes. For the purpose of this paragraph, the expression 'parties' shall include also the future subsidiary companies of respectively The Weir Group Ltd and The General Electric Company Ltd, any corporation which may control either of them and any subsidiary company of such corporation.
- (g) The conclusion of any agreement or arrangement which amends, replaces, supersedes or annuls the notified agreement, as amended on 30 September 1977; any joint activity by the parties relating to sodium circulators outside the terms of the notified agreement,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the Treaty establishing the European Economic Community, the provisions of Article 85 (1) are declared inapplicable to the agreement concluded on 21 March 1977 and amended on 30 September 1977 by Weir Pumps Ltd, The Weir Group Ltd, The English Electric Company Ltd and The General Electric Company Ltd. The period during which Article 85 (1) remains inapplicable shall be deemed to have begun on 14 April 1977 and shall continue for the duration of the agreement in accordance with its present terms, but not beyond 31 December 1989.

Article 2

The following obligations are attached to this Decision:

The parties, that is to say, The Weir Group Ltd on its behalf and on behalf of its subsidiary companies and The General Electric Company Ltd on its behalf and on behalf of its subsidiary companies, shall inform the Commission promptly of the occurrence of any of the following matters:

- (a) The date when the development contract awarded by NPC becomes effective;
- (b) The effective date and nature of any contracts placed during the period of the notified agreement with the joint venture or the parties, or any of them, for the development or production of sodium circulators, other than further development contracts placed by NPC or the United Kingdom Atomic Energy Authority;
- (c) The admission of any third party, other than NPC or the United Kingdom Atomic Energy Authority, to the development activity of the joint venture, except as suppliers or subcontractors for minor items or as purchasers laying down their own specifications;
- (d) Arbitration awards or settlements arising out of arbitration proceedings in relation to the agreement or the joint venture;
- (e) The grant of any licences in pursuance of 3 (e) (xiii) of I above, together with the terms thereof;
- (f) The conclusion between the parties during the period of the notified agreement of any agreements for joint cooperation between them in the development, manufacture or sale of any products of whatever kind within the fields of power engineering and/or liquid metal technology, but not (unless otherwise notifiable) such agreements principally relating to foundry processes. For the purpose of this paragraph, the expression 'parties' shall include also the future subsidiary companies of respectively The Weir Group Ltd and The General Electric Company Ltd, any corporation which may control either of them and any subsidiary company of such corporation;
- (g) The conclusion of any agreement or arrangement which amends, replaces, supersedes or annuls the notified agreement, as amended on 30 September 1977, and any joint activity by the parties relating to sodium circulators outside the terms of the notified agreement.

Article 3

This Decision is addressed to:

1. The Weir Group Ltd,
149 Newlands Road,
Cathcart,
Glasgow G44 4EX,
Scotland

on its behalf and on behalf of its subsidiary companies.

2. The General Electric Company Ltd,
1 Stanhope Gate,
London W1A 1EH,
England
on its behalf and on behalf of its subsidiary
companies.

Done at Brussels, 23 November 1977.

For the Commission

Raymond VOUEL

Member of the Commission
