COMMISSION DECISION

of 12 June 1978

relating to a proceeding under Article 85 of the EEC Treaty (IV/29.453 — SNPE-LEL)

(Only the English and French texts are authentic)

(78/571/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 No 17 of 6 February 1962 [1], and in particular Articles 1, 4 and 15 (6) thereof,

Having regard to the notification made on 31 May 1977 by Société nationale des poudres et explosifs of Paris, and Leafields Engineering Limited of Leafield, United Kingdom, relating to the cooperation agreement entered into on 23 February 1977 between these two undertakings,

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

Whereas :

I. THE FACTS

A. The parties

1. Société nationale des poudres et explosifs (hereinafter referred to as 'SNPE') is a company incorporated in France in which the French State holds 99·82 % of the capital. Its activities are divided between Department A, autopropulsion, Department B, powder and explosives, and Department C, chemicals. A fourth department for engineering was transferred to a subsidiary company, SNPE Chimie Expansion, on 1 January 1976.

During the year 1976 SNPE and SNPE Chimie Expansion employed some 6 000 persons and had a turnover of approximately FF 876 million.

On 21 November 1977 SNPE acquired a controlling interest of 70 % in Pyromeca, Toulon, a company specializing in the development and manufacture of pyrotechnic units.

2. Leafields Engineering Limited (hereinafter referred to as 'LEL') is a company incorporated in the United Kingdom. Its business is to design, develop and manufacture high-quality precision devices for the armed services and the offshore oil industry, such as major components for weapons systems, devices to inflate inflatable equipment, pyromechanisms, gas generators and hydraulic pumps.

In 1976 LEL employed some 158 persons and had a turnover of £1·2 million.

In 1974 LEL concluded an agreement with Pyromeca, Toulon (and its subsidiary in the United Kingdom, Pyromeca (UK) Ltd of Windsor) under which each party obtained *inter alia* the right to sell in its territory certain products manufactured by the other party. LEL acquired an 11 % share in Pyromeca when the latter was taken over by SNPE.

3. (a) Both SNPE and LEL are firmly established in the market for their respective products and both have specialized and partly complementary activities : SNPE in the fields of autopropulsion and chemical products, LEL in the fields of electronics and precision mechanics. Both have common and competitive interests in these fields as a whole and in particular products which incorporate their own respective specialist skills.

(b) A substantial number of the parties' products which are covered by the notified agreement are currently still under development and are likely to amount to a growing share in each party's total turnover.

B. The agreement

4. After discussing the conditions under which the 1974 agreement between LEL and Pyromeca could be replaced by a wider agreement between SNPE and LEL, the latter two undertakings agreed on 23 February 1977 to cooperate in the fields of pyromechanisms, tracers and submarine technologies Depending on the products concerned, this cooperation was to take the form of commercial representation by one party of the other, subcontracting between

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

the parties, the reciprocal granting of licences or of rights of reproduction, or of joint manufacture. For certain specific products the parties could become each other's exclusive distributors in their respective countries.

5. Clause 2.2 of the agreement, which was duly notified to the Commission on 31 May 1977, provides that 'this agreement is limited to France and Great Britain. This being so and except for provisions to the contrary listed under point 6, SNPE is forbidden, subject to the procedures specified in the various articles of chapter 3 and with the exclusion of current business, to grant a manufacturing licence or right of reproduction in Great Britain, or to produce or sell there directly the products listed in Annex 1 to this agreement; LEL is likewise forbidden under the same circumstances to operate in France'.

Clause 6 of the agreement provides for possible relief from the obligations contained in the notified agreement where these obligations are contrary to provisions in contracts between either party and its Ministry of Defence.

6. Clause 3 of the agreement which relates to the intended forms of collaboration between the parties for the products mentioned in Annex 1 to the agreement provides *inter alia* for:

(a) the grant of preferential rights by each party to the other of subcontracts for the latter's country (Clause 3.2);

(b) the grant of preferential rights by each party to the other of licences or rights of reproduction for the latter's country (Clause 3.3);

(c) joint production of certain products or parts thereof, the allocation of tasks to be proportional to the financial contribution of each party in the development of the product concerned (Clause 3.4);

(d) joint exploitation and promotion of the products (Clause 3.5);

7. Under Clause 4 of the agreement, the two parties undertake *inter alia*:

(a) to advise each other of negotiations pending from time to time and of commercial contracts which they intend to enter into with third parties, concerning the products mentioned in the agreement (Clause 4.1);

(b) to hold in confidence and not to disclose nor use without written agreement from the other party any information received from the other party relating to the products covered by the agreement or relating to their methods of manufacture or development (Clause 4.2);

(c) not to engage without the approval of the other party in negotiations for the manufacture or development by a third party of products listed in the agreement and which have been studied, developed or manufactured by the other party (Clause 4.4).

8. Under Clause 5 of the agreement, LEL undertakes:

(a) to waive its right of pre-emption in respect of shares in Pyromeca and to cancel the 1974 contract binding it to Pyromeca;

(b) to cancel another agreement, entered into in 1972, with Société d'études de réalisation et d'applications techniques (SERAT), Paris, concerning cooperation in fields of armaments and defence procurement.

9. Clause 9 of the agreement provides that if the notification of the agreement to the Commission of the European Communities results in an unfavourable response, the parties will jointly take remedial steps.

10. (a) The products covered by the agreement are listed in two annexes to the agreement:

(i) Annex 1 lists products for which a special agreement for collaboration is to be drawn up; namely, for pyrotechnic tracers, explosive attachments, pyromechanisms, gas generators for devices to inflate inflatable equipment and for lifting submerged objects, cutting lines and charges, cartridges and submarine products in lightened material. Concerning the latter submarine products, it is specified that, while awaiting a market study to be supplied by LEL, SNPE 'remains completely free to act directly in Great Britain'.

(ii) Annex 2 lists different other products which, initially, are merely to be subject to an exchange of information according to the provisions of Clauses 4.1 and 4.2 (see paragraph 7).

(b) For various reasons, it is not possible, and the information given by the parties confirms this, to give estimates of market shares for the products concerned, as between the parties and third-party competitors. First, the position varies in respect of the different products covered by the agreement; secondly, the products are at different stages of development and, thirdly, a number of the products need to be custom-built for their intended specific different uses by particular different customers. The parties have indicated, however, that, taking the products as a whole, there is no substantial competition to them within the Community from other producers.

11. Following a statement of objections made after a preliminary examination of the notified agreement, so far as this relates to the sharing of markets arising from Clause 2.2 (see paragraph 5), the undertakings concerned contested the Commission's objections in letters dated 20 December 1977 and requested the Commission to reconsider its views. They also stated that they would for the meantime and pending the grant of an exemption suspend the application of the agreement.

II. PRELIMINARY ASSESSMENT UNDER ARTICLE 85 (1) OF THE EEC TREATY

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, restriction or distortion of competition within the common market, and in particular those which share markets or sources of supply.

On the facts at present available, the Commission does not make a final ruling on the notified agreement but has reached the following conclusions on preliminary examination.

12. Both Société nationale des poudres et explosifs (SNPE) and Leafields Engineering Limited (LEL) are undertakings and their agreement of 23 February 1977 is an agreement between undertakings, within the meaning of Article 85 (1).

13. The agreement has as its object and effect the restriction of competition within the common market :

(a) The undertakings concerned are actual competitors, particularly in the field of pyromechanisms, and at least potential competitors in other areas. Each party is of significant importance in its respective country as regards civilian and military uses of its respective products.

(b) In respect of the products listed in Annex 1 to the agreement (see paragraph 10), Clause 2.2 of the agreement prohibits all manufacturing or trading activity of SNPE in the United Kingdom and of LEL in France (see paragraph 5). These provisions impose territorial limitations on the activities of the parties and amount to a sharing of the market in their products.

(c) The isolation of national markets is a particularly grave restriction as it runs counter to the principal objective of the Treaty to estabish a single market comparable to a home market. Such restrictions of competition are in opposition to principles of free trade in goods and services established by the Treaty. The sharing of markets is explicitly cited in Article 85 (1) (c) of the Treaty as a particular example of a restrictive trade practice which is prohibited and has been condemned in a number of Commission Decisions which have been upheld by the Court of Justice ([1]).

(d) Certain other provisions of the notified agreement, in particular those referred to under paragraph 6, 7 and 8, will be subject to a separate assessment by the Commission. Some of these appear to bind the parties to cooperate in such a manner that in important areas they no longer make independent decisions in their future business activities. These provisions also appear to prevent the parties *inter alia* from freely granting subcontracts or licences to third-party undertakings in the other party's country.

(e) Although, according to the parties, the products listed in Annex 1 to the agreement represent only a minimal or not significant part of their output (less than 2 % for SNPE, 10 % for LEL), the restrictions of competition referred to in paragraph 13 (b) are appreciable because the products are highly specialized in their particular applications, are offered on the European market only by a very limited number of manufacturers apart from SNPE, LEL and Pyromeca and there is no substantial competition to the parties within the Community from other producers.

14. For these reasons and also because the agreement brings about a territorial sharing of the parties' manufacturing and selling activities, the agreement may appreciably affect trade between Member States.

15. In respect of Clause 2.2 of the agreement (see paragraph 13 (b) and (c)), SNPE have stated *inter alia* that this clause 'did not aim at a market sharing with an absolute territorial protection. The leading idea behind this clause was that the technical complexity of the products concerned and the necessary exchange of information thereon would require that the parties be bound to maintain a close confidentiality, to provide the preconditions for a joint exploitation which could achieve a reliable cooperation between

([1]) Judgments in re 'Grundig-Consten' of 13 July 1966 (1966) ECR 299 ; 'Quinine' of 15 July 1970 (1970) ECR 661, 733, 769 ; 'Sugar' of 16 December 1975 (1975) ECR 1663 ; 'Frubo' of 15 May 1975 (1975) ECR 563.

technical teams, thus promoting the communication of knowhow between the parties concerned. The two parties, as they each supply their own complementary technological skills for the realization of a complete product, recognize it as legitimate that they should not offer the same product to third-party users in the other party's country' (SNPE letter of 20 December 1977).

16. LEL have similarly stated that the objective of Clause 2.2 is 'to ensure the technical interchange takes place to allow a natural and positive development of the products of our joint technologies. The agreement does not limit the opportunities for consumers to purchase the products to which the agreement relates from other sources within the EEC. On the contrary, the agreement enables each party to offer customers a full range of products of both companies which otherwise would not be available within the EEC' (LEL letter of 20 December 1977).

17. These arguments refer in substance to the general purpose of the agreement concerning the sharing between the parties of technical information and do not affect the conclusion that Article 85 (1) applies. Clause 2.2, whether it is considered in isolation or within the general framework of the agreement, has as its object and effect the creation of a territorial partitioning of SNPE's and LEL's respective activities which relate to the products listed in the agreement.

18. On a preliminary examination, therefore, the agreement in this respect infringes Article 85 (1) of the EEC Treaty.

III. PRELIMINARY ASSESSMENT UNDER ARTICLE 85 (3) OF THE EEC TREATY

Under Article 85 (3) of the Treaty, the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement between undertakings 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, nor (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

19. At this stage of the proceedings, it can be left open whether or not the restrictions on competition which are referred to in paragraph 13 (d) fulfil the requirements for an exemption.

In any event, Clause 2.2 of the notified agreement (paragraphs 5 and 13 (b) and (c)) does not meet the requirements for exemption for the following reasons :

(a) Even on the assumption that specialization of manufacturing activities and joint research and development of new products are in principle likely to contribute to improving production, the obligations of each party not to grant licences, or to produce or to sell directly in the other's country cannot contribute to such a development. The question whether the provisions contained in Clause 2.2 are indispensable to the attainment of such benefits does not therefore arise.

(b) In any event, consumers cannot draw any kind of benefit from the territorial allocation of the manufacturing and marketing activities of the parties. The parties themselves are the sole effective beneficiaries of the agreed partitioning of the market.

(c) Because of the limited number of other manufacturers of the products concerned, SNPE's and LEL's reservation to themselves of their respective home markets affords them the possibility of eliminating competition in respect of a substantial part of the products in question.

20. The relevant arguments of the parties, as outlined in paragraphs 15 and 16, do not displace the Commission's conclusion that the obligations of the parties as contained in Clause 2.2 of the agreement cannot benefit from the exempting provisions of Article 85 (1).

21. On a preliminary examination of the notified agreement, the provisions contained in Clause 2.2 do not satisfy the tests of exemption contained in Article 85 (3).

IV. APPLICATION OF ARTICLE 15 (6) OF REGULATION No 17

22. The infringement of Article 85 began with the conlusion of the agreement between SNPE and LEL on 23 February 1977. The sharing of markets is a particularly grave restriction having regard to the fundamental objectives of the EEC Treaty.

23. In accordance with Article 15 (6) of Regulation No 17 this Decision suspends, in respect of the obligations of the parties arising from Clause 2.2 of the agreement and in respect of like obligations, the immunity against the imposition of fines which normally results from the notification of an agreement,

HAS ADOPTED THIS DECISION :

Article 1

After preliminary examination under Article 15 (6) of Regulation No 17 the Commission considers that Article 85 (1) of the EEC Treaty applies to obligations of the nature contained in Clause 2.2 of the agreement made on 23 February 1977 between Société nationale des poudres et explosifs and Leafields Engineering Limited, to the extent to which each party is prohibited from granting licences in respect of, or to produce or sell directly, specific products in the other party's country, and that the application of Article 85 (3) is not justified.

Article 2

This Decision is addressed to the following undertakings :

1. Société nationale des poudres et explosifs,
   12, quai Henri IV,
   F-75181 Paris Cedex 04 (France).

2. Leafields Engineering Limited,
   Leafield,
   Corsham,
   Wiltshire SN1 39SS (England).

Done at Brussels, 12 June 1978.

For the Commission

Raymond VOUEL

Member of the Commission