

## COMMISSION DECISION

of 22 December 1987

relating to a proceeding under Article 85 of the EEC Treaty

(IV/27.093 — De Laval-Stork)

(Only the Dutch and English texts are authentic)

(88/110/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

WHEREAS:

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 <sup>(1)</sup>, as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 6 and 8 thereof,

Having regard to the notification made on 2 March 1973 pursuant to Article 4 of Regulation No 17 by Stork Roterende Werktuigen BV of Assen, the Netherlands, (Stork) regarding the set of agreements (j.v.a.) it had concluded on 1 September 1971 with De Laval Turbine International Inc. of Princeton, New Jersey, USA (De Laval) for the creation of a joint venture, De Laval-Stork v.o.f. (the j.v.); Stork's parent company, Koninklijke Machinefabriek Stork BV of Hengelo, the Netherlands, (KMS) was also party to the agreements, which concern the design, development, manufacture and marketing of certain types of steam turbines, centrifugal compressors and pumps,

Having regard to Decision 77/543/EEC <sup>(2)</sup> in which the Commission granted an exemption pursuant to Article 85 (3) in favour of the above parties, for a period ending on 1 September 1986,

Having regard to the application for renewal of that exemption filed by the undertakings on 2 July 1986 pursuant to Article 8 (2) of Regulation No 17,

Having regard to the publication pursuant to Article 19 (3) of Regulation No 17 of a summary of the agreements and relevant changes which have occurred since Decision 77/543/EEC was adopted <sup>(3)</sup>,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 10 (3) of Regulation No 17,

## I. THE FACTS

- (1) Since the 1977 exemption Decision, De Laval's corporate ownership has undergone a number of changes. At that time, it was a wholly-owned subsidiary of De Laval Turbine Incorporated of Trenton, New Jersey, USA, which in its turn was controlled by the Transamerica Corporation of San Francisco, California, one of the largest conglomerates in the USA. In 1979 the name of the parent company was changed to Transamerica Delaval Inc. Then, in December of 1986, all ties were broken between the parent company and the Transamerica Corporation, accompanied by another change of name to Imo Delaval Inc., a fully independent company whose shares are quoted on the stock market. De Laval, previously of Princeton and now of Lawrenceville, New Jersey, remains a wholly-owned subsidiary of Imo Delaval Inc. As for KMS, which owned Stork (previously of Assen and now of Hengelo, the Netherlands), its parent company was known until 1978 as Verenigde Machinefabrieken NV (VMF) of Amsterdam, Netherlands, and thereafter as Verenigde Machinefabrieken Stork NV (VMF Stork), likewise of Amsterdam. In 1978 the ownership of Stork was transferred from KMS to VMF Stork.

Sine the exemption Decision of 1977, the following circumstances have changed in the arrangements between the parties:

- (a) while the original j.v.a. was concluded for five years (renewable), the term is now indefinite, with a more flexible provision for termination, namely upon 18 months' notice by either party;
- (b) De Laval's option to extend its participation in the j.v. to 80 % has been deleted;
- (c) the machines and equipment, which were on hire-purchase, now belong fully to the j.v.;
- (d) the parent company of De Laval, which has continued its independent activities with respect to the products covered by the j.v. on markets outside the EEC and Eastern Europe, has expanded its activities on the European market to include the manufacture and sale of equipment relating to temperature, pressure,

<sup>(1)</sup> OJ No 13, 21. 2. 1962, p. 204/62.

<sup>(2)</sup> OJ No L 215, 23. 8. 1977, p. 11.

<sup>(3)</sup> OJ No C 255, 25. 9. 1987, p. 3.

and other types of electronic control; these products are not in competition with those produced by the j.v. or by the other parent company or the group to which it belongs;

- (e) since 1976, the group to which Stork belongs has gradually withdrawn from the market of manufacturing and selling heavy equipment. Apart from activities it has as a result of a minority participation by the parent company in a corporation involving cooperation for producing turbines of a type not covered by the j.v., it has since 1982 concentrated on manufacturing and selling advanced light machinery for the food, paper and textile processing and graphic industries. However, the group's activities relating to the assembling and servicing of turbines and compressors have continued as at the time of the initial exemption decision, and its involvement in the market of pumps for all types of purposes has been extended. The parties have stated that the Dutch partner could assume the activities of the j.v. if the American partner due to unforeseen circumstances should wish to withdraw;

- (f) at the time of the 1977 exemption Decision, the j.v. had 11 competitors in the turbine sector, 11 in the compressor sector and six in the pump sector, while four competitors were capable of making both turbines and compressors. Since then, the number of competitors has remained the same or risen: more than 20 manufacturers of turbines, nearly 20 manufacturers of compressors, 10 manufacturers of pumps and a dozen competitors producing both compressors and pumps;

- (g) at the time of the 1977 exemption Decision, the j.v.'s market share in the Community was estimated at being between 10 and 15 %. Since then, the market share has not risen: even in the Member States where the j.v. was the most successful, the market share for each product has not gone beyond 10 %, and in the rest of the world, the j.v.'s market shares for each product concerned have been modest. The American company, which has not sold j.v. products directly in the Community since the j.v. was launched, has had moderate to medium-sized market shares outside the Community and Eastern Europe, again not surpassing 10 % for any one product;

- (h) not only the modest market shares, but also other factors indicate that the j.v. has not flourished: due to the drop in demand, the number of employees has been reduced by 20 % since 1977 (from 400 to 310) and after several years

of suffering losses or making minimal profits, it was only in 1984 that enough profits were made to justify a distribution thereof to the partners. Several reasons are cited for these results: a worldwide recession in the sectors concerned, production overcapacity, the presence of fierce and growing competition from Japan, an otherwise growing tendency in and outside the Community to 'buy domestic' and, finally, the fall of the US dollar. The j.v., which also suffered a set-back due to a serious fire which destroyed part of the factory area in 1978, has endeavoured to find new markets for its products, and since 1982 the profits have slowly been increasing. In this connection, the parties have emphasized that entry into a capital goods business is a long-term commitment.

- (2) Following the publication pursuant to Article 19 (3) of Regulation No 17 of the above facts, in which the Commission announced its intention to renew Decision 77/543/EEC, no observations were received.

## II. LEGAL ASSESSMENT

### A. Article 85 (1)

- (3) For the same reasons as those stated in the Decision 77/543/EEC, the j.v.a. is still deemed to fall within the scope of Article 85 (1), notably because:
- (a) the j.v.a. has the object and effect of coordinating, in the common market, the research, production and marketing activities of the two parents, who in 1977 were considered to be and remain actual or at least potential competitors. Although the group to which Stork belongs has since then gradually withdrawn from the heavy equipment market as far as manufacturing and selling are concerned, its activities relating to the industrial servicing of turbines and compressors have continued and it has extended its involvement, including manufacturing and selling, in the market for pumps of all types. These considerations and the fact that the Netherlands partner could without any problem assume the operation of the j.v. — in other words, retains an access to the market in question if the American partner were for whatever reason to withdraw — lead to the conclusion that at present the parent companies remain actual competitors for part of the activities and products covered by the joint venture and at least potential competitors with respect to the remainder;

- (b) the supply structure on the market continues to be changed due to the j.v.a., because customers are not in a position to choose, albeit potentially, between two independent suppliers;
- (c) given the size and the international activities of both companies, as described in Decision 77/543/EEC, the arrangements between them must still be deemed to alter the normal flow of trade, thus resulting in the effect on trade between Member States which is necessary for the application of Article 85 (1).

#### B. Article 85 (3)

- (4) In view of the beneficial effects which resulted from the cooperation between the parties, the Commission was able to grant an exemption with respect to the notified arrangements. In particular, the j.v.a. made it easier for De Laval to enter the European market and enabled the Netherlands partner to reorganize and expand its turbine and compressor business, while substantial competition was found to persist on the markets in question. For further details, reference can be made to subsection III, points 9 to 14 of Decision 77/543/EEC.
- (5) In deciding whether a decision granting exemption can be renewed pursuant to Article 8 (2) of Regulation No 17, the Commission must as certain whether the requirements of Article 85 (3) continue to be fulfilled, whereby particular attention must be paid to any material changes which have occurred in the facts or circumstances of a given case since the initial exemption was granted.
- (6) The beneficial effects which the j.v.a. has brought about in terms of improved production and distribution of the goods concerned and the promotion of technical and economic progress continue to be supported by the arguments presented in subsection III, point 10 of the initial exemption Decision. In this context, taking into account the fact that the arrangements between the parties have been hampered by several external circumstances described above under point 1 and that the j.v. has thus only relatively recently started functioning on a fully fledged basis, a further period of exemption is necessary to provide a substantial source of supply of the goods in question, to accrue.
- (7) Taking into consideration the market shares involved in this case as well as the other market conditions described above, users will as before enjoy a fair share of these benefits. Also, under the present circumstances, the companies concerned are even less capable than before of eliminating competition in respect of a substantial part of the products concerned.
- (8) The agreements have not been modified in any way so as to impose any restrictions which are not indispensable to the attainment of the beneficial effects. In this connection it should be noted, however, that when the exemption was granted in 1977, the parties were obliged to amend certain restrictive provisions in their arrangements which were not deemed to be indispensable for the attainment of the objectives of Article 85 (3), namely those relating to the exclusivity which each partner granted to the j.v. and those relating to the industrial independence of the parties in the event of the termination of the j.v. (see subsection III, point 14 of the exemption Decision). In a restated version of the agreement, the parties had sought to comply with the conditions for exemption set out in Article 1 of the 1977 Decision by adding a saving clause to the objectionable provisions, namely a statement indicating that if any part thereof was found to be inconsistent with an 'outstanding ruling of the EEC', the latter would prevail. At the Commission's request, the parties subsequently amended the relevant provisions so as to comply textually with the conditions imposed. In any event, they confirmed that the question of exclusivity had never arisen in practice, as the j.v. had always been in a position to meet the orders of any customers, and the question of the post-termination obligations has been immaterial, as the agreement is still in force.
- (9) In view of the above considerations, the Decision granting exemption to the j.v.a. can be renewed pursuant to Article 8 (2) of Regulation No 17.

#### C. Article 8 of Regulation No 17

- (10) Pursuant to Article 8 (1) of Regulation No 17, the exemption granted in Decision 77/543/EEC was made subject to two conditions indicated in Article 1 of that Decision, which can be considered to have been fulfilled by virtue of the necessary modifications made by the parties to the j.v.a., as indicated above under point 8.
- (11) Furthermore, pursuant to Article 8 (2) of Regulation No 17 which requires the Commission to ensure that the requirements of Article 85 (3) continue to be satisfied, the undertakings were obliged to inform the Commission any changes or additions to the agreements on an *ad hoc* basis and to submit a report every two years on the activities of the j.v. These reporting requirements have been fulfilled throughout the period of exemption and can be imposed again for the duration of the renewal. Given the fact that the two-yearly reports have indicated that developments which fall under the Commission's surveillance have not been particularly rapid, that reporting requirement can be

reduced from every two to every four years. Furthermore, given the present market situation and the position which the parties occupy, the *ad hoc* reporting requirement can now be limited to any changes regarding the agreements between the parties or in any of their independent business activities which are relevant for the present purposes.

- (12) Pursuant to Article 8 (1) of Regulation No 17, a Commission Decision in application of Article 85 (3) must be issued for a specified period. In the present case, a long-term commitment has proved to be necessary in order for the full benefits of the cooperation to accrue in a capital-goods business such as this one. Also, the ten years which have elapsed since the initial exemption was granted have shown that competitive structures in this sector have a tendency to remain stable and healthy. Under these circumstances, Decision 77/543/EEC can be renewed for a period of 20 years.

HAS ADOPTED THIS DECISION:

#### *Article 1*

Decision 77/543/EEC is hereby renewed until 1 September 2006.

#### *Article 2*

Exemption is granted subject to the following obligations:

1. The undertakings to which this Decision is addressed shall without delay inform the Commission of any amendment or addition to the abovementioned agreements, and of all matters affecting their interpretation or application, including any arising as a result of arbitration.
2. The undertakings referred to shall furnish the Commission every four years with a full report on the activities of the joint venture.
3. Each of the undertakings to which this Decision is addressed shall without delay inform the Commission of any new activity in the turbine, compressor or boiler-feed pump industry other than purely occasional business, engaged in by it independently of the others.

#### *Article 3*

This Decision is addressed to:

- De Laval Turbine International Incorporated, 3450 Princeton Pike, PO Box 6550, 08048 Lawrenceville, New Jersey, USA,
- Koninklijke Machinefabriek Stork BV and Stork Roterende Werktuigen BV, Industriestraat 1, Postbus 2079, 7550 CB Hengelo, Netherlands,
- De Laval-Stork VOF, Lansinkesweg 1, Postbus 329, 7550 AH Hengelo, Netherlands.

Done at Brussels, 22 December 1987.

*For the Commission*

Peter SUTHERLAND

*Member of the Commission*