

COMMISSION DECISION
of 8 December 1983
relating to a proceeding under Article 85 of the EEC Treaty
(IV/29.955 — Carbon Gas Technologie)

(Only the German text is authentic)

(83/669/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 Greece, and in particular Articles 4, 6 and 8 thereof,

Having regard to the application for negative clearance submitted pursuant to Article 2 of Regulation No 17 by Deutsche BP Aktiengesellschaft, Hamburg (DBP) on 9 October 1979 and to the subsidiary notification pursuant to Article 4 (1) of the same Regulation concerning an Agreement between DBP, Carbon Gas Technologie GmbH, Ratingen (CGT), Deutsche Babcock Aktiengesellschaft (DB), Deutsche Babcock Beteiligungs GmbH, Oberhausen (DBB) and Projektierung Chemische Verfahrenstechnik GmbH, Ratingen (PCV),

Having regard to the publication of the summary of the notification pursuant to Article 19 (3) of Regulation No 17 ⁽²⁾,

Having regard to the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

The notified Agreement concerns cooperation between several undertakings in the field of coal gasification within the joint subsidiary CGT, and the planned participation of DBP.

The agreements on the activities of CGT and the cooperation between the parties can be summarized as follows:

- CGT is a joint subsidiary of DBB and PCV set up mainly for the purpose of developing to an industrial standard a combined pressure gasification process using run-of-mine coal which has been summarily upgraded, and of commercially exploiting this process (object of the cooperation).
- CGT has been set up for an indefinite period. No provision is made in the articles of association for dissolving the company. However, each shareholder may at any time transfer his entire holding to an associated company in which he has at least a 51 % interest or which has at least a 51 % interest in his equity capital. However, a transfer to British Petroleum Company Ltd, London, is not possible. In the event of a sale of shares in some other manner, the other shareholders have an option on them.
- DBP has a 33 1/3 % interest in CGT; the remaining shares are divided equally between DBB and PCV.
- The company has three executive directors, DBB, PCV and DBP appointing one each. It is represented either by two executive directors acting jointly or by one executive director together with one general agent. Matters falling outside the normal course of business such as financial planning, the acceptance of guarantees, the making of major investments, etc., are subject to the agreement of the general meeting. The latter has a quorum if two-thirds of the company's capital is represented, and its decisions require a unanimous vote.
- DBP, DB, DBB and PCV undertake to make available free of charge to CGT all their existing and future know-how which could be conducive to the attainment of the object of the cooperation. PCV has, in addition, contributed all its

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 220, 17. 8. 1983, p. 4.

know-how in the field of cooperation including its rights to valid patents relating to coal gasification.

- DBP, DB, DBB and PCV undertake both on their own behalf and on behalf of their associated companies, to refrain from competing with CGT in the field of cooperation during the period of their participation in the joint venture. Only DBP's parent company, British Petroleum Co. Ltd, London, is exempt from this obligation.
- DBP, DB, DBB and PCV undertake to refrain from using, for the purposes of their own companies or from divulging to third companies or associated companies within the meaning of Sections 17 to 19 of the Aktiengesetz (the German Companies Law, dealing here with parent and subsidiary companies, undertakings belonging to a group and companies with cross holdings), and confidential information relating to the object of the cooperation obtained during the currency of the Cooperation Agreement from other parties or from CGT.
- CGT's shareholders undertake, in the event of their withdrawal from CGT, to refrain for a five-year period from exploiting know-how belonging to CGT in the field of cooperation and from divulging it to third parties. A fixed penalty of DM 100 000 is payable in respect of each breach of this obligation. In the event of a dispute, it is for the shareholder who has withdrawn to show proof that it has neither exploited itself CGT's know-how in the field of cooperation, nor divulged it to third parties. The parties agree that this obligation is to be observed also by the shareholder's associated companies.
- The parties have agreed that Deutsche Babcock Aktiengesellschaft, DBB's parent company, will in due course receive from CGT a non-exclusive licence to build and market worldwide plant developed by CGT. DPB plans subsequently to acquire and operate the plant forming the object of CGT;

The first stage of CGT's operation consists of research and development as well as the operation of a pilot plant. Subsequently, the construction of a demonstration plant, which will not come on stream until the end of 1988, is planned. Up to then the aggregated cost could amount to between DM 400 and 500 million. This section of the project is partially financed by public aids. Following the period of development it is planned to conclude the agreement on the non-exclusive licence for DB. Further-

more, after the 'Research and Development' phase has come to an end, CGT will be involved in the marketing of the developed process in such a way as to ensure in particular, within the framework of the production and the running of pressurized coal gasification installations, the supply of the basic design package, the transfer of technology and accessory technical assistance.

Without exception, the parties were originally undertakings belonging to major groups active at Community and international level in industrial plant construction and in the energy sector: Gruppe Deutsche Babcock has a capital of DM 200 million, Gruppe Flick (PCV) DM 700 million, and British Petroleum Co. Ltd £ 500 million. In October 1982 the then chairman of PCV's managing board, Mr Manfred Nemitz, took over from Friedrich Flick Industrieverwaltung KGaA all of PCV's business interests.

Several coal gasification processes exist in various stages of development on the Community market. The leading competitors are Lurgi GmbH, Fried. Krupp GmbH, AGIP, Shell, Texaco, Ruhrkohle AG, Saarbergwerke AG and Rheinische Braunkohlenwerke AG.

No comments were received from third parties in response to the Commission's notice pursuant to Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

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

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

The Agreement between DBP, CGT, DB, DBB and PVC is such an agreement, for the following reasons:

1. The Cooperation Agreement in a field which may prove of great importance in relation to energy supply, provides that the parties and all associated undertakings refrain from competing with the joint subsidiary in the field covered by the cooperation and hence that they will refrain

from competing with one another. Although, unlike the other two shareholders, British Petroleum Co. Ltd, is not expressly prohibited from competing with the joint subsidiary, experience has shown that it is unlikely to do so. Each of the parties has either directly or indirectly through participating interests in other undertakings, theoretical or practical experience of coal gasification or coal liquefaction, the end products of which (gas and oil) can, to a large extent, be substituted for each other. It is to be assumed therefore that, in view of their financial power, economic importance and the diversity of their principal activities, at least DBP and DB would be able to achieve, even independently, the object of the cooperation. Consequently, the prohibition on competition imposed on the parties by the Agreement or the improbability of competition between them resulting from the Agreement has as its object or effect a restriction of competition within the common market. In view of the industrial importance of the parties and the importance of the new technology to be developed in the field of energy, this restriction is also appreciable.

The same applies to the obligation on the parties to refrain, in the event of their withdrawal from CGT, for a five-year period from exploiting know-how belonging to CGT in the field of cooperation and from divulging it to third parties. This obligation prevents shareholders who decide to withdraw from exploiting know-how which they transferred to the joint subsidiary when it was set up and subsequently placed at its disposal free of charge. It reinforces the prohibition on competition imposed on the shareholders by making it more difficult for a shareholder to compete in the field of cooperation once it no longer participates in the joint subsidiary.

2. With the possible exception of PCV following the withdrawal of the Flick group as its equity owner, the parties belong to major industrial groups which have considerable material and financial resources and which are active in virtually every country in the Community. They are therefore in a position to exploit the technology developed by CGT in several Community countries. As a result of the anti-competitive agreements, the parties cease to be suppliers of technological know-how in the field of cooperation in cross-frontier trade within the common market. The agreements are such, therefore, as

to restrict trade between Member States. In view of the existing structure of gas supply in the Community, characterized as they are by extensive intra-Community trade, trade between Member States is affected on this count too.

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

Under Article 85 (3), the provisions of Article 85 (1) of the EEC Treaty may be declared inapplicable in the case of agreements between undertakings which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

1. Since 1973, the importation of crude oil into the Community has, as regards availability and prices, been subject to recurrent or constant pressures. Even so, crude oil still accounts for almost 49 % of the Community's primary energy consumption. Under these circumstances, it is essential that the degree of dependence on this source of energy be reduced and the pattern of the Community's energy supplies diversified through the harnessing of alternative energy sources, and in particular those available in the Community itself.

In the search for greater diversification and self-sufficiency and hence greater stability of energy supplies in the Community, coal gasification in particular creates favourable conditions through improved exploitation of Community coal deposits. Moreover, using the resulting gas in the conversion process of power stations should be more efficient and less harmful to the environment than direct combustion of coal. Mastery of this technology may also open up for that industry in the Community significant marketing opportunities outside the Community. This being so, the competent bodies have repeatedly stressed the need for the Community to concern itself as a matter of urgency with the development of coal liquefaction and gasification processes. As far back as 1975, the Commission stated in its communication to the Council on 'Medium-term guidelines

for coal 1975 to 1985' ⁽¹⁾ that the process of coal gasification was an important factor in the Community's supply strategy in the energy sector. Subsequently, the Council, acting on proposals from the Commission, adopted two Regulations on the granting of financial support for projects to exploit alternative energy sources ⁽²⁾, primarily coal gasification and coal liquefaction. The European Council of 21 and 22 June 1979 in Strasbourg also called for an energy strategy aimed at reducing dependence on oil supplies and advocated the development of new methods for processing coal.

The Agreement contributes to the attainment of the above objectives. True, each of the groups to which the parties belong would be able on its own to achieve the object of the cooperation, but this assessment of the parties' competitive positions must take account of special circumstances conducive to the realization of the project within the framework of a joint subsidiary. Consideration must be given here to the main activity of the respective participating groups. In view of the object of the cooperation these activities are complementary, PCV (formerly Flick) being specialized in basic process technology, DB in the construction of large-scale industrial plant and British Petroleum in refining, a technology similar in nature to coal gasification. In view of this existing complementary specialization of the parties, their cooperation within the framework of a joint subsidiary creates, by ruling out competition between them, better conditions for the attainment of the object of the cooperation than if they were to compete with one another. The prohibition on competition under the joint venture compels the parties, moreover, to concentrate their resources on developing the new technology within the joint subsidiary. This should save both time and money. The cost of this development programme is put at roughly DM 500 million, but it is certain that, were they to try to attain the object of the cooperation individually, the parties which do possess the necessary resources would incur much higher costs because they would not have access to complementary technical know-how. It can therefore be assumed that the coordinated use within the joint subsidiary of the entrepreneurial skills available will

simplify and accelerate the transition of the desired coal gasification technology in question from the planning and research stage to that of large-scale industrial application. The prohibition on competition therefore contributes to promoting technical and economic progress.

2. By mitigating the potential difficulties which, in the light of experience gained in recent years, may arise in connection with the importation of hydrocarbons into the Community, coal gasification is such as to help create a pattern of energy supply which promises consumers greater stability in terms of quantities supplied and prices. The presence of strong competitors on this market will ensure that the parties will not be able to keep for themselves the benefit that can be expected to flow the joint subsidiary. From this point of view the Agreement is likely, therefore, to allow consumers a fair share of the benefit resulting from the cooperation.
3. The Agreement imposes no restrictions on the undertakings that are not indispensable to the attainment of the above objectives:
 - A mere agreement on the exchange or granting of licences or an agreement on specialization could not guarantee attainment of the object of the cooperation in the same way as complete pooling.
 - The clause prohibiting the parties from competing with the joint subsidiary is, under the circumstances, an indispensable part of the Agreement. The assumption must be that complete concentration of their efforts on the attainment of the object of the cooperation can be ensured only if any attempt to achieve an individual competitive edge is ruled out.
 - The obligation on the parties to refrain, in the event of their withdrawal from CGT, for a five-year period from exploiting know-how belonging to CGT in the field of cooperation and from divulging it to third parties is likewise to be regarded as a restriction indispensable to the attainment of the object of the cooperation. It affords a limited degree of protection against competition from a former shareholder or from

⁽¹⁾ OJ No C 22, 30. 1. 1975, p. 1.

⁽²⁾ OJ No L 158, 16. 6. 1978, p. 3; OJ No L 93, 12. 4. 1979, p. 5.

outside companies, without which the object of the cooperation cannot be attained.

4. Nor does the Agreement afford the shareholders the possibility of eliminating competition in respect of a substantial part of the product covered by the Agreement. Various gasification methods are already undergoing tests in the Community and elsewhere, and others are at the development stage. A number of leading firms in the Community are engaged in tapping this market. Their individual commercial success depends both on the quality and cost of their technology and on the coal they plan to use, its origin and its price. Under the circumstances, effective competition is guaranteed in this field.

C. Applicability of Article 85 (1) of Regulation No 17

Pursuant to Article 8 (1) of Regulation No 17, conditions and obligations may be attached to the exemption decision.

In the case at issue, the Commission must be given an opportunity to examine whether competition within the common market is not further restricted by measures which have their basis in the fact that the parties or undertakings making up the group to which each of them belongs carry on, or will carry on, directly or through interests in outside undertakings and independently of CGT, an activity in the field of coal gasification in the common market. For it is quite feasible that, under these circumstances, competing interests within groups of undertakings may conflict with one another and tendencies towards market sharing emerge. Accordingly, a condition needs to be imposed that will make it easier for the Commission to take steps against such practices.

Article 8 (1) of Regulation No 17 also stipulates that a Commission Decision in application of Article 85 (3) of the Treaty shall be issued for a specified period.

In view of the major investments planned by the shareholders, the period within which the object of the cooperation should be achieved cannot be too short. It should in the first place cover the period leading up to the commissioning of a demonstration plant. It is therefore appropriate to limit the period of validity of the exemption to 31 December 1989,

HAS ADOPTED THIS DECISION:

Article 1

Article 85 (1) of the EEC Treaty is, pursuant to Article 85 (3) thereof, hereby declared inapplicable to the Agreement concluded on 29 May 1979 between Deutsche BP of the one part and Carbon Gas Technologie GmbH together with its shareholders of the other part relating to Deutsche BP's interest in Carbon Gas Technologie GmbH, which was set up on 14 December 1977.

Article 2

The declaration of inapplicability in Article 1 shall be subject to the following condition:

CGT shall submit to the Commission for examination all licensing agreements entered into with its shareholders as soon as they have been concluded.

Article 3

This Decision shall apply with effect from 9 October 1979 and shall apply until 31 December 1989.

Article 4

This Decision is addressed to the following undertakings:

- Deutsche BP Aktiengesellschaft, Überseering 2, D-2000 Hamburg 60,
- Deutsche Babcock, Aktiengesellschaft, Duisburger Straße 375, D-4200 Oberhausen 1,
- Deutsche Babcock-Beteiligungs GmbH, Duisburger Straße 375, D-4200 Oberhausen 1,
- Projektierung Chemische Verfahrenstechnik GmbH, Ten Eicken 12, D-4030 Ratingen 1, Haus Hohbeck,
- Carbon Gas Technologie GmbH, Ten Eicken 12, D-4030 Ratingen 1, Haus Hohbeck.

Done at Brussels, 8 December 1983.

For the Commission

Frans ANDRIESEN

Member of the Commission