II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 14 July 1986

relating to a proceeding under Article 85 of the EEC Treaty (IV/30.320 — optical fibres)

(Only the English and German texts are authentic)

(86/405/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (1), as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 4, 6 and 8 thereof,

Having regard to the applications for negative clearance and notifications by Corning Glass Works of New York and some of its affiliated companies (hereinafter referred to as 'Corning') on the one hand and several European companies on the other hand of joint venture agreements and related patent licence agreements, as amended, concerning mainly the manufacture and sale of optical fibres and optical cables,

Having regard to the summary of the applications and notifications published (2) pursuant to Article 19 (3) of Regulation No 17,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No C 206, 16. 8. 1985, p. 3.

I

THE FACTS

A. The procedure

(1) The agreements relating to the United Kingdom of 1981 listed in Annex 1 were notified to the Commission on 17 March 1981. The German agreements of 1973 and 1978 listed in the same Annex and agreements relating to a joint venture in France were notified to the Commission on 24 June 1983. The parties have applied for negative clearance pursuant to Article 2 of Regulation No 17 or, failing that, for exemption pursuant to Article 85 (3).

(2) On 6 July 1983, the Commission initiated a proceeding under Article 3 (1) of Regulation No 17 with a view to establishing the possible existence of an infringement of Article 85 (1). The Commission sent a statement of objections to all the parties concerned considering in particular that Corning's participation in the operation of three joint ventures having the same business activity and located in three Member States was such that it could have led to a market allocation between the three joint ventures by extensive coordination of output, sales and pricing decisions and by exchange of sensitive competitive information. The Commission further objected to certain specific provisions contained in the notified agreements.

(3) The Commission's objections were made in the light of Corning's strong controlling powers over each joint venture by way of its voting rights in the shareholders' meetings and its representation of the boards of management of the joint ventures. The Commission's assessment was further based on the particular conditions of the optical fibre market in which Corning has a strong patent position, on the fact that Corning's partners are major cable makers and suppliers to national posts and telecommunications undertakings or authorities (PTTs) in their respective countries and that only a limited number of sources of supply for optical fibres is available in the EEC and world-wide.

(4) In December 1983, an oral hearing took place at which all the parties concerned submitted observations to the Commission. Following that hearing, the parties proposed amendments to the original agreements. The amendments have brought about important changes in both the structure of the joint ventures and the rights and obligations of the parties. The subject of the present Decision is the agreements in their amended form.

B. The undertakings concerned

Corning Glass Works

(5) Corning Glass Works is a US corporation registered in New York with many subsidiaries in the EEC and the rest of the world. The Corning group has interests in the development, manufacture and sale of diverse products, primarily glass and ceramic products. In 1984, Corning's consolidated group turnover amounted to US $ 1 732 700 000.

(6) In 1970, Corning made a major invention by developing optical fibres which could be used for communication purposes. Their main use is in the field of telecommunications where they are likely to replace most traditional copper wire or coaxial cables. Their advantages over traditional conductors are principally higher volume of transmissions, fewer repeaters to boost signals over long distances and immunity to electromagnetic interference.

(7) Since 1970, Corning has taken steps to protect its technology for the production of optical fibres by registering patents in all major countries of the world, in particular in the United States, Canada, Japan and Member States of the EEC. In the EEC, Corning has registered patents in all Member States other than Ireland, Luxembourg, Greece and Portugal. Corning has registered both product patents and process patents covering optical fibres. Corning has been and still is involved in various patent infringement actions, in particular in the United States and in Canada.

(8) In 1973 and 1974, Corning concluded joint development agreements with BICC plc and the Plessey Company plc in the United Kingdom, Compagnie Generale d'Electricité (CGE) in France, and Industrie Pirelli SpA in Italy. At the same time, Corning formed in the Federal Republic of Germany a 50/50 joint venture company with Siemens AG, named 'Siecor GmbH'. Corning and Siemens also concluded a technical cooperation agreement which was the equivalent of Corning's joint development agreements in the other three countries.

(9) The joint development agreements entrusted the European partners with the development of the cabling technology necessary to cable optical fibres, while Corning itself continued the development of optical fibres. Corning gave its partners an option to obtain, at any time during the term of the agreements, an exclusive (1) manufacturing and sales licence for optical fibres under its respective patents in the United Kingdom, France and Italy. In 1980, CGE and Pirelli exercised their options and took an exclusive licence as originally contemplated. BICC and Siemens, however, have preferred to conclude a joint venture agreement rather than taking an exclusive licence. The joint development agreements have all expired with the exercise of the licence options or the creation of the joint ventures.

(10) Between 1975 and 1978, Corning concluded with its European partners exclusive distribution agreements (but non-exclusive with regard to Corning itself) for the sale of its own optical fibres in their respective countries. In the United Kingdom and Germany, Corning granted these exclusive distribution rights to its joint ventures with BICC (2) and Siemens.

(11) In 1981, Corning formed a 50/50 joint venture with BICC in the United Kingdom in the form of an unlimited partnership, named 'Optical Fibres' (OF), and a 40/60 joint venture with Compagnie Financière pour les Fibres Optiques (COFO) in France, called 'Fibres Optiques Industries' (FOI).

(1) The exclusivity provisions, however, did not apply to Corning itself and to the US companies American Telephone and Telegraph, Western Electric, Southern New England Telephone Co and Cincinnati Bell Inc.

(2) Before the creation of the United Kingdom joint venture, these rights were granted directly to BICC.

(12) The principal purpose of the French and United Kingdom joint ventures is the manufacture and sale of optical fibres. The German joint venture further includes the manufacture and sale of optical cables. In fact, however, the German joint venture concentrates on the manufacture and sale of optical fibres, leaving the manufacture and sale of optical cables to Siemens. This development was confirmed by the creation in 1985 of a new joint company, called 'Siecor Gesellschaft für Lichtwellenleiter mbH & Co. KG' which has as its sole activity the manufacture of optical fibres.

(13) In 1984, Corning granted a non-exclusive licence to N.V. Philips' Gloeilampenfabrieken in the Netherlands and in Belgium. In 1986, it was announced that Corning planned to set up a subsidiary in Spain, in which Compañia Telefónica Nacional de España would take a minority shareholding, for the production and sale of optical fibres.

(14) In the United States, Corning has at present production plants for optical fibres with a capacity of 1 700 000 km/year. This is the biggest capacity in the world.

(15) Corning has also made a worldwide cross-licensing arrangement with AT & T, but relating only to patents covering inventions before 1980. Corning has also licensed ITT, Valtec, Spectran and Northern Telecom.

(16) In Japan, Corning granted in 1977 a licence to Furukawa Electric Co with the right to sublicense to Sumitomo and Fujikura.

BICC plc

(17) BICC plc is a leading cable maker in the United Kingdom and a major supplier of British Telecom. In 1984, BICC's consolidated group turnover amounted to £ 2 089 million. BICC has a plant manufacturing optical cables for telecommunication purposes at Blackley near Manchester.

(18) BICC has not developed technology similar to Corning's and does not compete with Corning in the optical fibre market.

(19) The United Kingdom joint venture has built a production plant for optical fibres with a capacity of 250 000 kms/year.

COFO

(20) The French joint venture, FOI, has undergone a restructuring operation and agreements amending those originally concluded have not yet been submitted to the Commission. On the basis of undertakings given by the parties, the Commission understands that new agreements similar to those relating to the United Kingdom and German joint ventures will be concluded and notified. If and when this is done, the Commission will consider the grant of an exemption under Article 85 (3) similar to the one granted herein.

Siemens AG

(21) Siemens AG is a leading cable maker in the Federal Republic of Germany and the major supplier of the Deutsche Bundespost. In 1983/1984, Siemens' consolidated group turnover amounted to DM 48 124 million. Siemens itself manufactures and sells optical cables.

(22) Siemens has not developed technology similar to Corning's and does not compete with Corning in the optical fibre market.

(23) The German joint venture is in the course of building a plant for the production of optical fibres which will have a capacity of 80 000 kms/year.

C. The product

(24) Optical fibres are a substitute for microwave and satellite transmission and for traditional coaxial and copper conductors in the field of communications. Their major application is in telephone communications. Cable television and other broad band transmissions are another important application for optical fibres. Optical fibre technology is developing rapidly and use of optical fibres can be expected to increase greatly as their price falls and the volume of communications grows. Most Member States have already installed a number of optical communication systems and/or plan to install such systems.

D. The market

(25) A table with the producers of optical fibres worldwide and their current estimated capacities is given in Annex 2 to the present Decision. The table also indicates whether or not the producer has a licence from Corning. It should, however, be noted that the output of optical fibre plants can be increased rapidly, so the capacities mentioned in the table can become quickly out of date.

(26) The main markets for optical fibres are North America, Japan and the EEC. To the extent that Corning's patents are not infringed, US, Canadian and Japanese producers can sell on the EEC market. Optical fibres can be transported easily.

(27) In the United States and Canada, there are at present nine producers, three of which produce optical fibres without a Corning licence. Corning and AT & T have by far the biggest production capacities, having approximately 1 700 000 km/year and 1 000 000 km/year respectively, representing some 80 % of total estimated US and Canadian production capacities.

(28) In Japan, there are six producers, three of which produce optical fibres without a Corning licence. Sumitomo (a sub-licensee of Furukawa) has the biggest capacity in Japan with 240 000 km planned for 1986. Furukawa (a Corning licensee) is the second largest producer with a planned capacity of 120 000 km for 1986.

(29) In the EEC, there are at present fourteen producers, including plants under construction. There are four producers in the United Kingdom : OF, STC, The General Electric Company plc (GEC) and Pirelli General plc, of which only OF has a Corning licence. There are two producers in France operating under Corning licence : FOI and CLTO. There are five companies either producing or intending to produce in the Federal Republic of Germany : Siecor, Wacker, AEG, SEL (ITT) and PKI (Philips), of which only Siecor and SEL have Corning licences. There is one producer in Italy, Fibre Ottiche Sud (FOS — 50 % owned by Pirelli, one in the Netherlands, Philips, and one in Denmark, NKT. FOS and Philips manufacture optical fibres under a Corning licence. NKT does not have a Corning licence.

(30) Corning's joint ventures in the EEC have a combined production capacity of 385 000 km/year, which represents some 48 % of total estimated EEC production capacity.

(31) There are other producers of optical fibres in Sweden, Switzerland, Australia, Brazil and Korea (see Annex 2).

(32) In the market described above, Corning has a special position since it holds a number of basic patents for the manufacture of optical fibres in most countries of the world. However, Corning's patent coverage varies from one country to another and several optical fibre producers operate without a Corning licence. This is in particular the case of Sumitomo, which produces optical fibres in Japan and the United States, is a partner in joint ventures in Australia and Korea and has granted licences to Pirelli General in the UK and Wacker-Chemitronic GmbH in the Federal Republic of Germany. Corning has started a patent infringement action against Sumitomo in the United States, which is still pending. No such litigation has been started by Corning in the EEC.

(33) Optical fibres are generally sold to cable makers, who cable the fibres and supply the cabled fibres to users of optical cables. Corning's joint venture partners in the EEC are large cable makers with substantial requirements of optical fibres. They will be the main purchasers of the optical fibres produced by their associated joint ventures.

(34) The principal users of optical cables are the PTTs. Corning's joint venture partners are established suppliers of the PTTs in their respective countries. The cooperation by Corning with important cable makers was essential for its penetration of the EEC market, because Corning was a new entrant in the telecommunications market and was faced with strong local purchasing policies on the part of most European PTTs.

(35) The price of optical fibres is formed by the interplay of three forces : the suppliers of optical fibres, the cable makers and the end users. The price of optical fibres is further determined by the price of traditional conductors with which they are in competition. The extent to which optical fibres are used depends mainly on their cost effectiveness in relation to traditional cables.

(36) Since its introduction in January 1983, the price of single mode fibre has fallen considerably. With the development of the technology and the increase of output, this falling trend in prices is expected to continue. There is also a strong downward pressure on price levels for optical fibres as a result of the system of competitive tendering applied by the PTTs. This tendering system leads to strong competition between the makers of optical cables who in turn put pressure on the prices of the optical fibres which represent generally more than half the cable cost.

E. The notified agreements and amendments

(37) (i) In the United Kingdom, there were originally three agreements: a partnership agreement setting up the joint venture 'Optical Fibres', a know-how and patent licence agreement for the benefit of the joint venture and a distribution agreement appointing the joint venture sole distributor for Corning's products in the United Kingdom and Ireland.

(ii) The partnership agreement, as amended, contains in particular the following provisions:

— the object of the joint venture is the production and sale of optical fibres;

— the board of management ('the board') consists of five members of which three are appointed by BICC and two by Corning;

— the partnership's general manager is nominated by BICC after consulting Corning and is appointed by the board. Corning appoints the technical manager and a financial manager will be appointed, if and when justified, by the board;

— all other managers with responsibility for production, sales, marketing or research are nominated by BICC after full consultation with Corning;

— the following resolutions of the board require a unanimous vote:

(a) substantial change in the field of activity of the joint venture;

(b) transactions between one of the partners (or its affiliates) and the joint venture other than on an arm's length basis;

(c) change in auditors of the joint venture;

(d) decision to wind up or dissolve the joint venture;

(e) provision or procurement of funds, except where a partner agrees to guarantee such funds without recourse to the other partner.

(iii) The know-how and patent licence agreement, as amended, contains principally the following provisions:

— Corning grants the joint venture a non-exclusive licence under its United Kingdom patents for the manufacture and sale of optical fibres;

— Corning and BICC waive any patent rights to prevent exports of optical fibres to the United Kingdom by Corning or any joint venture invlving Corning in a Member State of the EEC on the basis of reciprocal treatment;

— Corning, BICC and their joint venture partnership may pursue an active sales policy for optical fibres in all Member States of the EEC, except for territories in which Corning has an exclusive licensee with only passive sales rights into the United Kingdom, in which case the joint venture has only passive sales rights in those territories.

(iv) The distributor agreement which appointed the joint venture sole distributor of Corning's own optical fibres in the United Kingdom and Ireland has been terminated.

(38) (i) In Germany were originally three agreements: a joint venture agreement setting up the joint venture 'Siecor GmbH', a licence agreement by which Corning and Siemens granted a licence to the joint venture under their respective patents and a distribution and sales representative agreement appointing the joint venture sole distributor of Corning's products in Germany.

(ii) The joint venture agreement, as amended, contains in particular the following provisions:

— the object of the joint venture is the development, production and sale of optical fibres and optical cables;

— the joint venture sells optical fibres itself but sells optical cables through Siemens' sales organization. Siemens, however, can purchase optical fibres from other suppliers in the market;

— the joint venture is represented by a shareholders' committee and a managing director.

In the shareholders' meetings, Siemens has three votes and Corning one; resolutions are passed by a simple majority, except for the matters referred to above in point 37 (ii) (a) — (d), for which a majority of four-fifths is required.

Managing directors are nominated by Siemens and appointed by the shareholders' committee; the chairman, deputy chairman and all members of the shareholders' committee are appointed by Siemens.

(iii) The licence agreement, as amended, contains principally the following provisions:

— Corning and Siemens grant the joint venture a non-exclusive licence under their respective German and Austrian patents for the manufacture and sale of optical fibres and optical cables;

— Corning and the joint venture may pursue an active sales policy for optical fibres in all Member States, except for territories in which Corning has an exclusive license with only passive sales rights into Germany, in which case they have only passive sales rights in those territories;

— Corning, Siemens and the joint venture undertake not to use their rights deriving from patents to prevent imports into Germany of optical fibres manufactured by Corning or one of its joint ventures in the EEC, on the basis of reciprocal treatment.

(iv) The distribution and sales representative agreement which appointed the joint venture sole distributor for Corning's own optical fibres and optical cables in Germany has been terminated.

(39) Both the United Kingdom and German agreements, as amended, contain the following provisions:

— the agreements expressly stipulate that each joint venture will sell its optical fibres to all users on non-discriminatory terms and treat third parties on the same terms as its parents;

— Corning's partners are expressly permitted to purchase their requirements of optical fibres from independent suppliers;

— each partner is permitted to require expansion of the joint venture's production capacity. The German agreement provides that, in such a case, the partner requiring the expansion bears the added investment cost and purchases the additional output. The United Kingdom agreement provides for a suitable formula to be agreed between the partners, permitting an investment which does not materially disadvantage the other partner;

— no joint venture has an exclusive sales licence;

— the licence agreements expressly state that Corning, its partners and each joint venture have the right to pursue an active sales policy for optical fibres in the territories of all Member States, except those countries where Corning appoints or has appointed an exclusive licensee who would be permitted to make only passive sales in the territories of the joint ventures;

— Corning's partners and the joint ventures have an option to take up a non-exclusive licence under Corning's patents on termination of either the joint venture agreements or the licence agreements;

— the parents of each joint venture and the joint venture itself undertake not to forward information to the other joint ventures or their parents concerning prices, costs, sales, production, marketing plans or any other competitive information relating to other optical fibres or optical cables.

The joint venture agreements are limited to a term of 15 years, starting on the date of notification of the amended agreements, with a possibility of renewal subject to the Commission's approval.

(40) In addition, the following should be noted:

(i) In the United Kingdom, BICC's partner is now Corning Ltd., a wholly-owned subsidiary of Corning Glass Works;

(ii) The reciprocal waiver of patent rights to prevent imports does not apply to any rights which might be held by BICC in a manufacturing process which might be invented by it and used by OF to manufacture products distinct from those manufactured under Corning's patents;

(iii) The manufacturing rights granted to the joint ventures under Corning's licences are not exclusive;

(iv) The joint ventures are not obliged to grant Corning exclusive licences in respect of improvements they make to the licenced technology, although non-exclusive licences are made available on a reciprocal basis.

F. Observations from third parties

(41) Following publication of a Notice in the *Official Journal of the European Communities* pursuant to Article 19 (3) of Regulation No 17, the Commission received written observations from GEC, a British undertaking active in the relevant market. These observations raised several issues under Articles 85 and 86 and called upon the Commission to defer its Decision which, in any case, should be duly reasoned and contain effective safeguards. In particular, GEC objected to the exclusive nature of Corning's manufacturing licences to the joint ventures. This point has been dealt with and the manufacturing licences granted to the joint ventures under Corning's patents are not or are no longer exclusive.

(42) GEC also made representations to the Commission in relation to the creation and activities of the United Kingdom joint venture, alleging infringements of Articles 85 and 86 and calling upon the Commission to undertake further enquiries. GEC maintained that Corning and BICC were at least potential competitors when they established their joint venture and called upon the Commission to investigate the joint venture's pricing behaviour.

(43) The creation of the United Kingdom joint venture is dealt with in point 46 below. The activities of the United Kingdom joint venture are being examined in the light of GEC's representations which relate particularly to pricing practices. They are, however, in so far as they are not dealt with in this Decision, a separate matter and do not form part of the proceedings in the present case.

(44) The Commission expects the addressees of this Decision to comply in good faith with their agreements as amended and with the terms of this Decision Article 8 (3) of Regulation 17 empowers the Commission to revoke or amend this Decision in certain circumstances and the Commission will not fail to monitor developments in the optical fibres market.

II

LEGAL ASSESSMENT

A. Article 85 (1)

(45) The restrictions and distortions of competition resulting from the agreements arise from the parallel existence of functionally similar joint ventures in which Corning participates actively. Although the French joint venture is not a subject of this exemption Decision (see point 20 above), it forms an essential part of the legal and economic background to the analysis of the UK and German joint ventures.

(46) The individual joint venture agreements do not as such restrict competition between Corning and its partners. When the agreements were concluded, the parties were not actual or potential competitors in the market for optical fibres or optical cables. The production of optical fibres and optical cables are different activities. Corning had no experience in cable manufacture, while Corning's partners had no experience in glass manufacture which could have led to an invention competitive with Corning's. In spite of the parties' considerable financial resources, the entry by Corning into the optical cables market or by Corning's partners into the optical fibres market was not a natural and reasonably foreseeable extension of their respective business activities. The cooperation between Corning and its partners is rather of a complementary nature which does not give rise to restriction or distortion of competition at the level of the cooperating parties. Moreover, the agreements do not foreclose market access by third parties or have any other foreseeable anti-competitive impact on their activities. The various amendments made to the original agreements ensure that competition is maintained and that third parties do not suffer from discrimination or market partitioning. In addition, by virtue of the conditions and obligations attached to this Decision, competition is safeguarded and the Commission is in a position to monitor future developments.

(47) There is neither restriction nor distortion of competition between the parents and the joint venture. The agreements provide that the parents are free to engage in independent research and development of optical fibres. Furthermore, the individual joint venture agreements do not contain obligations which go beyond what would be admitted in simple licensing agreements between non-competitors. Thus the parties are free to engage in independent research and development of optical fibres, although in practice they depend on a continuous transfer of technology from Corning. In addition, there is no obligation on the joint ventures to grant exclusive licenses to Corning in respect of improvements or innovations.

(48) The principal restrictions and distortions of competition in this case are to be found rather in the relationship between the joint ventures. The joint ventures have substantially the same business acti-

vity, namely the production and marketing of optical fibres. These joint ventures are therefore directly competing companies. The agreements taken together give rise to the creation of a network of inter-related joint ventures with a common technology provider in an oligopolistic market. Corning is one of the major producers and distributors of optical fibres in the world. Its partners are cable makers with large market shares in their respective home countries. The joint ventures therefore bring together companies with strong positions in the optical fibres and cables markets. Although the joint ventures are free to make active and passive sales into each other's territories, only passive sales are permitted in territories where Corning has an exclusive licensee. Corning has interests, whether through joint ventures, subsidiaries or licensees, in several Member States. Its financial stake and key technical and financial personnel representation in the joint ventures, the success of which depends on rapid access to Corning's technology, ensure that Corning is in a position to influence and coordinate the joint venture's conduct.

(49) Neither of the joint ventures has developed its own technology or uses an independent source of technology. Therefore, the joint ventures depend fully on Corning's technology for the production of their optical fibres. The joint ventures also depend on Cornings' willingness to supply them with its most up-to-date technology. The ability of the joint ventures to produce sufficient quantities of high quality optical fibres at competitive prices is dependent on their continuing and rapid access to Corning's most developed technology. Since in the field of optical fibres technology develops rapidly and is the key to the reduction of production costs and increased competitiveness, the time and speed at which Corning transfers its technology to each joint venture is a crucial element in its operation and success. Given this technological dependence on Corning, Corning holds, in spite of the reduction of its voting rights and management powers, an influential position in each joint venture which it can use to coordinate the competitive relationship between those joint ventures.

(50) Corning's position is further strengthened by its active participation in the implementation of its technology by a representative called the technical manager whom it may appoint in each joint venture. Although the technical manager is a different person for each joint venture, this representation enables Corning to coordinate the implementation of its technology in the joint ventures with the result that none of them can gain a technological advantage over the others. The obligation for each joint venture to grant back to Corning, on a non-exclusive basis, any improvements, developments, inventions, changes or innovations relating to the licensed technology also permits Corning to ensure a uniform technological development in the joint ventures. Unlike independent licensees which often develop licensed technology in different directions, the joint ventures in this case will follow the same technological development. This uniform technological development substantially reduces competition between the joint ventures because technology is a key element in competition between optical fibre producers.

(51) Furthermore, Corning continues to have three representatives on the board of management of the United Kingdom joint venture and a financial controller in the German joint venture. Although these representatives have no decision-making power, they participate in the day-to-day operation of the joint ventures and hence permit Corning regularly to influence the production and marketing policies of these joint ventures.

(52) Corning's active participation in the joint ventures cannot be compared with a straightforward financial investment in or licensing of several independent third parties. Firstly, the joint ventures depend fully on Corning's technology and its implementation by a technical manager appointed by Corning. Secondly, the fact that Corning is a partner in each joint venture creates a network of closely inter-related companies which are otherwise competitors. Given this network of inter-related joint ventures and the technological dependence of the joint ventures on a common partner, they cannot be expected to compete with each other to the same extent as if they were unrelated competitors relying on different partners and different technologies.

(53) The fact that the partners have agreed not to communicate competitive information between the joint ventures does not materially change the above assessment. The distortion of competition results from the existence of the network of inter-related competing joint ventures, within which one partner is able to influence the joint ventures' behaviour on the market.

(54) The joint ventures may make only passive sales in Member States other than Germany and the United Kingdom in which Corning appoints or has appointed an exclusive licensee which itself has only passive sales rights in the territories of the joint ventures. This limitation to passive sales rights restricts free competition between the joint ventures and other Corning licensees in the common market. Given the procurement practices of most PTTs, this prohibition on active sales restricts competition between the joint ventures and other Corning licensees.

(55) The above restrictions and distortions of competition have an appreciable effect on competition within the common market and trade between Member States because trade in optical fibres is expected to grow rapidly in the period covered by the agreements and the distortion of competition occurs in a market which is already highly oligopolistic. By bringing together the joint ventures into a network with a common partner who owns important basic technology in the optical fibres field, the oligopoly becomes even narrower. In this oligopoly, trade between Member States is bound to develop along different lines than would otherwise be the case and therefore to be affected appreciably when inter-related joint ventures, licensees and subsidiaries are subject to influence and coordination by a common partner.

(56) In conclusion, the notified agreements have as their foreseeable effect restrictions and distortions of competition within the common market and are likely to affect trade between Member States. Unless exempted under Article 85 (3), they are prohibited by Article 85 (1).

B. Article 85 (3)

(57) Before the amendments to the agreements, Corning's participation in the operation of the joint ventures was such that it could effectively control their production and marketing policies. Therefore, this network of joint ventures seriously distorted competition between the joint ventures and was likely to lead to market sharing between them. There was also a considerable risk of collusion between the joint ventures, without it being necessary to conclude specific agreements to that effect.

(58) The amendments have reduced Corning's influence over the joint ventures' marketing policies. However, Corning retains an influential position in respect of the joint ventures' production policies because of its predominant role in the supply and implementation of the technology necessary for the production of optical fibres. The distortion of competition is, however, outweighed by the benefits to which these joint ventures give rise. Accordingly, Article 85 (1) can be declared inapplicable pursuant to Article 85 (3).

(a) *Improvement of production and promotion of technical progress*

(59) The agreements enable several European companies to produce a high-technology product with significant advantages over traditional cables in the Community and promote technical progress in relation to both optical fibres and optical cables. Moreover, the joint ventures facilitate a more constant and rapid transfer of Corning's technology than would otherwise be possible. This concurrent introduction of Corning's most up-to-date technology in the common market is essential to enable the European companies to withstand competition from non-Community producers, especially in the USA and Japan, in an area of fast-moving technology.

(b) *Consumers' share in the benefits resulting from the agreements*

(60) Consumers benefit from the availability of a new product having distinct advantages over traditional cables. In particular, the European cable makers and PTTs have at their disposal a greater number of sources of supply inside the common market than they would have had without the joint ventures. Because of the continuing and rapid transfer of technology to the joint ventures, production costs for optical fibres and optical cables are likely to be constantly reduced. This reduction of costs should bring about lower prices for consumers.

(c) *Indispensability of the agreements to achieve these benefits*

(61) The benefits resulting both from the continuing cooperation between a leading optical fibre producer and European cable makers and from the rapid transfer of a fast moving technology can be achieved only by permitting Corning to participate in the joint ventures. A partial or total divestiture

would destroy such benefits for the European companies which would then risk becoming uncompetitive on the EEC and world markets. The joint ventures give rise to important benefits for European industry which can be maintained only by the continued participation of Corning.

(62) Other options available to Corning were the marketing in Europe of optical fibres imported from the USA, the establishment by Corning of fully owned plants in the EEC or the grant of simple licences. None of these options would have had the same benefits as the joint ventures. Under the first two options, there would be no transfer of technology to the European companies and therefore no dissemination of Corning's technology. The grant of simple licences, while increasing competition and encouraging further developments by the licensees, would not facilitate the efficient flow of a technology which is undergoing rapid changes to the same extent as is possible within the framework of a joint venture relationship.

(63) The rights and obligations of the parties within the joint ventures have been modified at the Commission's request so as to ensure that the distortion of competition resulting from the joint venture agreements and the agreements relating thereto was reduced to the indispensable minimum for the effective operation of the joint ventures :

(64) (i) Reduction of Corning's voting rights :

The reduction of Corning's voting rights in the shareholders' meetings of the German joint venture company (1) to below the level required to vote a change in the articles of association removes Corning's ability to veto decisions adopted in those meetings.

(65) (ii) Reduction of Corning's management rights :

Corning has removed all its representatives from the board of management of the German joint venture and reduced the number of its representatives on the board of representatives of the United Kingdom partnership. It holds no other management posts in the joint ventures, except that it has the right to appoint a technical manager in the joint ventures and the right to appoint a financial controller in the German joint venture.

(66) (iii) Veto rights :

The limited number of matters on which a unanimous decision is required is indispensable for the continued operation of the joint ventures because the parties could not be expected to cooperate without such veto rights.

(67) (iv) Active sales rights as between the joint ventures :

There are no longer exclusive sales licences and each joint venture has the right to make active sales in the territories of the other. Passive sales rights alone would not have been sufficient in this case because of the following particular circumstances :

(a) as the market in optical fibres is highly oligopolistic, it is essential that each joint venture be able actively to promote and distribute its products in the territories of the other joint venture so as to maintain sufficient competition in the market for optical fibres ;

(b) the major purchasers of optical fibres and optical cables, the PTTs, often favour local suppliers both for components and end-products ; a right to make only passive sales might put non-local joint ventures at a competitive disadvantage ;

(c) there is no intermediate trade in optical fibres or optical cables which could create price competition through parallel imports.

(68) Passive sales rights in territories of other Corning licensees

Where Corning has exclusive licensees with only passive sales rights into the territories of the joint ventures, it is indispensable that the sales rights of the joint ventures into the territories of such licensees be similarly limited to passive sales rights in order to maintain a competitive relationship between such licensees and the joint ventures. This situation is, however, without prejudice to the possible application of Article 9 of Commission Regulation (EEC) No 2349/84 (2).

(1) This reduction of voting rights does not apply to the United Kingdom joint venture which is an unlimited partnership and has no shareholders' meeting.

(2) OJ No L 219, 16. 8. 1984, p. 15.

(69) Safeguard clauses

The right of each parent unilaterally to require expansion of the joint ventures' production capacity, the right of Corning's partners to purchase optical fibres from independent suppliers and the obligation of the joint ventures to sell their products to all users on non-discriminatory terms are safeguards which reduce the risks of anti-competitive behaviour of the three joint ventures.

(70) The right unilaterally to require expansion of production capacity prevents a limitation of the joint ventures' output if one of the parents wishes to expand production for sales to third parties or for the fulfilment of its own requirements for the production of optical cables. The right to purchase optical fibres from independent suppliers prevents the joint ventures from restricting the supply by third parties to the cable makers participating in the joint ventures. The obligation of the joint ventures to supply all users on non-discriminatory terms ensures that competitors of the parents are able to obtain optical fibres from the joint ventures in order to compete on equal terms.

(71) Duration of the joint ventures

The joint ventures' life is limited to a term of 15 years with a possibility of renewal. This limitation in time creates the prospect of possible future competition between the parties which is likely to influence their attitude during the joint ventures' life, by, for instance, encouraging independent research and development of optical fibres.

(72) Option to take up a non-exclusive licence on termination of the agreements

The option of Corning's partners and the joint ventures to take up a non-exclusive licence under Corning's patents on termination of either the joint venture agreements or the licence agreements guarantees continued access to Corning's technology and increases the prospect of possible future competition between the parties.

(d) *No possibility of eliminating competition in respect of a substantial part of the products in question*

(73) Although competition between the joint ventures is distorted, the parties are not able to eliminate competition in respect of a substantial part of the products in question for the following reasons:

(74) (i) There are several other producers of optical fibres in the common market. Details may be found in Annex 2.

(75) If Corning or its joint ventures were to bring successful patent infringement actions in the EEC and to refuse, without good reasons, to grant licences to third parties, the Commission would need to consider whether it would not have to revoke this exemption Decision pursuant to Article 8 (3) of Regulation No 17. The same reservation would apply to any change in the partners participating in the joint ventures covered by the present Decision.

(76) (ii) The optical fibre market in the EEC is not immune from the pressures of competition of the world market. These pressures derive principally from the strong position of US and Japanese producers, in particular AT & T and Sumitomo. AT & T has a worldwide licence under Corning's basic patents. It could at any time export optical fibres to the EEC or manufacture optical fibres in the EEC.

(77) (iii) Optical cables are in competition with traditional cables and microwave and satellite transmission techniques; the use of traditional cable, in particular in local telephone networks, remains predominant because of its cost advantages.

(78) (iv) There are a number of powerful competing cable makers who can obtain optical fibres from the joint ventures on non-discriminatory terms or from other independent suppliers of optical fibres in order to produce optical cables.

(79) (v) The main end-users, the PTTs, have exceptionally strong purchasing power; they are able to insist on supplies of both optical fibres and optical cables at world competitive prices and to obtain supplies from non-national producers, including those joint ventures which are not established on their own territory, if they so wish.

(80) For all these reasons, it will not be possible for Corning and its partners to eliminate competition in respect of a substantial part of the products in question in the EEC.

C. Regulation No 17

(81) In accordance with Article 8 (1) of Regulation No 17, a Decision in application of Article 85 (3) is issued for a specified period and conditions and obligations may be attached thereto.

(82) In the case of production joint ventures requiring substantial long term investments and concerning a new product not yet fully established on the market, a period of 15 years appears indispensable to enable the parties to rely on the enforceability of the agreements and to obtain a satisfactory return on their capital.

(83) In order to reduce the risk of collusion between the joint ventures, this exemption Decision shall be made subject to the condition that the parents of each joint venture and the joint venture itself do not forward to the other joint venture or its parents information concerning prices, costs, sales, production, marketing plans or any other competitive information relating to either optical fibres or optical cables.

(84) This exemption Decision shall further impose on the joint venture companies the obligation to provide the Commission on an annual basis with certain commercial data enabling the Commission to satisfy itself that the conditions of Article 85 (3) continue to be fulfilled —

HAS ADOPTED THIS DECISION:

Article 1

(1) The provisions of Article 85 (1) of the EEC Treaty are hereby declared inapplicable, by virtue of Article 85 (3), to the joint venture agreements and related licence agreements, as amended, identified in Annex 1.

(2) The declaration in paragraph 1 shall apply from 5 November 1985 to 4 November 2000 for the Corning-Siemens agreements and from 8 January 1986 to 7 January 2001 for the Corning-BICC agreements.

Article 2

This Decision is made subject to the condition that the parent undertakings of each joint venture and the joint venture itself do not forward to the other joint venture or its parent undertakings information concerning prices, costs, sales, production, marketing plans or any other competitive information relating to optical fibres or optical cables.

Article 3

Each joint venture company shall be obliged to provide the Commission, on an annual basis, not later than 30 June following the end of the preceding calendar year, with the following information:

(i) its total annual production and sales figures;

(ii) copies of all its quotations in the EEC which exceed 100 kms of optical fibres or optical cables;

(iii) with respect to orders exceeding 100 kms of optical fibres or optical cables, the names of the customers supplied in the EEC, the prices charged and the quantitatives supplied;

and

(iv) the prices and delivery terms for sales from the joint ventures to their parent undertakings.

Article 4

This Decision is addressed to:

(i) Corning Glass Works,
Corning,
NY 14831,
USA;

(ii) BICC plc
21, Bloomsbury Street,
UK - London WCIB 3QN;

(iii) Siemens AG,
Wittelsbacherplatz 2,
D-8000 München 2;

(iv) Optical Fibres,
Second Avenue,
Deeside Industrial Park,
Deeside,
UK - Clwyd CH5 2NX;

(v) Siecor GmbH,
Kistlerhof 174a,
D-8000 München 70.

Done at Brussels, 14 July 1986.

For the Commission

Peter SUTHERLAND

Member of the Commission

ANNEX 1

A. The Corning agreements with BICC plc in the United Kingdom

1. A partnership agreement dated 6 February 1981 between Corning Canada Inc and BICC plc, setting up a 50/50 joint venture with the name 'Optical Fibres' for the production and sale of optical fibres (as amended);
2. A know-how and patent licence agreement dated 6 February 1981 between Corning Glass Works and BICC plc for the benefit of the joint venture (as amended);
3. The agreement of amendment dated 31 December 1985 to the partnership agreement and the first amending agreement dated 31 December 1985 to the know-how and patent licence agreement;
4. A letter agreement dated 31 December 1985 terminating the distributor agreement of 6 February 1981.

B. The Corning agreements with Siemens AG in the Federal Republic of Germany

1. A joint venture agreement dated 12 April 1973 between Corning Glass Works and Siemens AG establishing a 50/50 joint venture with the name 'Siecor GmbH' for the development, production and sale of optical fibres and optical cables (as amended);
2. A licence agreement dated 1 January 1978 between Corning Glass Works and Siemens AG on the one hand and Siecor GmbH on the other hand (as amended);
3. The articles of association of Siecor Gesellschaft für Lichtwellenleiter mbH & Co. KG for the manufacture of optical fibres;
4. The agreement of amendment dated 26 September 1985 to the joint venture agreement, the licence agreement and Siecor's articles of association;
5. A letter agreement dated 26 September 1985 terminating the distributor and sales representative agreement of 1 April 1975.

ANNEX 2

WORLDWIDE CAPACITY

Producer	Corning licensee	Estimated capacity km/year
USA and Canada :		
Corning		1 700 000
Western Electric (AT & T)	Yes for patents covering inventions before 1980	1 000 000
ITT (including Valtec)	Yes (for USA)	160 000
Spectran/Sonetran	Yes	100 000
Sumitomo Electric Research Triangle	No	70 000
American Fibre Optics	No	9 000
Northern Telecom	Yes	250 000
Canstar	No	5 000
Japan :		
Furukawa	Yes (for Japan)	120 000
Sumitomo	Yes — sub-licence from Furukawa	240 000
Fujikura	Yes — sub-licence from Furukawa	60 000
Hitachi Wire	No	40 000
Dainichi	No	15 000
Showa Cable	No	15 000
United Kingdom :		
Optical Fibres	Yes	250 000
STC (ITT has approximately 25 % shareholding)	No	20 000
GEC	No	20 000
Pirelli General plc	No	25 000
France :		
CLTO (CGE)	Yes	25 000
Fibres Optiques Industries	Yes	55 000
Germany :		
AEG	No	10 000
SEL (ITT)	No	15 000
PKI (Philips)	No	5 000
Siecor GmbH & Co. KG	Yes	(80 000 planned for 1987)
Wacker/Sumitomo	No	(100 000 plus planned for 1987)
Italy :		
Fibre Ottiche Sud	Yes	75 000

Producer	Corning licensee	Estimated capacity km/year
Netherlands :		
Philips	Yes	60 000 (200 000 planned by end of 1986)
Denmark :		
NKT Electronic	No	20 000
Sweden :		
L.M. Ericsson	No	15 000
Finland :		
Nokia	No	5 000
Switzerland :		
Cabloptic	No	4 000
Australia :		
Olex (Dunlop-Sumitomo)	No	20 000 Plant under construction (start-up 1986)
Optical Waveguides Australia	Yes	30 000 Plant under construction (start-up 1986)
Korea :		
Taihan	No	40 000
Gold Star	No	30 000
Samsung	No	30 000
Daewoo	No	30 000
Brazil :		
ABC-XTAL	No	5 000