II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 26 July 1976

relating to a proceeding under Article 85 of the EEC Treaty (IV/28.996 — Reuter/ BASF)

(Only the German text is authentic)

(76/743/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 1 and 3 thereof,

Having regard to the written application dated 27 January 1975 concerning BASF AG of Ludwigshafen made by Dr Gottfried Reuter of Lemförde under Article 3 of Regulation No 17,

Having heard the undertakings concerned pursuant to Article 19 (1) and (2) of Council Regulation No 17 and to Commission Regulation No 99/63/EEC of 25 July 1963 [2],

Having regard to the opinion delivered by the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 10 of Regulation No 17 on 15 June 1976,

Whereas :

I. The facts

By letter dated 27 January 1975 Dr Gottfried Reuter lodged a complaint with the Commission under Article 3 of Regulation No 17. The subject of the complaint was a contractual non-competition clause imposed upon him by the purchaser, BASF AG, on the sale of Elastomer, a group of undertakings concerned with the manufacture of polyurethanes. The transfer agreement, concluded in June 1971, prohibits Dr Reuter for eight years, that is until June 1979, from carrying on certain activities.

1. *The product*

Polyurethanes are synthetic products used in manufacturing a wide range of final products in a number of industries, including the motor, building, furniture, footwear (synthetic leather), electrical engineering (insulating material), varnish, glue, shipbuilding and mechanical engineering industries. The market for these synthetics is in a state of constant growth, with rates in recent years of more than 15 % in some industries. The manufacture of polyurethane final products goes through the following stages :

The principal chemical products used as basic products in the manufacture of polyurethanes are polyols and isocyanates. The most important polyols are polyethers and polyesters ; the most important isocyanates are diphenylmethane diisocyanate (MDI), toluylendiisocyanate (TDI) and hexamathylene diisocyanate (HMDI). These basic products are themselves obtained as follows :

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

— polyesters from polyalcohols (burandiol, hexandiol, neopentyl glycol, trimethylol propane, dicarbonic acids and caprolactam),

— polyethers from propylene-propylene oxide,

— isocyanates from anilines, formaldehyde and diamines (naphtylene diamine, hexamethylene diamine).

The basic products are made into semi-finished polyrethanes, that is to say :

— foam plastic components,

— elastomers,

— granulates for thermoplastic processing,

— chips and prepolymers.

These semi-finished products are in turn converted into a large number of final products of varying shapes and properties, as for example soft and hard foam plastic, varnishes, solid materials and finished components.

There are thus four stages of product :

— stage 1 : the basic materials — glycols, polyalcohols, amines, dicarbonic acid, formaldehyde, propylene oxide,

— stage 2 : polyesters and polyethers and diisocyanates,

— stage 3 : semi-finished polyurethane products,

— stage 4 : final products.

Stage 1 products are not polyurethane-specific, since they are used for the manufacture of other materials as well. They are also produced by firms which are not active in polyurethane chemicals.

Two main methods are used to produce polyurethanes :

(a) the multi-component system, whereby polyester and polyether alcohols are combined in exact proportions with the diisocyanate in a single operation carried out by means of injection pumps.

This system was developed by Bayer, who had patents in the field of elastomer formulation which expired in 1969 ;

(b) the two-component system, whereby polyester and polyether alcohols are pre-mixed, but the diisocyanate is added, in exact proportion, only after the foaming caused by the first mixture has ceased.

This was the method used by the Elastomer group.

The main difference between these two methods is that in the first method stage 2 intermediate products are processed directly into the final product, so that other firms cannot carry out stage 4 final processing, while the second method allows the final processor to carry out his own polyurethane production.

According to the information before the Commission, about 75 % of final polyurethane products are produced under the multi-component system and 25 % by the two-component system.

2. *Market structure*

By far the largest polyurethane chemical supplier in the common market is Bayer. This applies not only to the basic materials of stage 1, particularly aniline (important as a raw material in the manufacture of MDI), but also at stage 2, where Bayer is the only manufacturer of a complete range of polyester alcohols, polyether alcohols, diisocyanates (MDI and TDI) and of nuclear chain-lengthening and cross-linking agents. Bayer has considerably strengthened its position at stages 3 and 4, in particular by taking over companies of the Metzeler group.

The number of competitors is limited : apart from BASF the most important suppliers in the common market are ICI, Rhône Poulenc (linked with Bayer through Progil-Bayer-Ugine, Paris), Shell (linked with Bayer through Bayer-Shell-Isocyanates, Antwerp), Ugine-Kuhlmann (linked with BASF through BASF-Ugine 'EURANE', Antwerp), Dow Chemicals (linked with BASF in the United States through Dow-Badische), Union Carbide Corporation (UCC), Henkel, Montedison, Upjohn and Società Italiana Resine (SIR). There is also Du Pont, though its significance in the common market is limited to the manufacture of elastomer threads.

BASF is a major manufacturer of stage 1 basic materials. It has strengthened its position with respect to other stages by :

— combining with Ugine to form Eurane (isocyanates and polyethers),

— establishing or expanding its own plants (e.g. in the field of chain-lengthening agents),

— acquiring the Elastomer group.

The Elastomer group is one of the most important 'system formulators' and ranks alongside the Metzeler Group, which was recently taken over by Bayer, as one of the chief German polyurethane processors. In 1971, the Elastomer group consisted of 50 companies in 11 countries. In the EEC, apart from the Federal Republic of Germany, there were branches in France, Italy and the United Kingdom. The total turnover of the group was DM 200 million. The group was concerned not only with the production and distribution of polyurethanes but also with development and construction of plant for the production of polyurethanes. The group was particularly important in the blending of polyurethane raw materials at stage 3. This importance increased from 1969 onwards, when Bayer's patents for blending technology expired and

polyurethane processors were no longer so dependent on Bayer.

The influence of BASF on the polyurethane sector in question does not, at stage 3, even after the acquisition of the Elastomer Group, extend to Bayer, which remains the market leader.

3. *The transfer of the undertaking*

Dr Reuter is a research chemist specializing in polyurethanes. In 1969 he held, through Reuter-Holding GmbH, Zurich, 50 % of the shares of Elastomer AG, Chur (Switzerland), the holding company of the Elastomer group of companies outside Germany. Another member of the Elastomer group was Elastogran GmbH, Lemförde, the holding company for the companies based in Germany and providing the group's main economic strength. The remaining 50 % of the shares in Elastomer AG, over which Dr Reuter held an option to purchase, were held by the Investitions- und Handelsbank Zurich (IHB).

(a) By an agreement dated 12 March 1969 between Dr Reuter and BASF, Dr Reuter undertook to exercise his option on the IHB shares and to transfer the shares in Elastomer AG so acquired to BASF. In addition, Dr Reuter granted BASF an irrevocable option with effect from 2 January 1972 to purchase the remaining 50 % of the shares in Elastomer AG held by Dr Reuter through Reuter Holding. The option was to expire on 30 June 1971. In connection with this option, and to enable Dr Reuter to acquire the shares from IHB and to discharge his and Elastomer AG's obligations towards the latter, BASF granted Dr Reuter a loan.

Under the agreement Dr Reuter remained the managing director of the Elastomer group but accepted various restrictions on his activities in respect of the period before and after the exercise of the option *(inter alia* a prohibition on competing for 10 years after the transfer of the remaining 50 % of the shares). These restrictions were, however, replaced by the subsequent agreement of 25 June 1971.

Pursuant to the agreement of 12 March 1969, Dr Reuter exercised his option to purchase the shares from IHB and transferred them to BASF.

(b) By an agreement dated 25 June 1971 (hereinafter referred to as 'the purchase agreement') Dr Reuter sold to BASF the remaining 50 % of the shares in Elastomer AG held by him through Reuter-Holding-GmbH. By this agreement BASF acquired the companies of the Elastomer group active in the following fields ('fields covered by the agreement'):

'The research, development, manufacture, use and distribution of:

(a) chemical products for the production of polyurethanes. Such chemical products include in particular polyester alcohols, in so far as they are used for polyurethane, and all pre-mixes used for the manufacture of polyurethane products. Included are granulates, prepolymers and adducers such as those used in thermoplastic processing, textile finishing, polyvinylchloride solvents, paints, adhesives and moulded materials. Excluded is research into the manufacture of diisocyanates and polyetherpolyols;

(b) all derived semi-manufactured products such as foils, sheets, extruded products, etc.;

(c) finished products, in so far as they form part of the production programme of the LKG, KKM and OVG companies at the date of the agreement. The production programme includes semi-manufactured and finished products for machines and vehicles, and for lifting, handling and transport equipment of any description. In addition are included those consumer products referred to in Annex XI. Excluded are finished assemblies in which polyurethane is not an important component, such as shock-absorbers, ball-joints and transmission gear;

(d) all technology, equipment and apparatus for the processing of the products set out in (a), together with any corresponding chain lengtheners, solvents, isocyanates, catalysts and additives used in the production of products containing polyurethane. Excluded are ordinary machines for thermoplastic materials, such as injection moulders, extrusion and calendering machines.

It is irrelevant whether intellectual or industrial property rights exist in respect of the above or not.'

The companies acquired by BASF account for most of the polyurethane producing capacity of the Elastomer group and include companies within and outside the Federal Republic of Germany. Those companies involved in other fields remain under the control of Dr Reuter (in particular CAF Chemie Anlagenbau GmbH & Co.).

On 25 June 1971 an agreement was also concluded between Reuter Holding GmbH and a subsidiary of BASF, Glasurit Werke M. Winkelmann GmbH Hamburg (hereinafter referred to as 'Glasurit'), to which Dr Reuter was a party. (This agreement is hereinafter referred to as 'the know-how agreement'.) By this agreement Reuter Holding transferred all its

know-how and technology in the relevant field to Glasurit, including a detailed series of documents containing most of the scientific and technical data and know-how possessed by Elastomer AG.

Dr Reuter resigned as manager of the Group after the sale. The restrictions placed on the continuance of his activities in the fields covered by the agreement are contained in Clauses IX to XI, which are set out below.

'Clause IX

Save as provided in Clause X of this contract, Dr Reuter shall for a period of eight years from the signing of this contract refrain from engaging directly or indirectly in any activity in Germany or elsewhere in the relevant field; he shall form no new firms of his own in this field nor own any firms or shares in firms, nor maintain or enter into any contractual association with third parties, nor act as employee, adviser or in any similar function. This does not apply to dealings in officially traded securities, provided Dr Reuter does not aim at any business activity thereby.'

'Clause X

1. Dr Reuter shall have the right to engage in business in the relevant field:

(a) as provided by Annex IX in respect of manufacturing finished parts;

(b) as provided by Annex X in respect of contracts concluded with VEB-Synthesewerk Schwarzheide.

Dr Reuter may continue R & D activities on manufacturing processes for isocyanates and ployether polyols and may commercialize the results of his R & D by issuing licences, which may extend to the construction of manufacturing plant. However, he shall not hold shares in companies operating plants using their own processes. Otherwise, his activities shall be as agreed in the contract. He shall inform Glasurit of any results achieved in respect of the physical separation of diisocyanates and polyisocyanates.

2. In exercising his right under paragraph 1, Dr Reuter shall respect the legitimate interests of the Elastomer group and its subsidiaries and affiliates in the relevant field.'

'Clause XI

Dr Reuter undertakes, for a period of eight years following the signing of this contract, not to divulge to any third party any protected or unprotected know-how and experience in the relevant field, nor any events, circumstances or facts relating to technical, commercial, financial or staffing matters in the companies of the Elastomer group which arose before this contract was made, unless they are already well-known or relate to the activity permitted by Clause X. Dr Reuter undertakes, in particular, not to allow third parties access to plans of plant and machinery falling within the relevant field.'

Annex IX, cited in Clause X, reads:

'Dr Reuter may, after leaving the Elastomer group, develop, plan and build factories for finished parts and hold shares in the capital of the firms owning them, even if polyurethanes are among the substances used in them.

Such factories may include establishments for the manufacture of:

— shoes,
— motor vehicles,
— boats, prefabricated building parts and furniture, and
— synthetic leather and films.

Dr Reuter shall in respect of factories in which he holds shares give the Elastomer group priority as regards the supply of all raw materials, plant and machinery in the relevant field, provided that the prices and quality of such items are competitive.

In this case the Elastomer group shall accord Dr Reuter "most-favoured-firm" treatment until 31 December 1974.

Dr Reuter shall pass on to the Elastomer group, in exchange for suitable remuneration, all business in the relevant field which becomes known to him in the course of his business activity.'

Annex X concerns transactions with the German Democratic Republic, which have in the meantime been completed.

Clause XI, according to the interpretation placed on it by BASF and by Dr Reuter, also contains a prohibition on research.

Under a licensing agreement of 26 June 1971 made between Elastogran GmbH, of the one part, and Dr Reuter and CAF, which he controlled, of the other part, Dr Reuter was able to perform contracts with the German Democratic Republic. It enabled Dr Reuter to do business in the relevant field subject to certain geographic (Eastern bloc countries only) and temporal limits.

4. *The substance of the application:*

(a) Dr Reuter objects to the non-competition clause in Clauses IX and X of the contract of 25 June 1971. His argument is as follows:

This non-competition clause is a threat to his professional and economic livelihood. It covers an area of research which is identical with the activities of the Elastomer group in the field of polyurethane research. In 20 years of professional activity he has been creatively active only in this field. If the clause is upheld he will lose touch with scientific developments in his special field and thus become permanently unable to work in that field again. The clause therefore means that he would never again be able to exercise his profession.

The clause is of considerable importance for competition. BASF intended, even before taking over the Elastomer group, to enter the group's polyurethane field. In taking over that group, it eliminated a competitor and the non-competition clause shielded it from competition by Dr Reuter on the polyurethane market.

The clause also excludes any opportunity of alleviating the dependence of polyurethane processors on Bayer at stage 3. Even graver is the prohibition on passing on to third parties the know-how needed for building up fully integrated manufacturing systems and thus becoming serious competitors for Bayer and BASF. The restriction on competition is not permissible, if only because of its duration of eight years. This clause could be accepted only in order to safeguard operations while the group is being transferred, but should not exclude the seller from competition any longer than absolutely necessary.

Since BASF has taken over from Dr Reuter a fully applicable technology plus complete know-how, in other words, acquired a group as a going concern, two years would be the longest duration acceptable for securing the clientele and adapting the group to its new owners and management; since the customers are mainly German firms, a clause limited to Germany would have have been sufficient to safeguard the group's operations. The extension of the non-competition clause to countries where BASF does not supply the market, together with the eight-year duration, is intended as a shield against competition in general and infringes Article 85 (1) of the EEC Treaty. There is no justification for the prohibition on research. Dr Reuter makes no complaint against the obligation to keep know-how secret, as there are areas in which he could carry out research without infringing this obligation.

Pursuant to this application the Commission investigated the facts and in consequence sent a statement of objections to BASF.

(b) In its answer BASF submits that:

At stage 2 only polyester polyols are affected by the non-competition clause. These are manufactured and sold by 12 undertakings within the Community. BASF names 46 European firms as stage 3 producers. BASF is itself represented in this sector only by Elastomer. BASF was not active in this field before 1971.

The scope of the non-competition clause is in accordance with the wishes of Dr Reuter himself, for he had seen a future for himself in areas not affected by the clause, i.e. in polyether polyols and isocyanates, as well as participation in or operation of plant for the application of technology in this field or the manufacture of final products. The areas excluded from the non-competition clause under Clause X of the agreement of 25 June 1971 allow unrestricted activity by Dr Reuter in by far the largest part of polyurethane technology. Under Clause 2 of the licensing agreement of 26 June 1971 between Elastogran GmbH, of the one part, and Dr Reuter and CAF, of the other part, Dr Reuter was able, up to 31 December 1973, to conclude contracts in the relevant field. He was allowed to perform these contracts, and thus engage in business in the relevant field, until 31 December 1976, i.e. for five-and-a-half years.

Furthermore, Dr Reuter had accepted a 10-year prohibition of similar scope in the 1969 agreements. Both the scope and duration of the restriction had been necessary. Because of its poor financial situation the Elastomer group would certainly have collapsed and ceased to be a competitor had BASF not rescued it by taking over at least its polyurethane-producing activities. In addition to the purchase price, liabilities of more than DM 130 million were taken over, an outlay not covered by the value of the assets of the undertaking and its know-how alone. In order to enable BASF to consolidate the takeover and reorganize the firm, it was essential that Dr Reuter abstain for a certain time from all activity in the relevant field, particularly as any new activity on his part would inevitably have been directed towards his old customers. The same arguments apply to the restriction on research. It is stressed that the essence of the transaction with Dr Reuter was not to transfer an undertaking but to transfer goodwill and technical know-how. The acquirer of know-how, like the

acquirer of a patent, is entitled to its sole use. This is legitimate protection from competition, since BASF has in effect acquired this sector of the market. Dr Reuter is therefore no longer entitled to make use of the technical knowledge transferred by him, unless specifically authorized to do so. All research activity in the relevant field involves the use of this transferred know-how and knowledge. Economically profitable polyurethane research is possible at stages 3 and 4 only in close cooperation with the customer. Only the customer can verify in his plant whether the product developed in the laboratory possesses the properties needed for its application, and where necessary make suggestions for improvements. Although non-commercialized research is possible even without practical testing by the customer, the product of such research developed without such cooperation could not be sold without at least precise instructions for storing and processing, even if its composition were kept secret. According to his own evidence, Dr Reuter as early as 1971 possessed know-how in all the presently known fields of application. Thus any know-how passed on by him in respect of blending or application would be based on knowledge that had been transferred when the undertaking was sold.

BASF further contends that, inasmuch as Dr Reuter has research carried out by experts employed by him for this purpose, he is bound to pass on his knowledge to them and hence to commit an infringement of the obligation to keep secret and not to exploit the relevant know-how. Competition from Dr Reuter in the relevant field if the restrictions were lifted would diminish the value of the assets transferred by him.

The period of eight years fixed for the duration of the non-competition clause was the time needed by BASF to familiarize itself with polyurethanes. Dr Reuter obtained from Bayer basic materials and the know-how necessary for their application; BASF did not receive know-how from Bayer with its supplies of basic materials. BASF has had to acquire this know-how by its own efforts in order to become a real competitor for Bayer with the Reuter know-how. BASF took over Elastomer without having done much preliminary work of its own in this field. The range of formulations acquired from Dr Reuter is still the core of BASF's polyurethane business. The purpose of polyurethane research is to develop a kind of 'recipe book' for the mixes needed in the various fields of application. These recipes are a sensitive type of know-how, easily transmissible to competitors or customers and therefore in particular need of protection. Through his familiarity with the know-how, the customers and their requirements, and possibly in combination with the raw material know-how provided by Bayer, Dr Reuter is in a position to deprive BASF of all benefits of the business so expensively purchased from him. BASF has been unable to strengthen its competitive position adequately in the past four years and it is uncertain whether it will be able to do so in eight years.

At the hearing Dr Reuter denied having received at the time of the sale raw material know-how from Bayer, claiming that the value of the Elastomer group lay primarily in the development of know-how of its own, independently of Bayer.

Dr Reuter explained that in the field of reactive synthetics research was constantly being carried out to improve their properties, with every new raw material produced necessitating a process of redevelopment; in particularly research-intensive fields, the developments in chemistry are such that 'recipe books' require revision at least every two years.

In reply, BASF stated that the revision of recipe books was only a technicality, conducted in gradual steps, in the further development of know-how. Not every improvement of the properties of a raw material necessitated revision, for the recipe often produced better results with the improved product without revision. Research should not provide the know-how for the present but for the future — for products to be marketed in two, five or 10 years' time.

II. Applicability of Article 85 (1) of the EEC Treaty

Article 85 (1) 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 agreement of 18 June 1971 containing the non-competition clause is an agreement between undertakings. Dr Reuter is also to be regarded as an undertaking for the purpose of Article 85, since he engages in economic activity through those firms of the Elastomer group which remain under his control, by exploiting the results of his own research and as commercial adviser to third parties.

2. Dr Reuter is prohibited by the non-competition clause in Clause IX of the agreement of 25 June 1971 from engaging in business as a supplier of services and goods in the relevant field and from competing in the polyurethane market, both within and outside Germany, for a period of eight years from the conclusion of the agreement, i.e. until June 1979. This applies to all forms of activity, including participation in third-party undertakings or partnerships and advisory and similar activities for third parties. The prohibition extends to research, development, manufacture, application and sales. But for this clause, Dr Reuter could, because of his personal technical knowledge and experience, have engaged in activity in all these fields and, for example, could have developed and exploited new application processes, even after the transfer of that part of the Elastomer group which had been acquired by BASF.

The exception made for the manufacture of finished products in accordance with Annex IX is confined to areas in which polyurethanes are used together with other substances.

The performance of the contracts with the German Democratic Republic was a transitional arrangement only valid until 31 December 1973 and limited to specific Eastern European countries. The fact that under the licensing agreement of 26 June 1971 the performance of contracts concluded by 31 December 1973 was permitted up to 31 December 1976 does not negate, but rather emphasizes, that Dr Reuter could also have competed within the EEC but was prevented by the clause in question.

The exception made for research, development and exploitation of manufacturing processes for isocyanates and polyether polyols covers a field which was not that of Dr Reuter and in which he had never been active (stages 1 and 2).

Even within the permitted exceptions the freedom of action of Dr Reuter is restricted to the extent that he is obliged to communicate certain results of his research to Glasurit and in general to preserve the 'legitimate interests' of BASF. This requirement in effect precludes competitive behaviour towards BASF.

3. When the material assets of a business are sold it is not normally necessary to protect the purchaser by imposing a prohibition on competition on the seller. In the present case, however, the sale included goodwill and know-how; indeed these items constituted a substantial part of the assets transferred. In order to determine whether Article 85 (1) applies to the non-competition clause in the agreement, it is above all necessary to examine how far the clause is essential to the preservation of the transferred worth of the undertaking and whether it exceeds what is necessary for such preservation.

(a) It is recognized that it may be necessary in certain cases to provide safeguards to ensure the effective performance of an agreement. These may take the form of a contractual non-competition clause in cases where not only the material assets of an undertaking but also its commercial goodwill, including relations with customers, are to be transferred to the purchaser. In such cases it is essential to prevent a seller from re-acquiring his old customers either directly or indirectly through cooperation with the purchaser's competitors in the period immediately following the transfer. Compliance by the seller with such a non-competition clause means no more than that he must respect his obligation under the agreement to transfer the full value of the undertaking. Application of Article 85 (1) to such a non-competition clause in an agreement can be excluded in such cases, since it would make more difficult or even impossible transactions which are generally recognized as legitimate.

This does not imply that the purchaser may benefit from protection without limit as to time, since the goodwill of an undertaking enjoys no absolute right of protection. It consists rather in a purely factual state of affairs which is constantly exposed to attacks by competing firms. The protection claimed by a purchaser against the competitive activity of the seller is justified only on the ground that the seller, as the former owner of the undertaking, may enjoy an advantage over outsiders in possessing special information about the undertaking's production and sales situation; this makes him more dangerous than other competitors. However, this protection must be limited to the period required by an active competitive purchaser for him to take over undiminished the undertaking's market position such as it was at the time of transfer. Account must be taken of such organizational problems as may arise until the newly acquired firm has been integrated into the purchaser's undertaking or group.

(b) It is further recognized that it may be necessary in certain cases to provide additional safeguards to ensure the effective performance of an agreement in cases where technical knowledge, constituting an important part of the value of a transferred undertaking, is placed at the disposal of the transferee. As in the case of goodwill, it must be possible to prevent the transferrer for a certain time from using such knowledge in a manner which would prevent the transferee from acquiring the undertaking with its market position undiminished.

Here too, the protection afforded to the transferrer should be limited in time, since the transfer of legally unprotected know-how confers no exclusive rights on the purchaser. Contrary to the contention of BASF, the transfer of technical know-how in connection with the sale of an undertaking does not automatically preclude any further activity on the part of the seller based on such know-how. The opportunity of using know-how which is unknown to competitors is, like goodwill, a competitive advantage. This advantage can be diminished by the development by third party competitors of their own know-how in the particular field of research. Unlike third parties the transferrer of an undertaking remains aware of the contents of any transferred know-how, since he cannot divest himself of his own knowledge. For this reason it appears legitimate to protect the transferee in order for a certain time to enable him to acquire the undertaking with its competitive position undiminished. This need to protect the competitive position of the undertaking provides the justification for and prescribes the time limits to any non-competition clause involved.

In determining the duration of the non-competition clause, the factors particularly to be taken into account are the nature of the transferred know-how, the opportunities for its use and the knowledge possessed by the purchaser. It is also reasonable to assume that the transferee will actively exploit the assets transferred. A distinction must be made between know-how existing at the date of transfer and new or further developments by the transferrer based on or in connection with the transferred know-how. A non-competition clause extending to new or further developments can be of shorter duration.

In respect of geographical extent and subject-matter the non-competition clause must in normal circumstances be confined to those markets in which the undertaking was active before its sale, or in which it may be regarded as a potential competitor on the basis of its relevant and demonstrable activity.

4. Having regard to the foregoing considerations the Commission finds that in this case the non-competition clause greatly exceeds that which is needed to secure the legitimate object of the agreement, namely, to secure to the buyer the transfer of the full commercial value of the transferred undertaking, and that at the time of this Decision the maintenance of that clause constitutes an appreciable restriction of competition.

(a) In so far as the non-competition clause also covers non-commercialized research and development, it clearly exceeds the limits of what may be agreed to safeguard the takeover of an undertaking.

The development by the transferrer of the results of his research even to the stage of industrial use does not, provided no breach of the obligation of secrecy is involved, jeopardize the achievement of the legitimate purpose of the agreement. As long as the transferrer does not exploit the results of his research and development activity in such a way as to compete directly or indirectly with the purchaser of the undertaking, there is no adverse effect either on the undertaking's market position or on the value of the acquisition, and likewise there is no risk of customers being taken away.

It is clear that Dr Reuter would lose touch with scientific and technical progress if he did not continue research and development in polyurethanes, where there is constant innovation. His continuance in research would be in line with the Community's interest in maintaining genuine competition within the common market. If the prohibition on research and development were upheld, there would be a danger of his being eliminated once and for all as a potential competitor. This prohibition must thus be regarded as a clause which was *ab initio* unjustified as a safeguard for the takeover and which has as its object and effect an appreciable restriction of competition.

(b) A non-competition clause restricting the commercial exploitation of technical knowledge in the areas covered by the agreement can be accepted only to the extent that such exploitation would hinder the acquisition of the transferred assets of the undertakings concerned and thereby diminish their value.

During the period required by BASF to incorporate the acquired undertakings within its group and to build up its own clientele, BASF considered it reasonable justification for the restriction of

competition that the transferrer might use the assigned know-how in competing for the customers of the transferred undertakings. The know-how in the present case consists mainly of recipes for mixes of polyurethane raw materials adapted to particular types of use and thus to particular customers. On the other hand, it should be remembered that the transferred undertakings have continued to use the assigned know-how, so that it is reasonable to assume that, after an initial period of several years of complete protection from the 'insider competition' of Dr Reuter, BASF is now able to make full use of the know-how transferred in its dealings with its customers. There are therefore no grounds remaining for preventing Dr Reuter, by means of the non-competition clause, from entering the market as a competitor with new further developments based on the transferred know-how.

With respect to the determination of the period necessary for the incorporation of the transferred undertakings, there is no evidence to suggest that BASF met any special difficulties in reorganizing these fully operational undertakings which could not be overcome by an active management in a relatively short time. As to the practical arrangement of customer-supplier relationships — taking polyurethane customers in the motor vehicle industry as an example — BASF stated that supply contracts were normally terminable at six months' notice, or a year's notice at the most. Thus Elastomer's existing customers had repeated opportunities over a period of several years to change their supplier. Those who chose not to do so after this time must therefore be regarded as among the clientele acquired by BASF's own efforts. In this sense BASF can be said to have attained the former market position of the undertakings it had taken over. A longer protection by means of the non-competition clause seems unjustified, because the customer relationships with Elastomer have been replaced by new relationships with BASF.

Account has been taken of the fact that the field of activity of the transferred undertakings was a wide one and that the customer relations were not easy to manage in view of the activities of the Elastomer group, which in 1971 comprised 50 firms extending over 11 countries.

On the other hand, BASF is a financially strong multinational enterprise with an internationally experienced management, with its own relevant experience appropriate to the new field of activities. Moreover, the acquired group of undertakings was taken over as a going concern.

In considering the transfer of know-how in this field it is to be noted that the rapid progress of polyurethane research and the constant emergence of new raw materials produces constant changes in manufacturing processes, so that continuous research efforts are needed.

Even if it were accepted that the development of new know-how emerges in a step-by-step process, it may be considered that over a period of several years the sum of these individual steps would give an active firm a considerable competitive advantage over an inactive firm.

Having considered these aspects, the Commission still takes the view that, in spite of the importance of the acquired goodwill and know-how at the time of transfer, BASF should not, in any event at the date of this Decision (being approximately five years after the takeover), need special protection from the competition of Dr Reuter.

(c) The contention by BASF that the non-competition clause, in its scope as agreed between the parties, was necessary in order to protect the secrecy of the transferred know-how cannot be accepted.

It is not necessary to decide whether the terms of the obligation of secrecy agreed between the parties with respect to the assigned know-how are compatible at all with the rules of competition in the Treaty. The following general observations may however be made.

The obligation of secrecy towards third parties does not in itself affect the competitive relationship between transferrer and transferee, but is completely compatible with independent behaviour by the tranferrer in the fields covered by the agreement. In the present case the technical knowledge transferred consisted primarily of recipes for polyurethane mixes specifically adapted to customers' requirements.

In view of the rapid development of technology in polyurethane chemistry, it may be questioned whether such know-how has at the present time sufficient economic value to justify its continued protection by an obligation of secrecy.

In no circumstances may an obligation to keep know-how secret from third parties, imposed on the transfer of an undertaking, be used to prevent the transferrer, after the expiry of the reasonable term of a non-competition clause, from competing with the transferee by means of new and further developments of such know-how.

(d) Nor can it be said that a non-competition clause of a particularly long duration would be justified by the high costs incurred by BASF in taking over the undertaking. Since the undertaking was taken over very much as a going concern, its existing liabilities could have affected the purchase price but could not have prolonged the time for which protection was needed from the competition of Dr Reuter.

(e) It follows from the foregoing that a non-competition clause may only be used to secure the market position of an undertaking. In consequence, the contention of BASF that it needed first to acquire for itself the raw material know-how which Dr Reuter had formerly received from Bayer together with raw materials and which it would no longer receive, is irrelevant.

Since the know-how involved here is that of a third party, the only question to be considered is whether the supplier-customer relationship with Bayer, on which the right to use the know-how is based, can be protected by a restriction of competition imposed upon the transferrer for a period of time longer than that necessary for taking effective charge of the acquired undertaking.

According to BASF's own statement, Bayer, a third party, ceased providing know-how of its own accord, quite independently of any action on the part of Dr Reuter. The customer relationship with Bayer was from the beginning subject to the uncertainties which occurred in the subsequent behaviour of this third party. The lack of protection against Bayer as a third party was sought to be compensated for by a restriction of competition imposed on the transferrer, not called for by any 'peculiar competitive threat' posed by the latter and therefore unreasonable.

It is moreover established that raw materials are constantly changing. The parties differ only in their views on what effect this had on the 'revision of recipe books'. These continuing developments in raw materials constitute in the eyes both of Bayer and of BASF new developments and cannot therefore be included among the assets of the transferred firm contributing to its competitive position at the time it was taken over. Both Bayer and the Elastomer group carry out independent research and development at their respective production stages. Because their research and development can take separate courses, it cannot be said to follow, even if one were to accept the submissions of BASF, that BASF would have been able to go on using the Bayer raw material even if Bayer had continued to provide know-how. The raw material problem is a general one which arises from the rapid advances which are being made in polyurethane chemistry.

The protection of such advances, i.e. the protection of future activity, cannot serve as justification for the prohibition. As soon as the takeover of the assets was complete, the production facilities of the undertakings being fully operational, were able to use the Bayer raw materials supplied at that time ; and it is clear that, at least as far as raw materials are concerned, Bayer continued its supplies.

5. The non-competition clause is also likely to affect trade between Member States, since it affects goods and services which, if they could be offered by Dr Reuter, would or could be the subject of trade between Member States. This applies also to cooperation between Dr Reuter and undertakings in non-Community countries, which may be restricted by the clause in so far as such undertakings could become suppliers and competitors in the common market.

Through his remaining companies, and by reason of his advisory activities, Dr Reuter would normally be able to act as a competitor in the relevant European market. His importance is in relation to that field of the polyurethane market in which stage 3 products are transformed by end-users, for the most part by such users themselves, in accordance with their own needs. This field amounts to 25 % of the entire polyurethane market in Europe. Dr Reuter supplied systems in this field and could again do so were the restriction on competition to be removed. It seems clear that the provision of application know-how to enable foaming to be carried out in the various localities where polyurethane is used has, as regards inter-State trade in finished polyurethane foams, immediate advantages in terms of reduced transport costs. BASF itself stressed that competition could be more easily affected if Dr Reuter, acting as an adviser, were to place his extensive knowledge at the disposal of competing firms. With the systems he has developed, Dr Reuter could help to reduce considerably the share of the market (at present some 75 %) now held by goods foamed from stage 2 products to end-products under the multicomponents system. The polyurethane market is already a substantial one and continues to expand as new applications for polyurethanes are found. The restriction of competition on this market and the effect on trade between Member States is therefore appreciable.

III. Applicability of Article 85 (3) of the EEC Treaty

An exemption under Article 85 (3) cannot be considered, since the agreement, although notifiable, was not notified to the Commission (Article 4 (1) and (2) of Regulation No 17). The agreement in that it excludes any activity by Dr Reuter throughout the common market, relates to imports and exports between Member States (Article 4 (2) (1)). The exception set out in Article 4 (2) (2) (b) does not apply, because restrictions have been imposed on Dr Reuter as the assignor of the know-how. Moreover, it is not apparent how a restriction of competition of the scope of the prohibition on research, development, manufacture and application in the present case contributes to promoting technical or economic progress while allowing the consumer a fair share of the resulting benefit. It cannot be contended, in the light of BASF's financial strength, which now supports the acquired group of companies, that the assumption by BASF of liabilities amounting to DM 130 million entitled it to special protection for a period of eight years. The restriction of competition provides no appreciable objective advantages to offset the serious disadvantages for competition in the relevant market.

IV. Applicability of Article 3 (1) of Council Regulation No 17

Article 3 (1) of Regulation No 17 empowers the Commission, where it finds, upon application or upon its own initiative, that there is an infringement of Article 85 of the EEC Treaty, by decision to require the undertakings or associations of undertakings concerned to bring such infringement to an end,

HAS ADOPTED THIS DECISION:

Article 1

Clauses IX and X of the contract of sale concluded on 25 June 1971 between Dr Gottfried Reuter and Gottfried-Reuter-Holding-GmbH of the one part and BASF Aktiengesellschaft of the other constitute an infringement of Article 85 (1) of the EEC Treaty.

Article 2

The undertakings named in Article 3 shall forthwith bring to an end the infringement referred to in Article 1.

Article 3

This Decision is addressed to the following:

1. BASF Aktiengesellschaft,
   6700 Ludwigshafen, Federal Republic of Germany;
2. Dr Gottfried Reuter,
   Bergstraße,
   2844 Lemförde/Hannover, Federal Republic of Germany;
3. Gottfried-Reuter-Holding-GmbH,
   Zürich, Switzerland.

Done at Brussels, 26 July 1976.

For the Commission

G. M. THOMSON

Member of the Commission