COMMISSION

COMMISSION DECISION

of 13 October 1988

relating to a proceeding under Article 85 of the EEC Treaty

(IV/31.498 — Delta Chemie/DDD)

(Only the German and English texts are authentic)

(88/563/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 2, 4, 6 and 8 thereof,

Having regard to the application of 14 March 1985 by the undertakings DDD Limited situated at Watford, United Kingdom, and Delta Chemie situated at Neu-Isenburg, Federal Republic of Germany, for negative clearance or alternatively exemption under Article 85 (3) of an agreement which they had signed on 15 January 1985,

Having published a summary of the application in accordance with Article 19 (3) of Regulation No 17 (2),

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

A. The notification

(1) DDD Limited (hereinafter DDD), a company incorporated under English law and having its registered place of business at Watford (United Kingdom), applied to the Commission on 14 March 1985 for negative clearance or alternatively exemption of an agreement which it concluded on 15 January 1985 with Delta Chemie (hereinafter called DC), a company governed by German law and having its registered place of business at Neu-Isenburg (Federal Republic of Germany).

Under the agreement, which effectively continues the operation of a previously existing oral exclusive distribution agreement, DC appoints DDD as its exclusive distributor for the sale of a range of products for the removal of certain stains from fabrics in the United Kingdom, Ireland and Greece, as well as in a large number of other countries outside the common market. DC also transfers to DDD its know-how for the manufacture and sale of these products in the same territory.

B. The undertakings

(2) DC sells a range of pharmaceutical products, cosmetics and toiletries, as well as stain removers which are produced by its fully-owned subsidiary Gisapharm. In 1986 it had a turnover of DM ... (3) of which DM ... derived from sales of the products which are the subject of the notified agreement. Its share of the German stain-removers market is estimated at ... %.

(3) DDD sells certain pharmaceutical, toiletry and household products, manufactured by its subsidiaries in the United Kingdom. In 1986 its total turnover was £ ..... % of this turnover, £ ... concerned the contract products, more than ... % of which are sold in the United Kingdom. Its share of the British stain-removers market is estimated at approximately ... %.

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No C 152, 10. 6. 1988, p. 2.

(3) In the published version of the Decision, some figures have hereinafter been omitted, persuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

C. The products and the market

(4) The products concerned by the agreement are products for the removal of stains (either in liquid or powder form, called 'Stain Devils' and 'Stain Salts' — in German 'Fleckenteufel' and 'Fleckensalz') and a product for the removal of unwanted colours (called 'Colour Run' — in German 'Entfärber-Teufel'). The first two products remove certain specific types of stains from fabrics, the second product restores the white or other original colours of a fabric after a 'mixed wash' accident. These products, whcih are intended to be sold to the general public, differ from universal stain removers which may be used for all types of stains.

Stain Devils and Colour Run were put on the market for the first time in Germany during the period 1960 to 1970. DC bought the trade mark and the know-how which is necessary for their manufacture in 1971. The other product, /Stain Salts, was developed by DC itself and put on the German market in the beginning of the 1980s.

At present DC is selling its products in other Member States either directly or through exclusive distributors which it has appointed in Italy, the Netherlands, Denmark, France, Portugal and Spain. DC's share of the stain-removers market is approximately ... % in Denmark, ... % in Italy, ... % in Luxembourg and ... % in the Netherlands. This share is insignificant in Belgium. DC's market shares in France, Spain and Portugal are not yet available, because the products were only launched on these markets in 1987.

These products were imported and sold in the United Kingdom from 1983 to 1985 by DDD according to an oral exclusive distribution contract, which is effectively continued by the present agreement. When the demand for the products became sufficiently important to justify local production, DDD requested and obtained from DC a manufacture and sale licence in the United Kingdom Greece, Ireland plus many other countries, mainly outside Europe. DDD's share of the stain-removers market is approximately ... % in Ireland. These products have not yet been sold in Greece.

DDD commenced manufacturing the products under the trade mark 'Stain Devils' (1) in April 1986. This company does not own any production plant outside the United Kingdom. It considers the existing demand for the products insufficient to justify the considerable investment which would be necessary to erect a new plant abroad. DDD never manufactured such products before 1986.

DC's products compete, both in Germany and in the United Kingdom, with universal stain removers produced by numerous other companies. In the United Kingdom these companies include Pletmester, Dylon (K2R), Johnson Wax (Goddards), Nicholas Kiwi (Dab-it-off) and Henkel (SIL). DDD states that competition will increase due to the imminent arrival of Danish and Australian competitors on the British market.

The manufacture of the contract products requires, according to the notifying undertakings, important investments in specialized equipment, including installations made of stainless steel and machinery for the extraction of emissions and gases. The marketing of these products necessitates a continuous investment in order to establish and maintain an important stock of products.

D. The know-how

(5) In the light of the confidential information provided by the parties to the Commission, it is concluded that the know-how licensed by DC to DDD consists of knowledge, information and experience, all of which has not yet entered the public domain. This know-how concerns the manufacture, packaging and sale of a range of original products which satisfy specific needs.

The manufacture of these products requires a specific mixture of certain chemical agents. This mixture differs according to the nature of the stain remover concerned. The licensed know-how therefore also includes instructions and technical standards which are necessary for the proper functioning of the production and packaging process. Compliance with these instructions and standards is essential because of the dangerous emissions and gases which are developed during the production process and because of the toxic nature of stain removers.

This substantial know-how is described in formulae and technical documents disclosed to the licensee. Furthermore, in order to ensure a correct application of this know-how, the licensor will give him the appropriate advice. Specialized technicians will also be put at his disposal.

(1) The other contract products, i.e. 'Stain Salts' and 'Colour Run' are imported by DDD from Germany.

The notified agreement has thus enabled a transfer of valuable technical knowledge and its effective exploitation by a company other than the company that developed it. Consumers in the countries concerned by this agreement are now able to buy new products which are locally manufactured and which are adapted to the requirements of the market.

E. The notified agreement

(6) The agreement was concluded on 15 January 1985 for a duration of 20 years commencing retroactively as of 1 January 1984. This agreement which continues the operation of an oral exclusive distribution contract, concerns the distribution, manufacture and sale by DDD in the United Kingdom, Ireland and Greece as well as in a large number of countries outside the common market, of a range of products which remove certain stains from fabrics or restore their white or original colours. These stain removers and bleachers already are or will be manufactured by DDD according to DC's confidential industrial know-how. The products are sold by the licensee in the licensed territory under the registered trademarks and trade names 'Stain Devils', 'Stain Salts' and 'Colour Run' which belong to DC.

(7) DC appoints DDD as its exclusive distributor for the sale of the imported products and grants it a licence for the manufacture and sale of these products in the licensed territory (Article 1 (a)).

DC undertakes *vis-à-vis* DDD not to appoint any other person, firm or company as its distributor for the sale of the products in this territory (Article 1 (b) (i)) and not to license any other person, firm or company to manufacture the products in this territory (Article 1 (b) (ii)).

DC undertakes to refer to DDD all inquiries for the products received from any person, firm or company in the licensed territory. It reserves the right, however, to sell the products in this territory to any person who expresses a desire to purchase from the licensor rather than the licensee (Article 2 (a)). Reciprocally, DDD agrees to refer to the licensor all inquiries for the products received from any person, firm or company in the licensed territory who expresses a desire to deal directly with the licensor rather than the licensee (Article 2 (b)).

In the light of the explanations given by the parties during the procedure in this case, these obligations must be interpreted as follows :

(a) DDD benefits from an exclusive licence for the manufacture of the products. This licence gives DDD the legally enforceable assurance that it is the only company authorized by DC to manufacture the products in the licensed territory. This is because the licensor undertakes not to manufacture these products itself in this territory.

The right to manufacture the licensed products is contractually limited to the licensed territory, which is, as far as it concerns the Community market, the United Kingdom, Ireland and Greece. The licensee is not therefore entitled to manufacture these products in other Member States of the Community and in respect of these States. The licensor reserves for himself the possibility to manufacture or to grant manufacturing licences. DC has not yet used this possibility ;

(b) in relation to the distribution and sale of the products, DC has only undertaken not to appoint any distributor other than DDD in the territory. This means, according to the parties, that DDD does not benefit from any protection against parallel imports by third parties nor from protection against passive competition (i.e. against sales which were not solicited) from DC's distributors established in other territories. Moreover, DDD also has to suffer passive competition from the licencor himself, who has reserved the right to sell the products in the licensed territory if the customer prefers to deal with him. In such event, DDD does not obtain any financial compensation.

Conversely, the provisions of the licence agreement do not prevent DDD from selling the products in other Member States. As regards the distribution agreements concluded between DC and its distributors in other Member States, the latter are free to sell the products in the territories of their fellow distributors, of the licensee and of possible future fellow licensees in response to non-solicited inquiries from customers established in these territories.

(8) DDD undertakes to manufacture the products strictly in accordance with the methods of manufacture funished by DC (a), to market them for sale in packaging materials according to the specimen or specifications determined by DC (b), and to make no alternations in the formulae and methods of manufacture without prior witten consent of DC (c) (Article 3).

(9) So long as the formulae and methods of manufacture of the products are not in the public domain or generally known by the industry, DDD shall not during the term of the agreement:

(a) use the formulae and methods otherwise than in the manufacture of the products; nor

(b) divulge them, in whole or in part, except as may be required by law (Article 4). This obligation of secrecy subsists after the expiry of the agreement. Moreover, DDD may not use DC's know-how on the expiry of the agreement in so far as this know-how remains secret. It shall also cease to use DC's trade marks and trade names (Article 16).

(10) DC undertakes to provide DDD with all information relating to the know-how including any modifications or improvements in respect of the manufacture and marketing of the products (a), to give advice to DDD in all matters concerning the manufacture and marketing of the products and to assist DDD in promoting sales of these products (b), and, if requested to do so by DDD, to procure the attendance at its premises of personnel skilled in the preparation, manufacture, marketing and sale of the products (c) (Article 5).

(11) DDD undertakes:

— to comply with existing and future laws and regulations concerning the manufacture, sale and advertising of the products and to use its best endeavours to obtain all relevant authorizations and approvals necessary for these activities (a),

— to advertise at its own expense (b),

— to use its best endeavours to develop the market for the products, to establish or employ an organization for their distribution, to promote their sales and market them effectively (c), and

— to provide the licensor all information on the modifications or improvements which it may develop in respect of the manufacture and marketing of the products (d) (Article 10).

At the Commission's request the parties to the agreement have modified this last clause. The licensor's right to use the licensee's modifications and improvements which cannot be used independently of the know-how licensed by DC for the manufacture of the products, will cease concurrently with the termination of the rights set out in the first Article of the agreement.

(12) DDD undertakes to manufacture and maintain a sufficient stock of products to meet the requirements in the licensed territory (Article 7). The agreement does not lay down any minimum quantities to be manufactured, stored or sold.

(13) DDD must pay DC a licence fee of 4,5 % of its United Kingdom wholesale price as published, for the contract sold by DDD in the licensed territory. The payment of this fee by the licensee is the financial compensation for the know-how transfer and for the right to use the licensed trade mark during the term of the agreement.

The prices of the products and discounts are determined by DDD (Articles 9 and 8).

(14) DDD is obliged to keep records of all raw materials purchased for the manufacture of the products, the quantitiy of products manufactured and sold, the invoices of customers and all the advertising expenditure in respect of the products. It must send each month to DC full particulars of its sales of the products. DC has the right to request examination of DDD's documents and accounts (Articles 11 and 12).

(15) The parties have agreed to maintain the industrial property rights forming the subject matter of the agreement and to take all necessary steps against third parties who, in the licensor's opinion, infringe those rights. The latter shall bear all costs and expenditure connected therewith.

DDD undertakes to take due care to the observation of the infringements in the licensed territory and to cooperate with DC in the prosecution and prevention of such infringements (Article 6).

The parties have indicated that this clause must not be interpreted as prohibiting DDD from challenging the licensed rights.

(16) On the expiry of the agreement, DDD must immediately cease any use of the industrial property rights, trade marks, know-how and trade names granted to it by DC (Article 16).

(17) DDD may not grant any sub-licences without DC's prior written approval (Article 1 (a)).

(18) The agreement also contains a clause by which DDD undertakes during the validity of the rights granted not to take part in the manufacture, sale or distribution of any products which, by their nature or by their use, are similar to the licensed products in name, appearance or method of manufacture, either directly or indirectly without the previous written agreement of DC. DDD is, however, authorized to manufacture and package such products for customers who sell them themselves or have them sold by their agents (Article 13).

At the Commission's request this clause has been amended and now includes provisions whereby the previous consent of the licensor to the licensee for the manufacture or sale will not be withheld, if satisfactory assurance exists that no breach of licensee's obligations under Article 4 and Article 10 (b) and (c) will occur.

(19) The general duration of the agreement has been fixed at 20 years, commencing retroactively as of 1 January 1984. At the Commission's request the parties have limited this duration on a specific point. The obligation of the licensor not to appoint any person, firm or company other than the licensee for the distribution of the products made by the licensor in the licensed territory is now only valid for 10 years commencing on the date of signature of the agreement, provided that the licensee also manufactures these products. The duration of this obligation had to be shortened, because it directly affects the trade between Member States. The term of 10 years is sufficient for DDD to master the acquired technology, to launch the resulting products on its market and to obtain a sufficiently strong position which does not require continued protection against other suppliers of these products.

Article 14 (b) lists the events that entitle each of the parties to terminate the agreement. Article 15 states in detail how the finished or semi-finished products shall be disposed of at the end of the contract.

(20) No observations were made by third parties to the Commission after publication of a notice pursuant to Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

A. Application of Article 85 (1)

(21) Article 85 (1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings and concerted practices which may affect trade between Member States and which may have as their object or effect the prevention, restriction or distortion of competition within the common market.

(22) DC and DDD are undertakings within the meaning of Article 85 (1). The agreement concluded between them is an agreement between undertakings within the meaning of that provision.

(23) The agreement has as its object the grant of a licence by DC to DDD for the transfer of certain technical knowledge, information and experience which is not in the public domain, and which concerns the manufacture, packaging and marketing of a range of products for the removal of stains from fabrics and a bleaching agent. However, the agreement, as it has been implemented by the parties, allows DDD to import the contract products made by DC until, depending on their commercial success, DDD decides to manufacture them under licence in the contract territory. This initial distribution phase continues the operation of an oral exclusive distribution contract. Under this oral contract, DDD has been importing the products since 1983, so that they were already known to users in Britain when the new agreement was concluded.

The initial distribution phase allows the licensee to acquire a firm position in the market before he takes the risk of manufacturing the products in the licensed territory. In this way, he began to manufacture the 'Stain Devils' in 1986 when their sales had already reached a substantial volume.

Therefore, the grant of the licence for the know-how and the ancillary trade mark does not concern the introduction or the protection of a new technology within the meaning of the judgment of the Court of Justice in case No 258/78 (1).

It has to be noted furthermore that some contract products were marketed for the first time in Germany between 1960 and 1970. Others were introduced on that market at the beginning of the 1980s.

(24) However, the transfer of secret technical knowledge is in principle an element which encourages competition because it enables other undertakings than the holder of the know-how to exploit this information to manufacture and sell a product. Nevertheless it is necessary to examine whether or not the agreement effecting such a transfer contains any clauses which are restrictive of competition.

(a) *Clauses falling within Article 85 (1)*

(25) By granting to DDD the exclusive right to manufacture the products in the licensed territory (in the Community: the United Kingdom, Ireland and Greece), the licensor deprives itself, for the duration of the agreement, of the possibility of conferring on other undertakings established within the territory the right to manufacture the products. Equally, this exclusive right prevents any future licenses that DC may appoint in other EEC Member States, or the existing exclusive distributors that DC has already appointed in certain Member States, from manufacturing the products in the territory reserved to DDD. As a result of this, these licenses and distributors are excluded from the competitive advantage of local manufacture. In particular, this advantage consists of a reduction of transport costs and of the possiblity of directly adapting production capacity to local demand as well as to the requirements of national laws and regulations. Furthermore, DC itself is prevented from manufacturing the products within the territory itself. Thus, the licensee is protected from the competition of any other undertaking capable and willing to manufacture within the territory.

Equally, the exclusive manufacturing right granted to the licensee implies, by its very nature, that it is prohibited from manufacturing these products outside the licensed territory. This limitation affects DDD's competitive position regarding the sale of the products in the Member States not reserved to it.

(26) DC appoints DDD as exclusive distributor of the products within the licensed territory. This concession relates not only to the products manufactured by DC and imported by DDD, but equallly to the products which DDD already manufactures. The exclusive nature of the licence implies that the licensor may not grant a similar licence to any other undertaking in the licensed territory. As a result of this, no other undertaking may obtain the products at the same conditions as DDD within the territory. Furthermore, the exclusivity from which DDD benefits is reinforced by the obligation of the licensor to refer in principle to DDD all inquiries by purchasers established within the territory unless the purchasers prefer to be supplied by DC. The licensor is thus limited in the manner in which it may compete with DDD.

(27) As a result of the exclusive licence, not only is the freedom of action of the parties to the agreement restrained, but equally the position of third parties who may wish to distribute the contract products is perceptibly modified. In fact, competition at the level of distribution is particularly important in relation to trade-marked products, when they are, as in the present case, individualized by their characteristics. This individualization of the products which is emphasized by the trade marks, enables consumers to express their preference for the contract products as against comparable products.

(28) In the field of the above, it appears that the exclusive grant of the right to manufacture the products in the territory and the appointment of DDD as exclusive licensee, restricts competition within the meaning of Article 85 (1) of the Treaty.

(29) The agreement is likely to affect trade between Member States. Firstly, it prevents undertakings situated in Member States other than those within the licensed territory from manufacturing the products within that territory. Secondly, it determines the conditions under which the products are imported and/or marketed in the territory. As a result of this, trade between Member States develops under conditions other than those that would exist in the absence of the agreement.

(1) Judgment of 8. 6. 1982, (1982) ECR 2015.

(b) *Clauses not falling within Article 85 (1)*

(30) The obligations on the licensee to manufacture the products strictly in accordance with the methods of manufacture communicated to him by the licensor, to market the products in packages strictly conforming to specimens or specifications proposed by the licensee and accepted by the licensor, and not to modify the formulae of manufacturing methods without the agreement of the latter, do not fall within Article 85 (1) of the Treaty. All these obligations are inspired by the legitimate desire of the licensor to ensure the strict conformity of the products manufactured by the licensee with his own products. This is particularly important, because the products carry either the registered trade-mark or the commercial name belonging to the licensor, and because any change in the quality of a trademarked product has an effect on the goodwill of that trade-mark, thus affecting the legitimate interest of its holder. This applies equally to the legitimate interests of the licensor in ensuring that the products manufactured under licence which contain active chemical ingredients be packaged in packages providing maximum, transport security and usability for purchasers.

(31) The prohibition upon the licensee from using the formulae and the manufacturing processes (i.e. the technical know-how transmitted by the licensor) for other uses than the manufacture of the licensed products, for as long as these formulae and processes are not within the public domain, is equally not restrictive of competition within the meaning of Article 85 (1), because it constitutes the corollary to the acknowledged right of the licensor to dispose freely of his know-how and, as a result, to limit the use by third parties solely to the manufacture of the licensed products. If this was not the case the holder of the right may be deprived of a more or less important part of the receipts from his know-how.

(32) Similarly, the obligation imposed upon the licensee not to divulge, even after the expiry of the agreement, the know-how communicated to him by the licensor for as long as the know-how remains secret, does not fall within Article 85 (1). In fact, the commercial value of know-how rests very largely in its confidential character, and each disclosure brings prejudice to the holder of that know-how. Such an obligation must be considered to be necessary in the context of the present type of agreement. Furthermore, since the validity of know-how, is not limited in time by the expiry of a period of legal protection, as is the case for a trade mark, it is legitimate for its holder to impose upon a licensee the obligation to respect its secrecy for so long as this know-how has not entered in the public domain and is freely accessible to all interested parties.

(33) The licensee is required to communicate to the licensor all information relative to modifications or improvements that the licensee may make to the manufacture or to the marketing of the products. This obligation which corresponds to a similar reciprocal undertaking by the licensor gives effect to the legitimate wish of the licensor to ensure that the manufacture of the licensed products by the licensee remains in conformity with the prescriptions relative to the formulae and methods which he instigated and does not compromise the maintenance of the quality of the products. These products which are marketed under the trade marks and commercial names of the licensor have to be of equal quality, whatever their place of manufacture and must benefit from the most recent improvements which may be made by one or other party together undertaking the commercial exploitation of the same basic technique. Such an obligation is not restrictive of competition in the present case. The licensee remains free to communicate his own information to third parties in so far as this does not result in the communication of know-how of the licensor, including all the information communicated by the latter during the course of the contract. He is also free to use his own modifications and improvements after the expiry of the contract, in each case in so far as the use of this does not require the use of the know-how belonging exclusively to the licensor, equally for as long as this know-how is not freely accessible. However, it has been agreed between the parties that, at the request of the Commission, at the expiry of the contract the licensor will no longer have the right to use the improvements made by the licensee which are inextricably linked to the basic know-how. The licensee therefore does not find himself in the situation whereby, at the expiry of the contract, the licensee is unable to use his own improvements when these are inextricably tied to the know-how that be no longer has the right to exploit, whereas the licensor continues to be able to use these improvements communicated by the licensee. The parties will therefore have to freely renegotiate their agreement in the event that they wish to continue the initial know-how as improved by the developments made by the licensee.

(34) DDD is obliged not to manufacture or distribute similar products to those covered by the licence without the prior agreement of DC. The licensee is however permitted to manufacture and package such similar products on behalf of clients who sell these products themselves or via their agents. In addition, it is stated that the prior agreement of DC will be given should sufficient certainty exist that the licensee will respect his contractual obligations.

This obligation is not restrictive of competition within the meaning of Article 85 (1). It enables the licensor to ensure that the licensee does not use its know-how for the manufacture of products other than those under the contract. Furthermore, in accepting this obligation, the licensee agrees to make his best efforts to exploit the know-how and thus to sell the licenced product. Without this safeguard, the licensor may not have agreed to grant the licence.

(35) The obligation upon the licensee to cease immediately using the intellectual property rights (i.e. trade marks, commercial names, know-how) at the expiry of the agreement, is an essential condition for the conclusion of licensing agreements and for this reason does not fall within the provisions of Article 85 (1). In fact, any company having succeeded in developing a unique and secret know-how is free to dispose of it as it chooses. As the company cannot be obliged to share the know-how with other undertakings, it may remain the sole and unique holder of the know-how, in so far as it has not fallen into the public domain due to disclosure. This undertaking must therefore be able to limit in time the grant of its know-how and to refuse its use by a licensee at the expiry of the agreement. Although such an obligation has as a consequence the removal of the licensee from the market for the licensed products at the expiry of the agreement, the necessary conditions for the transfer of technical knowledge should prevail. Without these conditions this element of public interest may not be safeguarded.

(36) The prohibition upon the licensee from granting sub-licences without the prior written agreement of the licensor does not constitute a restriction of competition under Article 85 (1), taking account of the fact that it remains the sole right of the owner of the know-how to decide whether or not a third party should be granted a licence to use that know-how.

B. Article 85 (3)

(37) Under Article 85 (3), the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement which contributes to improving the production or distribution of goods or to the promotion of technical or economic progress, while allowing consumers a fair share of the resultant benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable for the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(38) Commission Regulation (EEC) No 1983/83 [1] concerns the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements. According to Article 1 of the Regulation, Article 85 (1) is declared inapplicable to agreements to which only two undertakings are party and whereby one party agrees with the other to supply certain goods for resale within the whole or a defined area of the common market only to that other.

The notified agreement provides that DDD is appointed by DC as exclusive distributor for the licensed territory. However, this exclusivity is not exempted under Article 1 of Regulation (EEC) No 1983/83 for various reasons.

(39) The distribution exclusivity of which DDD benefits within the licensed territory falls, above all, within the context of a larger group of contractual relations which envisage the transfer of the know-how necessary for the manufacture of the licensed products. However, it is correct that the notified agreement envisages a period during which DDD operates as exclusive distributor for the products manufactured by DC.

This period is however only temporary. It permits DDD to organize and set up on the stain remover market so that it might subsequently justify the investment necessary for the manufacturing installation. Furthermore, the period of exclusive distribution differs according to the category of the contract products. Certain of these products, the 'Stain Devils', are already manufactured by DDD, whilst others, 'Stain Salts' and 'Colour Run', are still manufactured by DC and imported by DDD.

[1] OJ No L 173, 30. 6. 1983, p. 1.

(40) In the light of this, Regulation (EEC) No 1983/83 does not apply to the notified agreement, which must be classified as a know-how licensing agreement. It therefore remains to consider the individual application for Article 85 (3) to the agreement as a whole.

(41) The manufacturing and distribution exclusivity contributes to promoting technical and economic progress, because it encourages DDD to undertake the investments necessary to exploit in the territory the licence of substantial secret know-how with the aim of manufacturing and marketing a series of original stain removers which are different from universal stain removers. The exclusivity thus granted to a Community undertaking offers the possibility to manufacture the products according to a specific technique and contributes to the increase in number of production centres of stain removers in the common market. In fact, it should be noted that DDD and DC were not competitors before the conclusion of the agreement, and that, as a result of this agreement, DDD has been able to become a competing manufacturer.

The exclusive distributorship for the products which are still made by DC enables DDD to obtain a view of the whole commercial situation of the market for stain removers in the licensed territory. DDD may thus better decide when to commence the production of the products and what level of production capacity is appropriate for that manufacture.

The limitation of the right to manufacture to the licensed territory obliges DDD to concentrate its efforts on manufacturing and selling the products within this territory and to devote itself to improving the quality of the products manufactured and also to the increase of their quanitities.

(42) Consumers may by expected to benefit from these improvements because the contracted products which are adapted to their particular requirements will be more easily available. They also benefit from speedy delivery. Moreover, they have the choice of being supplied by DDD or by DC for the products manufactured by both these companies.

An increase in price which might result from the protection reserved to DDD appears unlikely owing to the effect of actual and potential competition. In effect, the contract products sold by DDD in the licensed territory are subject not only to the competition of other producers, but are also exposed to the competition of parallel imports from Member States outside the licensed territory.

(43) The manufacturing and distribution exclusivity is indispensable to the attainment of the abovementioned results. In effect, if the licensee did not have the certainty that he would not be subject to the competition of other licensees which would be appointed within the same geographic territory, he may be led not to accept the risk of manufacturing and selling the licensed products. This result would be harmful to the distribution of stain-removing products and equally would hinder the development of competition between the licenced praoducts and similar products in the common market.

Equally, the limitation of the right to manufacture the products to the licensed territory is necessary so that the undertakins situated in the Member States outside this territory may themselves be interested to receive a licence regarding the know-how in question and to contribute in this manner in these States to the promotion of technical progress.

(44) One may appraise the obligation of the licensor to transmit in principel to the licensee all requests coming from purchasers established in the licensed territory in the same way. The licensee would be discouraged from making the investments necessary for the manufacture of the licensed products if the licensor was free to complete with the licensee himself. This restriction of the freedom of the licensor to compete with the licensee is, furthermore, strictly limited because DC may suppsly any party, whether or not he intends to resell the products, established in the licensed territory who wishes to be supplied by DC.

(45) The contract products distributed by DDD are in competition with comparable products sold in and outside the licensed territory by other undertakings. The parties to the agreement expect further competitors to enter the markets on the territory in question, such that this competition will increase even more. Further, DDD benefits from no absolute territorial protection from direct and indirect imports from Member States where DC and its exclusive distributors operate. As a result of this the agreement does not give to the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(c) *Articles 6 and 8 of Regulation No 17*

(46) Article 8 of Regulation 17 provides that a decision in application of Article 85 (3) of the Treaty shall be issued for a specified period and conditions and obligations may be attached thereto. According to

Article 6 of the same Regulation, the Commission must specify the date from which the decision takes effect. This date may not be earlier than the date of notificaiton.

(47) The length of the agreement is 20 years from 1 January 1984. This duration does not appear excessive taking account of the presence on the market of numerous other competing products and because the free circulation of the contracted products is assured. DDD is free to sell the products outside the licensed territory and DC as well as the exclusive distributors in the Member States outside the territory may sell to purchasers established within this territory if they so wish.

Furthermore, taking account of the particular circumstances of the market in question and of the licensed technology, it appears that the provisions setting out the duration of the agreement are necessary to guarantee to the licencee access to a continuing stream of know-how and also to amortize the investment without fear that the licensor will prematurely terminate the agreement. In this respect it should be noted that this investment represents a considerable proportion of the financial means of the licensee.

(48) In order to guarantee that DC does not unduly refuse its prior agreement that DDD may undertake activities which are competitive to the manufactaure and sale of the licensed products, it is necessary to impose upon the parties, in conformity with Article 8 of the Regulation, the obligation to inform the Commission of each request for such type of authorization that is refused by DC, accompanied with a statement of the reasons for this refusal. This obligation enables the Commission to examine whether or not the agreement results in the practice of absolutely prohibiting DDD to undertake competing activities.

(49) The agreement was concluded between DC and DDD on 15 January 1985. It entered into force with retroactive effect on 1 January 1984 and expires on 31 December 2004. The agreement was notified on 14 March 1985.

The exemption that the Commission considers it may grant on the base of the abovementioned considerations, takes effect on 14 March 1985 and will last until the expiry of the notified agreement, on 31 December 2004. However, it is noted that the contract provides a different duration of 10 years for the obligation for the licensor not to appoint a different licensee than DDD for the sale of products manufactured by DC in the territory, if DDD manufactures these products as well,

HAS ADOPTED THIS DECISION:

Article 1

The provisions of Article 85 (1) of the Treaty establishing the European Economic Community are hereby, pursuant to Article 85 (3) of the said Treaty, declared inapplicable to the agreement notified on 14 March 1985 between the undertakings specified in Article 4.

Article 2

The undertakings specified in Article 4 shall inform the Commission of all refusals of a request for authorization made pursuant to Article 13 of the agreement referred to in Article 1 of this Decision.

The exemption shall apply with effect from the date of notification and until 31 December 2004.

Article 4

This Decision is addressed to:

1. Delta Chemie,
   Hans Bockler Straße 5,
   6078 Neu Isenburg,
   Germany;
2. DDD Limited,
   Rickmansworth Road 94,
   Watford,
   Herts. WDI 7 JJ,
   United Kingdom.

Done at Brussels, 13 October 1988.

For the Commission

Peter SUTHERLAND

Member of the Commission