COMMISSION DECISION

of 25 July 1977

relating to a proceeding under Article 85 of the EEC Treaty (IV/27.093 : De Laval-Stork)

(Only the Dutch text is authentic)

(77/543/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 on 2 March 1973 by Stork Roterende Werktuigen BV, Assen, Netherlands, pursuant to Article 4 of Regulation No 17, requesting that the joint venture agreement entered into by it on 1 September 1971 with De Laval Turbine International Incorporated, Princeton, New Jersey, United States, should, inasmuch as that agreement be found to come within the scope of Article 85 (1) of the EEC Treaty, be declared exempt from the application of that paragraph by virtue of paragraph 3 of the Article in question,

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

Having regard to the summary of the notification published pursuant to Article 19 (3) of Regulation No 17 in *Official Journal of the European Communities* No C 292 on 11 December 1976,

Having regard to the opinion delivered on 18 January 1977 pursuant to Article 10 of Regulation No 17 by the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

The facts may be summarized as follows :

A. The undertakings

1. De Laval Turbine International Incorporated (hereinafter referred to as 'De Laval International'), a company incorporated in accordance with the laws of the State of Delaware, USA, is a wholly owned subsidiary of De Laval Turbine Incorporated (hereinafter referred to as 'De Laval Turbine'), Trenton, New Jersey, USA. De Laval Turbine is controlled by Transamerica Corporation, one of the largest conglomerates in the United States. De Laval International operates on the Community market through its wholly owned subsidiary, Barksdale International GmbH, Friedberg, Germany, which manufactures and markets various kinds of measurement and control equipment, most of its sales being made in Germany and the COMECON countries.

For several years the De Laval Group has developed, manufactured and sold centrifugal compressors, mechanically driven steam turbines and barrel-type boiler-feed pumps bearing the name De Laval, not only in the United States and Canada but throughout the world. The group also carries out the necessary research to support and develop its business.

2. Koninklijke Machinefabriek Stork BV (hereinafter referred to as 'KMS'), now a private company but formerly a public limited liability company, is an important wholly owned subsidiary of Verenigde Machinefabrieken NV, Amsterdam (hereinafter referred to as 'VMF'). VMF is a Dutch group which has operations throughout the world. Approximately half its turnover comes from its foreign operations. The group is in business in a large number of industries, particularly light processing, erection, engineering, railway track, heating and lighting technology, goods-handling equipment and machine tools, and energy. KMS is further in business in a number of industries which are connected with steam turbines and compressors. Stork Roterende Werktuigen BV (hereinafter referred to as 'Stork'), known until 7 July 1971 as Stork Pompen NV, is a wholly owned subsidiary of KMS.

3. The joint venture, De Laval-Stork VOF (hereinafter referred to as 'De Laval-Stork'), is a business association formed in accordance with Dutch law in 1971. An association of this kind does not have legal personality ; the two companies forming the association remain jointly and severally liable in respect of all the obligations entered into in the name of the association up to the amount of the association assets. Each of the two constituent companies may, within the limits set by Dutch law, bind the association *vis-*

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No 127, 20. 8. 1963, p. 2268/63.

à-vis third parties. Half the shares in De Laval-Stork are held by De Laval International and the other half by Stork. Stork provided its contribution in cash, while De Laval International's contribution was chiefly in the form of know-how. The value of each parent's contribution was three million guilders. In addition, after a starting-up period Stork's plant was to be transferred to the joint venture. The parents are entitled to equal shares in the profits and are liable for equal shares in losses ; except in certain agreed circumstances on the termination of the agreement.

De Laval International generally acts as managing partner and is responsible for the day-to-day running of the business. However, for a number of specified acts the consent of both parents is required, notably for any act which could affect the continued existence of De Laval-Stork in its present form.

B. The products

1. The products which are the subject of the agreement notified to the Commission are the following :

— single and multi-stage axially balanced steam turbines for all mechanical drive applications and for all forms of electricity generation,

— single and multi-stage centrifugal compressors, both with and without turbine drive,

— barrel-type boiler-feed pumps and feed pumps for nuclear power stations, both single and multi-stage, axial and centrifugal, driven by electric motors or by turbines,

— any other products subject to approval by the partners.

2. De Laval-Stork is able to supply steam turbines, compressors and pumps both separately and in the form of units in which the steam turbine provides the motive force for the compressor or pump.

3. De Laval-Stork regularly carries out general market research, in the course of which it enters into personal contact with potential customers. For this purpose the support of technical staff is indispensable in view of the nature of the products. If inquiries are made with a view to placing orders with De Laval-Stork as a result of such market research, offers are accordingly made. The offer is drawn up on the basis of plans and designs which have been licensed to De Laval-Stork by the two parents, subject to any necessary changes to meet the requirements of particular clients.

4. De Laval-Stork provides the usual after-sales service to its customers. This includes guarantees, technical assistance in the case of breakdown and, if the customer so requires, verifications.

Users regard after-sales service as being of great importance. If a turbo-compressor set breaks down the loss suffered by the user, as a result of the shutdown of his plant, may be greater than the cost of the set. Speed and quality of service are therefore highly regarded. The servicing is usually done by the engineers and technicians who designed and installed the set.

C. The agreements

1. On 2 June 1969 De Laval Turbine and KMS entered into a compressor, turbine and pump technical assistance agreement (hereinafter referred to as 'the 1969 licensing agreement'), which was not notified to the Commission.

The 1969 licensing agreement was a partly exclusive and partly non-exclusive manufacturing and sales licence, granted by De Laval Turbine to KMS for a territory which included most of the Member States of the EEC. The licence covered technical assistance, commercial assistance, special development service, patents, trademarks and designs, and the supply of parts and equipment.

2. On 1 September 1971 the 1969 licensing agreement was replaced by a joint venture agreement (hereinafter referred to as 'the JVA'), entered into by De Laval International, KMS and Stork and notified to the Commission on 2 March 1973. The JVA consists in fact of a number of agreements which together form a composite whole. The conclusion of the agreements summed up at (b) to (e) below was provided for in the basic agreement (a), on which they depend.

The JVA consists of :

(a) the basic agreement between De Laval International and Stork, signed also by KMS (which enjoys certain of the rights and accepts certain of the obligations attributable to Stork under this agreement) ;

(b) a supply agreement between De Laval-Stork and KMS, to be replaced at a later stage by a manufacturing agreement, which in its turn was to be replaced in the final stage by a support agreement ;

(c) a contract management agreement between De Laval-Stork and KMS ;

(d) a know-how and industrial property licensing agreement between De Laval International and De Laval-Stork. The object of this agreement was a royalty-free licence covering a territory extending to all the Community countries and most other western European countries, the Middle East and (for some products only) South Africa. The licence is exclusive provided that both the customer's place of business and the place of delivery are within the licence territory. In other cases, the licence may be in the form of a non-exclusive licence on terms to be agreed between the two

parents. There are other exceptions to the exclusivity rule, notably where the equipment is subsidized from American or Canadian sources. In addition the licence is not exclusive for products already licensed by De Laval to other firms in the licence territory prior to formation of the joint venture ;

(e) a licensing agreement between Stork and De Laval-Stork concerning compressor, turbine and pump designs, know-how and industrial property rights. The terms of this licensing agreement are almost identical to those of the agreement at (d).

3. The object of the JVA is to enable the products transferred to De Laval-Stork by the parents in accordance with existing De Laval International and Stork designs, and any other products of whatever origin which De Laval-Stork requires in order to increase its turnover, to be designed, redesigned, manufactured and marketed. The aim of the parties is to increase De Laval International's penetration of the European market and to expand the business of KMS in the field of compressors and industrial turbines. Under the JVA the parties have since 1971 continued both manufacturing and marketing these products on a joint basis in the Community.

Both parents have contributed the necessary capital in cash or in know-how, provided the requisite staff at all levels, granted licences and made manufacturing plant, office space and other facilities and technical know-how available. De Laval chiefly provides management staff and know-how, whereas KMS provides plant and technical staff.

The know-how to set up De Laval-Stork in business was provided under the two exclusive licensing agreements, each between one of the parents and De Laval-Stork. At the same time the necessary staff was made available to De Laval-Stork so that the licensed designs and drawings could be worked and altered as required and licensed know-how could be developed. De Laval-Stork undertook new research.

4. The implementation of the JVA was to be spread over several years, and three stages were planned. The section of the JVA dealing with these stages was, however, found to be too complex, and the first changes were made in 1974. At the end of 1976 all activities were transferred to De Laval-Stork in the manner prescribed for the end of the preparatory stage. The Stork plant was leased to De Laval-Stork at the beginning of 1977.

5. Clause 8 of the JVA (basic agreement) further lays down the measures which are to be taken if the cooperation should be terminated. The JVA is concluded for a period of five years and, unless terminated at the end of that period by six months' notice, is renewed automatically for a further five-year period. If either party wishes to sell its interest in the joint venture, the other has a right of preemption.

6. Clause 8 (4) of the basic agreement provides that if the joint venture is not renewed, or if one party sells its interest to the other or to an outsider, the licensing agreements will be altered in the following manner :

(a) If the business of the joint venture is carried on by one of the parties or by the two parties acting separately, the continuing business of the party or parties, as the case may be, shall take over the licences which have been granted under the licensing agreements mentioned above. The licenses will then be non-exclusive, but the territory will remain expressly confined to that specified in the licences. These non-exclusive licensing agreements will remain in force for three years following the dissolution of the joint venture and then expire. A royalty of 5 % or 10 % will be payable on all machines or parts respectively sold under the licensing agreement by the licensee or licensees.

(b) If the business is not carried on by at least one of the parties, the licensing agreements will terminate with the dissolution of the joint venture.

Clause 8 (6) governs the consequences of the termination of the joint venture as regards the use of the trade names or trademarks licensed to it by the parties. The joint venture in effect will no longer be able to use such names or marks in these circumstances without the prior consent in writing of the party which gave the licence in question.

D. The economic situation

1. The products covered by the agreement are manufactured individually, in accordance with each particular order and on the basis of designs made available to De Laval-Stork under the know-how licensing agreement. In this industry, where most patents have now expired, know-how consists chiefly of these basic designs and technical knowledge of specialized staff. Hence the two parents have supplied De Laval-Stork with all the designs and specialist personnel required for the relevant products.

For every product developed, manufactured and installed by De Laval-Stork, the basic designs have to be

adapted to the specific requirements of the customer. Every product is therefore individually manufactured, and no two products are identical. As a consequence there are no intermediaries or dealers coming between the manufacturer and the customer. For each product a separate offer is made with an estimate of the prices, and negotiations then follow with the customer. For this purpose, since the formation of De Laval-Stork sales offices have been opened in London, The Hague and later, Frankfurt.

2. De Laval-Stork's business extends only to steam turbines and to the compressors and pumps generally sold with steam turbines. Its business does not include hydraulic turbines (for electricity generating stations) or gas turbines (central heating systems, aircraft propulsion, etc.). Since 1971 marine turbines have also been added to De Laval-Stork's product range. Customers are classified in five major categories according to the use to which they put the steam turbines :

(a) gas transmission and pipeline ;

(b) utility ;

(c) petroleum and petrochemicals ;

(d) marine ;

(e) general industrial (sugar, mining, etc.).

Both De Laval and KMS were already in business, but at differing levels, on these five submarkets, except that KMS was not involved with marine turbine. Roughly 15 % of the products manufactured by De Laval-Stork are based on KMS designs and 85 % on De Laval designs. Two-thirds of De Laval-Stork's staff consists of design engineers and one-third of sales managers. While development work is largely in the hands of American staff, Dutch personnel are entrusted with the subsequent work.

3. Both parent companies belong to large powerful groups with business interests all over the world.

De Laval Turbine sells its products throughout the world, and notably in the Community. In the field of turbines and compressors it possesses substantial technical knowledge and know-how, which it has licensed to firms throughout the world. Before entering into the licensing agreement with Stork in 1969, it was already selling products in the common market.

KMS and its subsidiary Stork also sell throughout the world. Stork admittedly achieves smaller sales of turbines and compressors than De Laval, but, before the joint venture was formed, it accounted for a substantial percentage of the Dutch market and exported a sizeable proportion of its output to other Community and non-member countries.

The joint sales of the parties under the JVA represent only a fraction of the aggregate sales of their respective groups.

De Laval's chief competitors on the turbine and compressor market are Kraftwerk Union, Brown Boveri, Borsig, Alsthom Rateau, MAN, Westinghouse and General Electric. These companies cover the entire world market, have extensive technical know-how and are established in other Member States with capacities and sales often in excess of those of De Laval-Stork. Even so, De Laval-Stork has achieved a considerable expansion in sales during the first few years of its life. Its Community market share is estimated at between 10 and 15 %.

II. APPLICABILITY OF ARTICLE 85 (1)

1. Article 85 (1) of the Treaty prohibits, as incompatible with the common market, all agreements between undertakings, decisions by association of undertakings and concerted practices 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. These provisions are applicable in this case.

2. The agreement made by De Laval and Stork to form De Laval-Stork is an agreement between undertakings within the meaning of Article 85 (1).

Such an agreement must be assessed not only in its legal context, that is the formation of a new business entity, whether or not it has distinct legal personality, but also in its economic context. The joint venture agreement, in the context in which it was concluded, has the object and effect of bringing all the research, production and marketing activities of the two parents in the common market under joint control, so that the relations between the two companies and their conduct on the market are altered.

3. The first matter for consideration is whether trade between Member States may be affected. The purpose of this provision, as has been stated in the judgments given by the Court of Justice of the European Communities in the Grundig-Consten (1) and Commercial Solvents (2) cases, is to define the field of application of the Community rules on competition in relation to national legislation.

(1) Judgment of 13 July 1976 : [1966] ECR 429.
(2) Judgment of 6 March 1974 : [1974] ECR 255.

The agreement has been made by competitors which previously operated independently on the various Community and external markets. De Laval International achieved a considerable proportion of its turbine and compressor sales in the common market, where its know-how and size would have helped it to develop its sales even further. Stork was not in business in the Netherlands alone, since much of its sales were in other Community countries and elsewhere.

The formation of a joint venture by these two undertakings means that production and marketing, no longer being handled by distinct enterprises, will proceed in a different manner and from different places than they would have in the absence of the joint venture. De Laval-Stork's business covers the entire Community and a number of non-member countries. Formation of De Laval-Stork has the further consequence that De Laval International and Stork are likely to refrain from selling in competition with their joint subsidiary, or at least considerably to reduce the extent of such competition. On the other hand the joint subsidiary is not allowed to compete with De Laval International in certain non-member countries, which affects its competitive capacity within the common market.

The formation of the joint subsidiary is therefore likely to alter the normal flow of trade having regard to the size of the undertakings in question. Trade between Member States is likely, therefore, to be appreciably affected.

4. Before considering whether competition within the common market is prevented, restricted or distorted, it should first be considered whether the two undertakings were and remain actual or at least potential competitors in the various relevant markets. Apart from the fact that both undertakings previously carried out research and manufactured and sold most of the relevant products throughout the world, it is clear that each on its own account previously sold the greater part of its production of these and similar products within the common market. KMS had engaged in research, manufacture and marketing of a large number of the relevant products, and was able, without having to invest too heavily, to extend its business to the other products which are covered by the joint venture. De Laval International, which had decided to try to penetrate the European market, had already been exporting to Europe.

In addition, De Laval International, on its own, could have entered the relevant markets in Europe without any real difficulty, to which end De Laval and KMS had in fact already entered into a licensing agreement in respect of the relevant products. The two companies were at that time either actual competitors, or if not, then the American company, despite any difficulties it may have found in organizing its European operations from the United States, must be regarded as having been a very powerful potential competitor, both because it was in business on the same markets in the United States, which gave it the opportunity to undertake the same business on the common market without having to begin by acquiring the necessary basic experience, and, secondly, because of its substantial financial power which enabled it and still enables it to make the necessary investments. Thus the two parties were actually or at the very least potentially in competition with each other on the relevant markets.

After the entry into force of the JVA, the parties have remained competitors on the relevant markets. Their involvement in the joint venture and the fact that they are still carrying on business in related product markets or in neighbouring geographical markets mean that there are no insurmountable barriers to stop them reverting to separate business activities in the relevant markets. De Laval remains in business on the American market for similar products, and KMS is continuing to operate Dutch plant for the manufacture of product ranges which are related to the products covered by the agreement, especially those classes of turbine which are not covered by the JVA. It is clear from the licensing agreement that each of the two parties has, subject to certain conditions, retained the right to sell the relevant products within the Community without passing through the joint venture. Even the fact that research is being jointly undertaken will not prevent either company from continuing to use the results separately. Accordingly the two companies remain real or at the very least potential competitiors.

5. The circumstances of this case and the provisions made by the parties in question do not lead to the conclusion that the formation of the joint venture constitutes a merger.

In the first place the agreement leaves the parents subsisting as economically independent undertakings and there is no evidence to suggest that they have become purely holding companies.

Secondly, it is not the case that at least one of the companies has completely and irreversibly abandoned

business in the area covered by the joint venture nor that it is certain that the pooling of this area of business will weaken competition in other areas, particularly in related industries, where the firms involved remain formally independent of each other.

To be regarded as having completely and irreversibly abandoned business in the areas covered by the joint venture, the parties would have had to have given up all their existing capacity to compete actually or potentially and to have ceased to do business in the industry. The withdrawal would have had to have been completely irreversible so that they could no longer be regarded as actual or potential competitors.

They cannot be considered to have done so if they pool only part of their existing activities in these areas, whether it be research or production or marketing of the relevant goods. It is clear from the facts of this case that the association between the parties extends only to part but not all of their activities relating to research, production and marketing and the parties remain actual or at least potential competitors. This fact is further confirmed by the limitation, under the agreement, of the joint venture's activities to a specific territory and the inclusion of certain restrictions in the activities of the two parent companies which would have been unnecessary if the parties had ceased to be able to compete with each other.

The reversible nature of the joint venture is confirmed by the provisions in the agreement relating to the conditions to be applied on termination and further from the fact that the agreement has been made for a period of only five years. Although the agreement can be renewed and may therefore create a more durable association, the two parties retain the right to terminate the agreement and to revert to fully independent status ; hence they remain actual or at least potential competitors.

6. The agreement has the object and effect of restricting and distorting competition within the common market.

Each party controls 50 % of the assets of the joint venture, and it is clear from this fact, as from the wording of the agreement, that the consent of both parties is required for any major decision concerning the activities of the joint venture. A number of anti-competitive consequences flow from this by reason of the consultations which will inevitably have to take place between the two parties within the joint venture. Even if an increase in competition between the joint venture and other companies in business on the relevant market results from the agreement, the effect of the agreement is to eliminate competition between the two parties on the same markets, both as regards research and as regards production and marketing. The two companies have therefore deprived themselves of the opportunity for autonomous costing and pricing, which would be available if their activities were separate. By exchanging information connected with their competitive ability they not only destroy the independence of their market conduct but also remove uncertainty as regards their future behaviour towards their competitors. The pooling of a part of their activities alters the supply structure on the relevant markets, as consumers will no longer be able to choose between two independent suppliers.

7. The agreement contains further restrictions. For the duration of the agreement certain customers will, as a result of the exclusive licensing agreements entered into in connection with the JVA, no longer be able to choose between the two parties. By these licences the business of De Laval-Stork remains confined exclusively to cases where both the customer's place of business and the place of delivery are within a specific territory, which includes all the Member States of the EEC. Such a customer's scope for choice is thus substantially restricted by the fact that the parties are prevented from making individual offers. The JVA also contains clauses which will have the effect of restricting competition even after its expiry. As the result of Clause 8, the two parties will be able to derive only limited benefit from their association, since the licences granted under the JVA are restricted in various ways. Once the JVA has expired, the two parties will still not be in a position to engage in full competition with one another.

8. The question then arises whether the effects of these restrictions of competition within the common market are appreciable. The size of the two companies, each of which is a multinational with an extensive turnover, and their position on the relevant markets, where, without being the largest firms, they nevertheless have sizeable market shares, indicate that the restrictions of competition within the common market are appreciable. The agreement therefore comes within the prohibition in Article 85 (1) of the EEC Treaty.

III. APPLICABILITY OF ARTICLE 85 (3)

9. Under Article 85 (3), the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement which contributes to improving the production or distribution of goods or to promoting 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.

The agreement was notified to the Commission on 2 March 1973 with an application for exemption under Article 85 (3). Subject to certain conditions the agreement satisfies the tests of Article 85 (3).

10. The agreement does contribute to improving the production and distribution of the relevant goods and to promoting technical and economic progress.

The temporary cooperation makes it easier for De Laval to penetrate the European market than it would have been if it had acted alone, and enables Stork and KMS to reorganize and expand part of their turbine and compressor business. The attainment of these two economic objectives, which benefit the consumer, is made easier and quicker by the cooperation.

Through the temporary coordination of development and joint investment, the agreement prevents the creation of uneconomic capacity and thus enables the parties to reach optimal size in relation to market conditions. Furthermore, the benefit of the latest technical advances can be shared by the parties.

The cooperation also has a decisive influence on costs by providing the assurance that the jointly-owned plant will be able to work at greater capacity and thus reduce the large proportion of the total costs represented by fixed costs, which will tend to reduce prices.

Moreover, the parties will be able jointly to pursue their research and development activities with a view to a profitable industrial exploitation of the technical experience which they have acquired and continue to acquire.

11. The agreement allows the consumer a fair share of the resulting benefit.

The temporary centralization of the two parties' supply potential in the joint venture and the flexibility which follows from the pooled operation of the joint plant further contribute to improving the service offered to consumers by increasing the regularity of customer service before and after delivery of turbine and compressor units. The new firm will be better placed to take account of the specific requirements of individual customers, having regard to the need in this industry to adapt the design and manufacture of products to individual orders. Users will also benefit from the improved service offered by the joint venture, which will be able to act more quickly and more efficiently in the event of a breakdown of a turbo-compressor installation.

By imposing conditions and obligations and by the supervision which it will carry out, the Commission will ensure that the benefits to the consumer are effective and are not in any way disregarded by the parties. For this purpose consumers themselves, most of which are large firms, can also use their own economic power.

12. The agreement does not afford the companies concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

Although certain of the relevant markets are oligopolistic in structure, the market position of the two parties is not such as to place them among the top firms. They have a Community market share of between 10 and 15 % and have to compete with some very large groups which sell their goods throughout the world and have capacities and sales often far greater than that of De Laval-Stork.

13. With the exception of two matters considered below, the agreement imposes no restrictions which are not indispensable to the attainment of the objectives described above.

The formation of the joint venture is indispensable, since it leads to a reduction in the necessary investments and the risks associated therewith, without which neither of the parents could expect to penetrate the relevant markets as quickly or as effectively.

Although it is not always indispensable for research, production and marketing to be pooled, the particular circumstances of this case justify the extension of the joint venture's activities to the joint marketing of the relevant goods and, as a result, to the fixing of common prices. Close technical cooperation with the purchaser is necessary in order that the market may be researched, orders obtained, plans for turbines and compressors satisfying the purchaser's own requirements and needs worked out and production programmed in the light of available capacity. All this must be done through, and with, the same team of technicians that also provides the after-sales service which is one of the most important features of marketing in this industry.

The exchange of scientific and technical know-how between the parties is also a necessary extension of their business coordination, since De Laval-Stork must be able to work as efficiently as possible and to be assured of the necessary technology in good time for the satisfactory construction of an installation.

It is also indispensable for the two parents to transfer their pump operations to the joint venture, where these advantages do not necessarily apply, as well as their turbine and compressor business, since all these products are usually supplied together as a composite whole and this is indispensable to efficient operation.

14. However, the JVA as notified does impose certain restrictions which are not indispensable for the attainment of the objectives set out in Article 85 (3).

(a) The exclusivity which each parent granted De Laval-Stork through the patent and know-how licensing agreements has already been modified by the parties, which now have the right to supply the relevant market direct if either the customer's place of business or the place where the machines are to be installed is not in the licence territory. In addition, in certain other circumstances specified in the JVA, the parties have the right, despite this exclusivity, to make supplies direct, and not through the joint subsidiary, and to grant licences to third parties. These concessions are not, however, sufficient. The fundamental quality of total exclusivity conferred by these licences will no longer be indispensable after the first phase of the joint venture is completed. During this period it will be necessary to concentrate as much business as possible on the joint venture. But thereafter users must retain the legal and economic freedom to approach the parties direct where, for whatever reason, the joint venture cannot satisfy their requirements. In these cases the parties must retain the freedom to deal with and supply the consumer direct, or to issue non-exclusive licences to third parties likewise to do business with consumers.

To the extent that the exclusive rights conferred by the parties on their joint subsidiary, despite the modifications already made, prevent such dealings, the exclusivity cannot be regarded as indispensable to the proper operation of the joint venture and to the attainment of the resulting benefits.

(b) The industrial independence of the parties is restricted in the event of the termination of the joint venture. The parties have agreed that upon the dissolution of the joint venture they will take over all the patent and know-how licences granted to the joint venture so that they may have all the scientific and technical knowledge which they will need to continue in business at the end of the joint venture. In this context, certain restrictions on the future actions of the parties imposed by Clause 8 (4) (a) of the agreement cannot be regarded as indispensable to the proper operation of the joint venture during its existence and to the attainment of the resulting benefits.

In order that the parties may operate in the future on the relevant markets in active competition, they must be given access to all the technical and commercial resources they need to carry on their business. Accordingly, each of the parties must, on the termination of the JVA, be entitled to compete as it wishes with no restrictions as to time, territory or any other kind. The restrictions in Clause 8 (4) (a) of the agreement, however, restrict the licences given to the parties in a number of ways as follows :

— first, access to technical and scientific knowledge is available only for three years. The parties must, however, be in a position to use the parents and know-how licensed to the joint venture to the extent that such use is indispensable to the exploitation of patents and know-how jointly acquired through the joint venture,

— secondly, the parties are expressly confined to the territory of the joint venture itself. Such a restriction is not justified after dissolution of the joint venture, since it prevents Stork from selling its goods freely in many countries outside the common market and thereby contributing to the improvement of its own capacity and the competitive structure within the common market,

— thirdly, the parties will be required to pay royalties from 5 to 10 % on all machines and parts supplied under the licences, whereas similar licences can be given to third parties at lower rates of royalty, which may lead to distortions of competition.

Since the above restrictions of competition are not indispensable, exemption can be granted only on certain conditions.

IV. CONDITIONS AND OBLIGATIONS

Under Article 8 (1) of Regulation No 17, conditions and obligations may be attached to a declaration of exemption, in which respect the following considerations are relevant.

15. Exemption in this case should be subject to the two following conditions by reason of the fact that certain clauses of the JVA do not satisfy the tests of Article 85 (3).

(1) If for any reason the joint venture cannot meet an order from a customer, the exclusive nature of the patents and know-how licences granted to it by the parent companies shall not prevent such companies from dealing directly with such customer or from granting non-exclusive licences to third parties to deal with that customer.

(2) The licences to be granted under Clause 8 (4) of the basic agreement shall afford the parties the opportunity :

— to continue to have the benefit after the expiration of the period of three years following the dissolution of the joint venture of the patent and know-how rights licensed to the joint venture to the extent that the exercise of those rights is indispensable for the exploitation of patents and know-how jointly acquired through the joint venture,

— to export the products manufactured under these patent and know-how licences to all common market and non-member countries.

The royalties payable under the licences granted by the parties in accordance with this provision shall not exceed the lowest amount of royalty payable under any licence granted by the parties to third parties in respect of the same patents or know-how.

The effect of this latter condition must not be to make it impossible for the parties, on the expiration of the three-year period provided for in respect of the licences in question, to prevent the use of the designs for the purpose of reproducing the form and presentation of the relevant products. They must remain free to use the know-how embodied in these designs, although they may be prohibited after that three-year period from making exact copies of the form and presentation of the designs such that each other's products are not recognizably differentiated.

16. Article 8 (2) of Regulation No 17 requires the Commission to ensure that the requirements of Article 85 (3) continue to be satisfied. To this end the undertakings to which this Decision is addressed must be required to inform the Commission of any change or addition to the agreements and to make a report to the Commission every two years on the activities of the joint venture so that the actual effects of their agreement can be determined.

The Commission must also be in a position to verify whether competition within the common market is restricted by any other practices of the companies concerned. Such restrictions might arise as the result of financial holdings or new links in these sectors, whether direct or indirect, between any company in one group and any company in the other group (the parties themselves included) or between any such company and another company where any of these companies is directly or indirectly engaged in either the turbine or the compressor industry within the common market. Such might be the case if one of the parties or any company belonging to its group develops new business in these industries independently. In such a situation the Commission must be enabled to verify whether the competitive capacity of the parties has been altered.

A company belonging to a party's group is, for these purposes, a company in which such party or any other company in either the De Laval Turbine Incorporated Group or the Verenigde Machinefabrieken NV Group, directly or indirectly, controls at least half the voting rights, or has the right to appoint half the members of the board of directors or in any other way is able to control the affairs of such company.

For the reasons stated above, therefore, obligations must be imposed to ensure that the parties inform the Commission without delay of such relationships or new activities.

The opportunities for the parties to compete on the dissolution of the joint venture must not be prejudiced by any agreement or practice entered into or operated by the parties in order to retain or employ those employees of the dissolved subsidiary who are required by either party in order to continue in business. If they do terminate the joint venture the parties must be required to inform the Commission of any agreements or practices in that connection so that the Commission can ensure that competition is not thereby restricted.

17. Under Article 8 (1) of Regulation No 17, a Commission Decision granting exemption under Article 85 (3) of the Treaty must be issued for a specified period.

The joint venture in question, to which the parties are extensively committed, has to be given the opportunity to develop properly if it is to offer worthwhile benefits. A period of nine years would therefore not seem excessive. The date at which the third stage of the agreement is due to end, 1 September 1986, would accordingly seem to be an appropriate limit for the exemption,

HAS ADOPTED THIS DECISION :

Article 1

It is hereby declared, pursuant to Article 85 (3) of the Treaty establishing the European Economic Community, and subject to the conditions set out below, that the provisions of Article 85 (1) are, and shall be, until 1 September 1986, inapplicable to the basic agreement and four implementing agreements made on 1 September 1971 by De Laval Turbine International Incorporated and Stork Roterende Werktuigen BV, formerly known as Stork Pompen NV, of the one part, and Koninklije Machinefabriek Stork BV, on the other part, for the formation of the joint venture De Laval-Stork VOF.

1. If for any reason the joint venture cannot meet an order from a customer, the exclusive nature of the patents and know-how licences granted to it by the parent companies shall not prevent such companies from dealing directly with such customer or from granting non-exclusive licences to third parties to deal with that customer.

2. The licences to be granted under Clause 8 (4) of the basic agreement shall afford the parties the opportunity :

   — to continue to have the benefit, after the expiration of the period of three years following the dissolution of the joint venture, of the patent and know-how rights licensed to the joint venture to the extent that the exercise of those rights is indispensable for the exploitation of patents and know-how jointly acquired through the joint venture,

   — to export the products manufactured under those patent and know-how licences to all common market and non-member countries.

   The royalties payable under the licences granted by the parties in accordance with this provision shall not exceed the lowest amount of royalty payable under any licence granted by the parties to third parties in respect of the same patents or know-how.

Article 2

Exemption is granted subject to the following obligations :

1. The undertakings to which this Decision is addressed shall without delay inform the Commission of any amendment or addition to the abovementioned agreements, and of all matters affecting their interpretation or application, including any arising as a result of arbitration.

2. The undertakings referred to shall furnish the Commission every two years with a full report on the activities of the joint venture.

3. Each of these undertakings shall without delay inform the Commission of the existence, in any of the following forms, of any link between them or of any change made or to be made in such a link :

   (a) shareholdings of 25 % or more ;

   (b) interlocking directorates ;

   (c) formation of a joint subsidiary or joint acquisition of an existing undertaking ;

   (d) grant of patent or know-how licences ;

   between

   (a) the undertakings themselves ; or

(b) any company belonging to the De Laval Turbine Incorporated Group or the Verenigde Machinefabriek NV Group and another company belonging to either of these groups or any other company or companies, where any such company is directly or indirectly engaged within the common market in either the turbine or the compressor industry.

4. Each of the undertakings to which this Decision is addressed shall without delay inform the Commission of any new activity in the turbine or compressor industry other than purely occasional business, engaged in by it independently of the others.

5. Each of the said undertakings shall without delay inform the Commission of any agreements or practices entered into or operated for the transfer of patent or know-how licences or for the substitution of parties thereto and for the allocation or assignment of staff of the joint venture in the event of the dissolution of the joint venture.

Article 3

This Decision is addressed to :

— De Laval Turbine International Incorporated, PO Box 2072, Princeton, New Jersey 08540, USA,

— Koninklijke Machinefabriek Stork BV, Industriestraat 1, Hengelo, Netherlands

— Stork Roterende Werktuigen BV, Dr A. Philipsweg 51, Assen, Netherlands,

— De Laval-Stork VOF, Industriestraat 1, Hengelo, Netherlands.

Done at Brussels, 25 July 1977.

For the Commission

Raymond VOUEL

Member of the Commission