COMMISSION DECISION

of 23 December 1975

relating to a proceeding under Article 85 of the EEC Treaty (IV/26.940/b — KEWA)

(Only the German text is authentic)

(76/249/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 6 and 8 thereof,

Having regard to the notification made on 11 October 1971, pursuant to Article 4 (1) of Regulation No 17, by Kernbrennstoff-Wiederaufarbeitungsgesellschaft mbH (KEWA), Frankfurt-am-Main, Germany, concerning an agreement concluded on 23 August 1971 between Farbenfabriken Bayer AG, Leverkusen, Farbwerke Hœchst AG, Frankfurt-am-Main, Gelsenberg AG, Essen, and Nukem GmbH, Wolfgang-bei-Hanau, for the formation of KEWA,

Having regard to the summary of the notification published, as required by Article 19 (3) of Regulation No 17, in the *Official Journal of the European Communities* No C 83 of 16 July 1974,

Having regard to the opinion dated 27 February 1975 delivered by the Advisory Committee on Restrictive Practices and Monopolies pursuant to Article 10 of Regulation No 17,

Whereas

I

1. The agreement can be summarized as follows:

The parties plan, when they are satisfied that it will be profitable, to build and operate jointly a high-capacity plant (approximately 1 500 metric tons/a) for the commercial reprocessing of nuclear fuels and to market the products recovered. To this end they are forming, with equal shareholdings, a joint subsidiary to be known as Kernbrennstoff-Wiederaufarbeitungsgesellschaft mbH (KEWA); they undertake not to operate in these fields otherwise than through their joint subsidiary.

The joint subsidiary will construct and/or operate such a plant or will acquire a shareholding in a company having the same object; accordingly it has been decided that the joint subsidiary will subscribe one third of the capital in United Reprocessors Gesellschaft mbH (the other two thirds being subscribed by British Nuclear Fuels Ltd and the French Commissariat a L'Energie Atomique).

Any party may withdraw from the joint subsidiary, but not before 31 December 1977, provided that he gives at least two years' notice. The subsidiary is formed for an unlimited period.

2. The situation and trends on the relevant market can be summed up as follows:

(a) The market comprises only the reprocessing of oxide fuels, for the only plant which KEWA is considering setting up will be for the reprocessing of fuels of this type. It covers all the European countries having free market economies, taking into account the present state of technology on the reprocessing, transport and storage of irradiated fuels and wastes; the future supply and demand situation for reprocessing in other European countries is not known; moreover, political barriers (plutonium being usable for military purposes) will in all probability prevent irradiated fuels from being traded freely between East and West; the United States, for instance, currently prohibits the reprocessing of United States' fuels outside the country.

[1] OJ No 13, 21. 2. 1962, p. 204/62.

(b) Oxide fuels reprocessing services in Europe are offered by plants financed entirely or extensively by public authorities, which have also defrayed all research and development costs; States generally regard reprocessing as a critical link in the nuclear fuel chain and therefore wish to have access to adequate reprocessing capacity, whether alone or in conjunction with other States.

The following plants already exist or are being planned:

— a capacity of some 800 metric tons/a at Windscale, England, due to go on stream in 1982;

— a capacity of 800 metric tons/a at La Hague, France, to be brought into operation by stages between 1976 and 1978;

— a 40 metric tons/a plant at Karlsruhe, operated by GWK (Gesellschaft zur Wiederaufarbeitung von Kernbrennstoffen), whose shareholders are the same as KEWA's. Under the agreement, oxide fuels for light-water reactors will no longer be reprocessed here once the La Hague plant is in operation;

— a plant of a capacity of some 70 metric tons/a at Mol, Belgium, belonging to Eurochemic (European Company for the Chemical Processing of Irradiated Fuels) — a company formed by thirteen European countries; however, the Board of Directors decided to shut this plant down at the end of June 1974. There is currently a plan to replace this plant by one of 300 metric tons/a, a first unit of 150 metric tons/a coming on stream in 1981;

— a pilot plant for some 25 metric tons/a (Eurex I) in Italy; however, until at least 1977 this plant will be working on the development of new processes. Another unit (Eurex II) on an industrial scale is being planned, but no dates have yet been fixed.

(c) Demand for the reprocessing of uranium oxide fuels in Europe depends on the installed capacity of light-water (boiling or pressurized) nuclear reactors and, in certain cases, the first fast breeders, which use a mixture of uranium and plutonium oxides. The first fuels come up for reprocessing between three and four years after a reactor goes on stream.

(d) In preparing the following table, which sets out forecasts of supply and demand for oxide fuels reprocessing services in all European countries, the degree of uncertainty, surrounding the estimates meant that no single figure could be given; in each case a 'high' and a 'low' variant appear. The low variant for supply takes account of the shutdown of the Eurochemic plant and an average two-year delay in bringing currently planned reprocessing units on stream; such delays are quite likely in view of the number of technical unknown factors still to be dealt with in this area. The high variant for demand is based on the nuclear power plant construction programmes known of at the end of 1974, while the low variant assumes an average one-year delay in such programmes, to allow for economic factors and siting and ecological problems.

The table shows that demand for reprocessing will be growing rapidly, so making desirable the commissioning in 1984 of the large-scale German plant envisaged by the URG agreement.

Approximate forecasts of capacity and requirements for reprocessing oxide fuels in Europe

(metric tons/a)

Capacity (1)	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
Germany	40	—	—	—	—	—	—	—	—	500	1 000	1 500
France	—	150	400	800	800	800	800	800	800	800	800	800
United Kingdom	—	—	—	—	—	—	—	400	800	800	800	800
Italy	—	—	—	25	25	25	25	25	25	25	25	25
Eurochemic	—	—	—	—	—	—	150	300	300	300	300	300
Total H	40	150	400	825	825	825	975	1 525	1 925	2 425	2 925	3 425
L	40	40	40	150	400	825	825	825	825	1 225	1 625	2 125
DEMAND												
Total Europe H	135	175	260	420	615	885	1 235	1 730	2 345	2 965	3 605	4 400
L	135	135	175	260	420	615	885	1 235	1 730	2 345	2 965	3 600
Belgium	5					30					130	
Denmark	—					—					20	
Germany	55					230					890	
France	5					100					780	
Ireland	—					—					15	
Italy	10					30					310	
Luxembourg	—					—					30	
Netherlands	—					10					35	
United Kingdom	—					170					240	
Community	75	90	135	275	440	570	775	1 100	1 520	1 970	2 450	2 955
Spain	19					93					370	
Sweden	12					140					336	
Switzerland	28					52					197	
Other countries (2)	—					33					250	

(1) Assuming the URG agreement is applied.

(2) Finland, Greece, Norway, Austria, Portugal, Turkey.

(e) In addition to the description of the present situation and future outlook on the market given above, some particulars as to the specific nature of this industry are called for :

— The oxide fuels reprocessing industry is just getting under way : demand, which can be forecast up to 1985 as accurately as can plans for building nuclear power stations working on uranium oxide fuels, will rise in Europe from some 135 metric tons in 1975 to some 800 metric tons in 1980 and 3 300 metric tons towards 1985, any margin of uncertainty depending directly on progress in nuclear power station building programmes ; as regards supply, the experimental stage (low-capacity plant, conversion of existing plant) is giving way to the industrial stage (construction of high-capacity units designed for the reprocessing of oxide fuels).

— Other economic factors characterizing the reprocessing industry are, firstly, the scale of the capital tied up (at 1975 prices it is estimated that it would cost some 400 million units of account to build a plant with a capacity of 1 500 metric tons/a) ; secondly, the fact that costs decrease sharply as plants increase in size (this is the scale effect : the cost per kilogramme of reprocessed fuel in a 1 500 metric tons/a unit working at full capacity is substantially lower than half that in a 300 metric tons/a unit ; a fivefold increase in capacity leads to less than a twofold increase in tied-up capital) ; and thirdly, the preponderance of fixed costs in total costs (it is estimated that two thirds of the cost of reprocessing fuel is accounted for by depreciation and loan servicing costs, the other third consisting in roughly equal proportions of operating costs and variable costs ; thus fixed costs account for some 80 % of total cost at full capacity working). As a result of the second and third

factors, future reprocessors are likely to consider building only plants with a capacity of the order of 1 500 metric tons/a (possibly divided into two separate production units for operational safety reasons) which, from the time of coming on stream, are assured of a load factor of at least 50 %.

The reprocessing market, which can be expected to grow over the next few years along the lines indicated above, will not be able, before 1984, to absorb more than a single 1 500 metric tons/a unit in addition to the two 800 metric tons/a units already working or planned. Only then will the market, which will continue to expand at an increasing rate, have room for the installation of a 1 500 metric tons/a plant every two years.

— The governments of most European countries have taken the view that, although reprocessing accounts for not more than 7 % of the total cost of the nuclear fuel cycle (and therefore less than 3 % of the cost of a kWh), it was necessary to master this field of technology both on ecological grounds—irradiated fuels and waste being highly radioactive products which must be processed and stored in conditions of absolute safety — and from considerations of energy policy — recycling recovered products helps to bring about an appreciable drop in demand for natural uranium (10 % in 1985 and even more later). Accordingly, individually or in concert, they have committed major research and development expenditure in this field.

— In most countries, the electricity-producing companies, which are the only customers of reprocessing plants, are controlled by central or local authorities. This could considerably reinforce the trend towards building plants designed to meet national requirements, and thus towards the segregation of markets.

Hitherto, however, the economic importance of electricity generating companies — which supply all or most of the territory of a given country — has enabled them to preserve or even enhance their degree of management independence in relation to the public authorities. In any event there is no doubt that with their extensive research and marketing departments they will be negotiating with reprocessors from a position of substantial strength.

II

Article 85 (1) of the EEC 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, or distortion of competition within the common market.

The agreement between Bayer, Hoechst, Gelsenberg and Nukem is such an agreement, for :

1. The object and effect of the agreement is to affect competition between the parties in the supply of reprocessing services in that the parties undertake not to operate in this field except through their joint subsidiary. It is true that the parties have not hitherto been effective competitors on this market, since none of them individually supplies reprocessing services ; their only connections with this field are their equal shareholdings in GWK (Gesellschaft zur Wiederaufarbeitung von Kernbrennstoffen), which operates a pilot plant with a 40 metric tons/a capacity at Karlsruhe ; however, the fact that they all possess reprocessing technology makes them from now on potential competitors.

2. The agreement may affect trade between Member States in view of the status of the parties to the agreement (they comprise all the German firms possessing reprocessing technology) and of the scale of the investments involved (the capacity of the proposed plant will, by the time it goes on stream, exceed Germany's domestic demand and this collective tendering by the German firms will affect other countries) as well as because of the intention expressed in the agreement of linking with further parties (KEWA is a party to the URG agreement, which organizes reprocessing services at international level).

III

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 between Bayer, Hoechst, Gelsenberg and Nukem, is such an agreement for :

1. The agreement contributes to improving the production and distribution of reprocessing services and to promoting technical and economic progress.

The agreement enables the parties rapidly to reach a position where they can reprocess on an industrial scale, while at the same time allowing them to retain their interest in a new industry where conditions do not favour isolated efforts by individual firms ; the parties are to continue joint research and development into the application on an industrial scale and in profitable conditions of the technical experience they have acquired in building and operating a pilot plant.

2. The agreement allows consumers a fair share of the resulting benefit.

By enabling the parties to continue their research activities and transfer of technology, it will help to reduce costs and to guarantee the stability of reprocessing services; it thus opens the way to an eventual drop in prices charged to users, in this case electricity producers. By virtue of the conditions and obligations which it will impose on the parties and through its subsequent supervision, the Commission will ensure that no conduct of the parties can prevent users from receiving their share of the resulting benefit. Moreover the electricity producers will use their economic strength to exert pressure in the same direction.

3. The agreement imposes no restrictions of competition which are not indispensable to the attainment of these objectives.

It is essential to form a joint subsidiary, for this makes it possible to cut down the investment needed and reduce the attendant risks and without it none of the parties would persist in trying to move rapidly into large-scale production.

The clause requiring each party to operate in this field only through the joint subsidiary is, on account of the circumstances of the agreement, a necessary consequence of the formation of the subsidiary and is indispensable as a means of ensuring that it can work effectively.

4. The agreement, having regard to the very special nature of the market and to the still unresolved technological problems, does not afford the undertakings the possibility of eliminating competition within the meaning of Article 85 (3) in respect of a substantial part of the relevant market since the exemption will cease in 1986, which means that the firms are faced with the certainty of becoming competitors at that time and are obliged to behave from now on with this in view. Moreover, once the URG agreement expires (in 1986 at the latest), there will be effective competition between British Nuclear Fuels Ltd, the Commissariat à l'Énergie Atomique and the partners of KEWA.

IV

1. Under Article 6 (1) of Regulation No 17, the Decision can have effect from 11 October 1971, the date on which the agreement was notified.

2. The period of validity of the Decision to be fixed under Article 8 (1) of Regulation No 17, must be long enough to enable the parties to pursue their joint efforts towards attaining the favourable result sought. The period of validity should therefore be fixed at 15 years.

3. Under Article 8 of Regulation No 17, conditions and obligations may be attached to the Decision and the Commission may revoke or amend its Decision or prohibit specified acts by the parties where the parties abuse the exemption from the provisions of Article 85 (1) of the Treaty granted by the Decision.

This Commission Decision covers exclusively the agreement as it is actually operating at the present time. The authorization does not cover any direct or indirect extension of the current scope of KEWA's activities, which is the reprocessing of oxide nuclear fuels, or the extension of the agreement to other parties.

Furthermore, KEWA has and will probably retain for several years a very strong position in a substantial part of the common market. It should therefore be required to send the Commission each year copies of its balance sheets and profit and loss accounts; this will enable the Commission to ensure that KEWA is allowing users a fair share of the benefits resulting from the agreement.

4. The observations received by the Commission from interested third parties in response to the notice published in pursuance of Article 19 (3) of Regulation No 17 drew its attention principally to the need to show clearly that all the restraints of competition in the agreement were indispensable and to attach prior conditions and obligations to the Decision so as to ensure that a fair share of the benefits resulting from the agreement accrued to users; the Commission has paid due attention to these observations,

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 23 August 1971 between Farbenfabriken Bayer AG, Leverkusen, Farbwerke Hoechst AG, Frankfurt-am-Main, Gelsenberg AG, Essen, and Nukem GmbH, Wolfgang-bei-Hanau relating to the establishment of Kernbrennstoff-Wiederaufarbeitungsgesellschaft mbH.

Article 2

The following conditions and obligations are attached to this Decision:

— the Decision covers exclusively the agreement as it is actually operating at the present time; the parties shall communicate to the Commission, as the case arises, their intention to extend, directly or indirectly, the present field of application of the agreement, which is the reprocessing of oxide nuclear fuels, or to increase the number of parties to the agreement;

— each year the parties shall send the Commission copies of the balance sheets and profit and loss accounts of KEWA.

Article 3

This Decision shall have effect from 11 October 1971 and shall apply until 31 December 1986.

It is addressed to Farbenfabriken Bayer AG, Leverkusen, Germany; Farbwerke Hoechst AG, Frankfurt-am-Main, Germany; Gelsenberg AG, Essen, Germany, and Nukem GmbH, Wolfgang-bei-Hanau Germany.

Done at Brussels, 23 December 1975.

For the Commission

A. BORSCHETTE

Member of the Commission