II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 17 December 1986

relating to a proceeding under Article 85 of the EEC Treaty

(IV/31.340 — Mitchell Cotts/Sofiltra)

(Only the French and English texts are authentic)

(87/100/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 6 and 8 thereof,

Having regard to the notification of the agreements hereinafter mentioned and the application for negative clearance submitted on 20 September 1984 by Mitchell Cotts & Co. (Engineering) Ltd, Birmingham, United Kingdom (hereinafter 'M. C. Engineering') and Sofiltra Poelman SA, France (hereinafter 'Sofiltra') concerning the creation of a joint venture company, Mitchell Cotts Air Filtration Ltd (hereinafter 'the Joint Venture') which Agreements were made effective as of 5 July 1984 and comprise a Joint Venture Agreement, a Know-how Licence Agreement and the Memorandum and Articles of Association of the Joint Venture,

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

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

Whereas :

I. THE FACTS

A. Subject of the Decision

(1) This Decision concerns Agreements between M. C. Engineering and Sofiltra for the creation of a joint venture company, Mitchell Cotts Air Filtration Ltd, in the United Kingdom with the grant of a know-how licence to the joint venture for the manufacture and marketing of high-efficiency air filters using microfine glass fibre for the nuclear, biological, chemical and computer markets.

B. The Undertakings

(2) M. C. Engineering is a wholly owned subsidiary of Mitchell Cotts Group plc ('the Mitchell Group'), which is a United Kingdom public company with a group turnover for the year up to 30 June 1985 of approximately £ 377 million, whose principal interests are in the fields of international engineering, transportation and trading.

(3) Sofiltra is a *société anonyme* incorporated under the laws of France. Sofiltra is a part of the Contracting and Services Division of the Groupe Saint-Gobain, which owns approximately 72 % of Sofiltra's shares. The turnover of Saint-Gobain as of 31 December 1983 was in excess of FF 57 billion, and its principal manufacturing activities are in the

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 245, 1. 10. 1986, p. 2.

fields of flat glass, insulation products, cast-iron pipes for water supply systems, glass containers, paper and cardboard for packaging, chipboard and plywood, roofing and building materials, fibre reinforcements for plastic and refractory products.

(4) Mitchell Cotts Air Filtration Ltd was, until the date of the Agreements (5 July 1984), a wholly owned subsidiary of the Mitchell Group. On 28 June 1984 it acquired from Mitchell Cotts Environmental Control Limited (another wholly owned subsidiary of the Mitchell Group) the business of the manufacture and sale of air filtration equipment which had been carried on previously by Mitchell Cotts Environmental Control Limited.

C. The Product

(5) The Agreements relate to the manufacture and sale of high-efficiency air filters utilizing microfine glass fibre for the nuclear, biological, chemical and computer markets. Sofiltra manufactures in France high-efficiency particulate air filters from small pleated paper media which are composed of submicronic glass fibres. These filters are produced as either 'V' type filters or as filter panels. M. C. Engineering has been involved since 1976 in the manufacture and marketing of air filtration devices incorporating pleated glass fibre paper purchased from Sofiltra. Unlike the manufacture of pleated glass fibre paper, no advanced technology is involved in the assembly of the final product, which merely entails the provision of a metal or plastic casing. The pleated glass fibre paper represents the major cost component and the key technical element in the finished product. M. C. Engineering does not possess either the relevant technology or the research and development facilities necessary to manufacture independently these high-efficiency air filters. M. C. Engineering does produce certain filtration devices which are not substitutable for high-efficiency air filters. The know-how licence enables the Joint Venture to manufacture the finished product, and thus obviates the necessity to import the pleated glass fibre paper.

D. The Agreements

(6) Mitchell Cotts Air Filtration Ltd was a wholly owned subsidiary of the Mitchell Group having an authorized share capital of £ 92 000, made up of 69 000 £ 1 'A' ordinary shares and 23 000 £ 1 'B' ordinary shares. Sofiltra acquired the 'B' ordinary shares representing a 25 % interest in the Joint Venture.

(7) The Articles of Association of the Joint Venture provide for the establishment of a Shareholders' Committee to which each parent company appoints an equal number of members. Each member has one vote and there is no chairman's casting vote. The following business requires the prior approval of the Shareholders' Committee :

(i) The payment of any sum to :

(a) any Director of the Joint Venture ;

(b) any employee of the Joint Venture whose aggregate compensation will exceed the salary of the lowest-paid Director ; or

(c) any relative of any person mentioned in (a) and (b) ;

(ii) The approval of the capital and operating budget of the Joint Venture ;

(iii) The purchase, sale, lease, pledge, mortgage, charge or other acquisition or disposal by the Joint Venture of certain capital assets ;

(iv) The lending or borrowing by the Joint Venture of any money (save certain bank overdrafts) or the guarantee by the Joint Venture of any debt or obligation ;

(v) The establishment or closure by the Joint Venture of any plant or production facility ;

(vi) The establishment by the Joint Venture of any new business or the closure by the Joint Venture of any business ;

(vii) The entering into by the Joint Venture of any contract, agreement or other undertaking which is either :

(a) of a material nature and is outside the ordinary course of the business of the Joint Venture, or

(b) entered into with a Director of the Joint Venture or a member of the Shareholders' Committee or with any shareholder of the Joint Venture, and is on terms more onerous to the Joint Venture than would have applied had it not been entered into with any of the aforesaid ;

(viii) The instigation or defence of any litigation, arbitration or similar proceedings taken by or against the Joint Venture ;

(ix) The entering into by the Joint Venture of any agreement for the acquisition or disposal of any industrial property rights ;

(x) The declaration or payment by the Joint Venture of any dividend ;

(xi) The amendment of the Memorandum or Articles of Association of the Joint Venture ;

(xii) The commencement of proceedings for the winding up of the Joint Venture;

(xiii) Any increase or reduction in the authorized or issued shares or loan capital of the Joint Venture, or the creation or issue of any warrants, options or other rights over any share or loan capital;

(xiv) The consolidation or amalgamation of the Joint Venture with, or the acquisition or disposal of any interest by the Joint Venture in, any other company, association, partnership or other legal entity, or the creation by the Joint Venture of any subsidiary of the Joint Venture;

(xv) The appointment and removal of the Managing Director of the Joint Venture;

(xvi) Any change in the name of the Joint Venture;

(xvii) Any change in the location of the registered office of the Joint Venture.

(8) The Board of Directors of the Joint Venture is composed of two directors nominated by Sofiltra and three directors nominated by M. C. Engineering, decisions being taken by simple majority vote.

(9) The Joint Venture undertakes to manufacture air filtration devices using Sofiltra's technology know-how and expertise under a royalty-bearing licence. 'Know-how' is defined as secret technical data and other information relating to the design and manufacture of absolute and high-efficiency filters using small pleated paper media. Mitchell Cotts Environmental Controls Limited leases the production premises to the Joint Venture and supplies the commercial know-how. The Joint Venture Agreement and the Know-how Licence Agreement provide for the grant by Sofiltra to the Joint Venture of an exclusive licence to manufacture air filters in the United Kingdom. This means that Sofiltra will not grant further licences to manufacture in the United Kingdom.

(10) The Licence Agreement prohibits the Joint Venture from manufacturing or dealing in competing products and imposes an obligation to maintain confidentiality as to the know-how, information or technology disclosed to it. The Joint Venture is also prohibited from granting sublicences without the prior consent of Sofiltra.

In addition, there is provision in the Licence Agreement for the reciprocal disclosure of and granting of non-exclusive licences for improvements and new inventions. This provision may be summarized as follows:

Sofiltra is to disclose to the Joint Venture any improvements or new inventions relating to the licensed equipment, whether patented or not, which it shall lawfully acquire or with respect to which it shall have the right to grant licences, and the Joint Venture may use such improvements or inventions for the term of the Agreement. The Joint Venture is to disclose to Sofiltra all information regarding any improvements or inventions developed or acquired by it pertaining to the licensed equipment, whether patented or not, and is to grant Sofiltra a royalty-free licence to use any such improvements or inventions. Sofiltra may disclose such improvements and inventions to its other licensees. To date Sofiltra has not appointed any other licensees in the common market.

(11) The Licence Agreement also includes an exclusive right of sale granted to the Joint Venture in respect of a sales territory comprising the United Kingdom, Ireland and seven non-EEC countries. This is, however, subject to the right of Sofiltra and other licensees to sell the licensed products and spare parts in the United Kingdom when such sale is made under medium-term financial agreements, specifying country of origin, concluded between governments of customer and seller. Such agreements are likely to be rare. A sum by way of compensation is paid to the Joint Venture when such a direct sale is made. At the same time, the agreement contains a provision which prohibits the licensee from using, manufacturing, warehousing, stocking or advertising the licensed product outside the exclusive territory. The licensee is also prohibited from establishing any commercial sales branch or agency for the sale of the licensed equipment outside his sales territory. Passive sales, however, are permitted. The Licence Agreement, which became effective on 1 July 1984, is to continue for 10 years and thereafter from year to year, unless terminated by either party upon 10 months' notice.

E. The Market

(12) The market in which the goods compete is the high efficiency air and gas filtration equipment market, which are also referred to in the trade as 'absolute' or 'very high efficiency' filtration equipment. The market concerns equipment which incorporates the maximum performance levels with respect to efficiency, retention rates and product life in relationship to the conditions of utilization.

Below are listed the companies which compete in the very high efficiency filtration market in the United Kingdom/Ireland and in the rest of the EEC. These companies, which represent 80 to 85 % of the EEC market, manufacture high-efficiency filtration equipment.

Country of origin	Companies
United Kingdom	Vokes Ozonair Auchard Microflow
USA	American Filter Flanders
Sweden	Camfil
Federal Republic of Germany	Trox Delbag Draeger
Switzerland	Luwa
Italy	Codas

(13) Sales estimates for the EEC market for very high efficiency filtration equipment for 1984 are as follows :

France :	FF 90/100 million,
Federal Republic of Germany :	FF 150/170 million,
UK/Ireland :	FF 100/110 million,
Benelux :	FF 60 million,
Italy, Denmark, other :	FF 60 million,
Total :	FF 460/500 million.

(14) During the three years prior to the conclusion of the Joint Venture Agreement, Sofiltra's sales were approximately as follows :

Sales

(million FF)

	1982	1983	1984
France	47,5	44,9	53,5
Federal Republic of Germany	2,0	1,3	1,5
UK/Ireland	0,7	1,1	2,0
Benelux	10,0	12,0	6,5
Italy, Denmark, other	2,8	6,7	6,5
Total :	63,0	66,0	70,0

(15) The filtration equipment in question is traded across national boundaries within the common market and several undertakings operate throughout the EEC. Competitive conditions are broadly similar throughout the Community.

Sofiltra's EEC market share for the three years prior to the conclusion of the agreement was approximately 15 %. During the same three-year period, M. C. Engineering's sales and market shares in the EEC were negligible for very high efficiency filtration equipment, except for the United Kingdom and Ireland in which their market share for 1984 was approximately 10 %. Based on these figures, the approximate market shares of the parent companies are as follows :

	France	United Kingdom	EEC
Sofiltra	54 %	2 %	15 %
M. C. Engineering	2 %	10 %	2 %

M. C. Engineering and Sofiltra could not however be considered competitors at the manufacturing level. As explained at paragraph 5 above, M. C. Engineering was marketing a finished product incorporating pleated glass fibre paper purchased from Sofiltra, whereas Sofiltra and other manufacturers produced the finished product without recourse to outside assistance.

(16) The Joint Venture arrangement enables both of the parties to become more competitive in the United Kingdom. M. C. Engineering would not have been able to manufacture the air filters without the know-how licence and Sofiltra would not have set up its own manufacturing facility in the United Kindom without 'substantial uneconomic expenditure'.

F. Observations of Third Parties

(17) 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. Article 85 (1)

(18) Since Sofiltra's consent is required for the adoption of important decisions relating to the conduct of the Joint Venture's business, Sofiltra is not merely a minority shareholder. Day-to-day management

decisions in the Joint Venture are the responsibility of the Board of Directors on which M. C. Engineering holds a majority (see paragraph 8). Nevertheless, Sofiltra's influence will be brought to bear on the Joint Venture's conduct, since it is the key provider of technology, an important shareholder, and participates on an equal footing with M. C. Engineering in the Shareholders' Committee, whose prior approval is required for certain important decisions (see paragraph 7). Sofiltra must therefore be considered a full partner in the Joint Venture, sharing control with M. C. Engineering. As a result, the Joint Venture Agreement has to be considered under Article 85 (1).

(19) Since competitive conditions are broadly similar for the products concerned throughout the common market, the EEC as a whole is the relevant geographical market in which the parties' positions should be assessed. The question arises whether the participating undertakings are competitors within the relevant geographical and product markets. The relevant product market for the assessment of competitive relations between the parent undertakings prior to the conclusion of the agreements in question is that for the manufacture and sale of the complete finished product including the key component, pleated glass fibre paper.

As regards manufacture, M. C. Engineering was not an actual or potential competitor of Sofiltra since M. C. Engineering lacked the requisite know-how and research and development facilities for the production of pleated glass fibre paper, the crucial component in the finished product and the subject of the technology transfer in this case. The mere availability of purchases or licences from other sources does not alter this analysis : M. C. Engineering had an evident economic and commercial interest in developing its own technology in this field and has not been able to do so, resorting first to purchases from Sofiltra and later to a joint venture coupled with a know-how licence. Therefore, M. C. Engineering and Sofiltra were neither actual nor potential competitors for the manufacture of the complete finished product incorporating the essential technical component which is also the major cost component.

Furthermore, due to the number of other undertakings competing in this market and the relatively small market shares of the parties to the Joint Venture in the relevant geographical market, the creation of the Joint Venture does not pose any risk in terms of the foreclosure of similar possibilities to other competitors. Since the parties are not competitors and there is no loss of competition involved and no foreclosure risk, and the agreement does not involve the creation of a network of competing joint ventures, the agreement to undertake joint manufacturing does not in itself fall within the terms of Article 85 (1).

(20) On the other hand, as regards sales and distribution of the final product, Sofiltra and the Joint Venture are competitors and, as a result, territorial restrictions between them fail to be analysed as a separate matter under Article 85 (1) since, even if the agreement to undertake joint manufacturing between non-competitors does not fall under Article 85 (1), the agreements and their specific provisions must be examined in order to determine whether competition is restricted in any other way.

(21) The following provisions in the Licence Agreement are considered not to be appreciable restrictions of competition within the meaning of Article 85 (1) :

— the obligation on the Joint Venture :

  — to maintain confidentiality in respect of the know-how, information or technology disclosed to it,

  — not to grant sub-licences,

  — to disclose to Sofiltra any improvements developed or acquired by the Joint Venture, and to grant royalty-free non-exclusive licences to Sofiltra for the use of such improvements ;

— the obligation on Sofiltra to disclose, on a non-exclusive basis, to the Joint Venture any improvements or new inventions relating to the licensed equipment which it has lawfully acquired or with respect to which it has the right to grant licences. The Joint Venture shall have the right to use such improvements or inventions so long as the Licence Agreement is in force.

(22) The following provision in the Licence Agreement in the specific circumstances of this case is considered not to be an appreciable restriction of competition within the meaning of Article 85 (1) :

— the obligation imposed on the Joint Venture not to manufacture or deal in products competing with the licensed products is necessary since the Joint Venture needs to concentrate on the success of the new production unit. In this case, the parties have invested considerable sums of money in creating new production capacity. Sofiltra expands its activities to other

parts of the common market and M. C. Engineering is enabled to develop its manufacturing activities. The transfer of technology takes place in conditions of integrated industrial cooperation which ensure that the technology is adequately protected and is exploited fully, without depriving Sofiltra of the necessary control over exploitation and dissemination of its technology. Therefore, this obligation cannot be considered in the specific circumstances of this case to constitute an appreciable restriction of competition within the meaning of Article 85 (1).

(23) However, the exclusive licence granted to the Joint Venture to manufacture air filters in the United Kingdom means that Sofiltra will not itself manufacture in that territory or appoint other licensees there. This cannot, without some time limitation, be considered strictly necessary for the creation and proper operation of the Joint Venture. It is not inconceivable that Sofiltra could decide after such a period, and especially when the Joint Venture has reached full capacity, to establish its own production unit rather than extend that of the Joint Venture. Such a course of action would not, in these circumstances, undermine the existence of the Joint Venture. Similarly, if the Joint Venture is unable to meet an order, Sofiltra should normally be free to do so and this would not undermine the operation of the Joint Venture. The exclusive right granted to the Joint Venture to sell the licensed products in the United Kingdom, Ireland and seven non-EEC countries prohibits Sofiltra and possible future licensees, save in certain exceptional cases, from actively selling air filters in those territories [1]. For its part, the Joint Venture is prohibited from actively selling in territories reserved for the Licensor. This mutual ban on active sales, although it allows for passive sales by licensor and licensee in each other's territory, must be considered to fall within Article 85 (1) since such a restriction results in the sharing of markets between Sofiltra and the Joint Venture which have become competitors and are offering competing products. As it is highly unlikely that there will be intermediate trade in the product, a ban on active sales constitutes a particularly perceptible restriction as there is no alternative source of supply.

(24) Trade between Member States will be affected by the Joint Venture arrangements in that the Joint Venture's production will be marketed not only in the United Kingdom but also in Ireland. The 50 % increase in sales of the product during the two years 1 July 1982 to 30 June 1984 (noted at paragraph 5), and the relatively strong position within the common market of Sofiltra, makes it likely that the effects on trade between Member States will be appreciable.

[1] i.e. pursuing an active policy of putting the licensed product on the market in those territories and, in particular, engaging in advertising specifically aimed at those territories or establishing any branch or maintaining any distribution depot there.

B. Article 85 (3)

(25) The agreement was notified to the Commission on 20 September 1984 with an application for negative clearance. Bearing in mind that the Joint Venture is of 10 years' duration, that this is the first time that Sofiltra's technology and know-how are being exploited directly in the United Kingdom, and that market penetration is a film objective of the Joint Venture, it is clear that, to enable the Joint Venture to establish itself and to develop in a competitive market, it should not be subject to competition from other production units established by Sofiltra or from active sales by Sofiltra or from other licensees. Furthermore, the territory allocated to the Joint Venture is sufficiently large to occupy its attention for a considerable period of time and it is in the interests of the Joint Venture not to be distracted from developing the market in this extensive territory by attempting to sell outside it. Such a restriction should enable the Joint Venture to concentrate its efforts on its exclusive territory, building on the experience of M. C. Engineering's existing sales network. The territory can therefore be easily supervised with the result that there is better market knowlege based on closer contact with consumers. Accordingly, the agreements contribute to an improvement in production and distribution.

(26) As a result of the agreements, the products in question are manufactured by an integrated production process and technological improvements are made more widely and rapidly available to users and consumers. Competitive pressures in the market will ensure that consumers benefit from those improvements, while competition will not be eliminated for a substantial part of the products in question. It is important to note in this regard that the Joint Venture is free to make passive sales outside its licensed territory. The restrictions are indispensable to attain the benefits to which the Joint Venture gives rise, since without them the parties would not be prepared to make the necessary effort and commitments. Therefore the restrictions caught by Article 85 (1) can be exempted under Article 85 (3).

(27) Under Article 8 (1) of Regulation No 17, a Commission Decision granting exemption under Article 85 (3) must be issued for a specified period. The duration envisaged for the Joint Venture is an initial period of 10 years from 5 July 1984. It appears appropriate therefore, pursuant to Article 8 (1) of Regulation No 17, to grant an exemption with effect from the date of notification until 4 July 1994. This period should be sufficient to enable the Joint Venture to establish and develop itself by concentrating its efforts within its own territories,

HAS ADOPTED THIS DECISION :

Article 1

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are declared inapplicable for the period from 20 September 1984 to 4 July 1994 to the agreements concluded on 5 July 1984 between Mitchell Cotts and Co. (Engineering) Ltd, Birmingham and Sofiltra Poelman SA, La Garenne-Colombes in so far as they give rise to restrictions on production and on sales by Sofiltra and the Joint Venture company in each other's territories.

Article 2

This Decision is addressed to :

1. Mitchell Cotts & Co. (Engineering) Limited,
   42-46, Hagley Road,
   UK—Birmingham B16 8PE,
2. Sofiltra Poelman SA,
   71, Boulevard National,
   F—92250 La Garenne-Colombes,
3. Mitchell Cotts Air Filtration Limited,
   42-46, Hagley Road,
   UK—Birmingham B16 8PE.

Done at Brussels, 17 December 1986.

For the Commission

Peter SUTHERLAND

Member of the Commission