COMMISSION DECISION

of 21 December 1977

relating to a proceeding under Article 85 of the EEC Treaty (IV/29.236 — Sopelem/ Vickers)

(Only the French and English texts are authentic)

(78/251/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof,

Having regard to Council Regulation No 17 [1] of 6 February 1962, and in particular Articles 4, 6 and 8 thereof,

Having regard to the notification submitted on 26 February 1976 pursuant to Article 4 of Regulation No 17 by 'Société d'optique, précision, électronique et mécanique' (Sopelem), Paris, of three contracts (hereinafter referred to as 'the agreement') concluded on 17 April 1975 between Sopelem, Vickers Ltd (Vickers), London and Microscopes Nachet SA (Nachet), Paris,

Having regard to the publication in Official Journal No C 248 of 15 October 1977 of a summary of the notification, as required by Article 19 (3) of Regulation No 17,

Having regard to the opinion obtained of the Advisory Committee on Restrictive Practices and Dominant Positions on 24th November 1977 pursuant to Article 10 of Regulation No 17,

Whereas:

I. The facts

1. The products covered by the agreement are microscopes, stereo-microscopes and microdensitometers manufactured by Sopelem and Vickers as well as all spare parts and accessories for these instruments.

2. In connection with the notified agreement Vickers has acquired 49% of the shares in Nachet, which until then had been a wholly controlled subsidiary of Sopelem in charge of marketing and distribution of Sopelem's products. Thus Nachet has been turned into a joint-venture company of Sopelem and Vickers.

3. The system set up by Sopelem and Vickers aims at establishing the basis for a progressive technical cooperation between the two companies in the field of microscopy as well as establishing a future common means of distribution, Nachet, although this has not yet taken full effect.

4. The main provisions of the agreement as it stands are as follows:

A. *Technical cooperation and manufacture*

(a) The parties will cooperate and coordinate their activities by regular contacts between their research and development teams and by means of comprehensive exchange of expertise and know-how in the field of microscopy.

(b) Each of the parties continues carrying out concurrently its own research and development activities as well as manufacture in this field.

(c) The parties have not anticipated a common production to be undertaken by their joint venture company Nachet for the time being.

(d) The parties have, however, established a technical cooperation in this field with a view to reaching a standardization of components so that Sopelem parts may be fitted into Vickers instruments and vice versa.

(e) Furthermore they envisage a specialized division of their production between their respective factories in order to avoid irrational double production. Thus Sopelem may undertake to supply Vickers with certain parts of its microscopes and vice versa. This specialization will take into account the particular knowledge and expertise of each of the parties in relation to the production of particular features or components. Initially each will concentrate on the production it was carrying out prior to the agreement and only after some time will they decide the exact guidelines for future specialization.

B. *Distribution*

(a) Nachet has been appointed the sole distributor of all Sopelem and certain Vickers microscopes (M 17 and microdensitometers M 85 and M 86) in the common market with the exception of Ireland and the United Kingdom.

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[1] OJ No 13, 21. 2. 1962, p. 204/62.

(b) Vickers has been appointed the sole distributor of certain Sopelem microscopes (NS 800, NS 400 with all accessories and stereo-microscopes NS 50) in Ireland and the United Kingdom and also retains the distribution of its own microscopes in these countries.

(c) Nachet has been appointed the exclusive distributor of Sopelem and Vickers microscopes and accessories in a number of other European countries (Switzerland and Spain) and in certain, mainly French speaking, African countries.

(d) Vickers has also been appointed the exclusive distributor of Sopelem microscopes in all countries of the world except those attributed to Nachet under (c). In the USA and South Africa the distribution is carried out by local subsidiaries of Vickers.

(e) The relationship between the principal and the distributor according to the agreement is that of buyer and seller; the distributor shall purchase from the principal all its requirements of the products for sale in its territory; the distributor is free to determine his own sales prices and he undertakes all after-sales servicing of the products he has sold in his territory.

(f) The distributor is not permitted to be concerned with any products which shall or may compete with those of the principal's microscopes which fall under the agreement (see I, 1).

(g) Nothing prevents Sopelem or Vickers from fulfilling unsolicited orders from any part of the common market where Vickers or Nachet has been appointed sole distributor but they may not maintain stocks nor advertise the products in those countries.

The distributor shall not directly or through any intermediary endeavour to obtain orders for the products outside his distribution territory. He is not allowed to establish any branch or to maintain distribution depots outside his territory to handle the products.

(h) The agreement came into force on 17 April 1975 for a period of three years and thereafter continues in force until determined by six months notice.

5. The other main points emerging from the investigation are as follows:

A. *The products and the technical cooperation*

(a) The microscopes covered by the agreement range from a more elementary level over an intermediary level to highly sophisticated instruments. The instruments cover several sectors (e.g. the metallurgical and the biological as well as others). They are sold to industry, universities, research institutes, laboratories and hospitals at prices ranging from FF 2 000 to about FF 60 000. It is, however, possible to produce instruments which are even more expensive depending on the devices and accessories attached to them. It should be noted, however, that even the more elementary microscopes manufactured by the parties, from a technical point of view are superior to mere toy instruments which none of the parties manufacture. The elementary models are the so called 'student' instruments used in universities and laboratories for basic research work. The intermediary level instruments and the sophisticated ones are used for more demanding advanced technological and medical research and practice.

(b) Sopelem and Vickers are producing a wide range of microscopes although Sopelem for the time being is alone in manufacturing stereo-microscopes.

(c) The more elementary level of microscope is numerically the biggest range for both Sopelem and Vickers. Sopelem's microscope at this level is the NS 200 and Vickers' is the M 15. These two microscopes are very similar from a consumer point of view and may appeal to the same customers.

(d) As far as the more advanced and sophisticated instruments are concerned, there is only a little similarity and overlapping between Sopelem and Vickers microscopes. Instruments at these levels are more individually adapted to the customer's needs and use.

Due to the individual research results, expertise and manufacture of Sopelem and Vickers, their instruments at these levels are rather more complementary than competing in that together they make up a complete range of instruments and not two ranges of identical and competing microscopes.

There is, therefore, no actual interchangeability between the final products of each party but only between a number of parts of the parties' microscopes and it is one of the aims of the agreement to increase this interchangeability.

(e) The general trends on the market for microscopes are towards the more sophisticated individually adapted instruments. It is the intention of Sopelem and Vickers to use their cooperation in the technical research and development to move out of the routine area of microscopes towards the more specialized and sophisticated levels of instruments.

In this sense the first result of the parties' cooperation under the agreement has already been achieved. They have introduced a new microscope, the M 17. From a technical point of view this instrument is at the intermediary level of microscopes. It has been developed on the basis of experience and designs exchanged between the parties and Vickers are carrying out the manufacture. Prior to the agreement the emphasis of the Vickers range of microscopes had been on elementary and sophisticated instruments.

B. *Market positions and competitors*

(a) In the wide range of products manufactured by Sopelem and Vickers the microscopes falling under the agreement are of minor importance to both companies. In 1975 Sopelem's sales of the microscopes in the EEC countries were about ..... or less than 3% of the total sales of Sopelem. The sales of the microscopes in the EEC countries outside France counted for about .....

In the same year Vickers sales of microscopes in the EEC countries were about ..... which was a little more than 0·5% of the total sales of Vickers Ltd. The sales in the EEC countries outside Ireland and the United Kingdom were about .....

(b) Both Sopelem and Vickers are engaged in a wide range of other activities in the technical field.

Sopelem's major activity is in armaments, optical instruments and hydraulic equipment which account for about 75% of its total sales, which in 1975 were about .....

Vickers are active in shipbuilding, aeronautical products, aircrafts, armaments and several other technological fields. In 1975 the total sales of Vickers Ltd exceeded ..... and in 1976 ..... The total sales of Vickers Instruments, the division which is manufacturing the microscopes, were in the same years ..... and .....

(c) Competition in the common market for the products concerned (see I, 1) is strong and neither Sopelem nor Vickers have been able to obtain appreciable market shares outside France (Sopelem), Ireland and the United Kingdom (Vickers). Sopelem hold an overall market share of about 1·5% of all sales of these products on the common market and a share of about 20% of the sales in France. Vickers' overall market share in the common market is about 2% and their market shares in Ireland and the United Kingdom are respectively 25% and 16%.

(d) The most important competitors for the products in question (see I, 1) are Zeiss, Leitz and W. Will of the Federal Republic of Germany, the Swiss company Wild which controls Leitz and the Japanese manufacturers Nikon, Kyowa and Olympus.

There is also some competition from East European and American manufacturers but it is not of the same importance as those mentioned above.

Leitz is the largest and most important manufacturer of microscopes in the world with a market share of about 35 to 40% of all sales in the world of more advanced microscopes and with a similar importance in the common market.

The three large manufacturers (Zeiss, Leitz and Will) are currently holding a market share of approximately 50% of all sales of microscopes in the common market. Their influence and market position are strong on all technical levels of these instruments. On their home market they count for more than 80% of the sales of microscopes. Also in the other EEC countries they have a strong market position. In the United Kingdom they are believed to be supplying about 60 to 70% of all microscopes on the intermediary and advanced levels, and in France their sales are about the same level.

The Japanese manufacturers mentioned above are believed to hold an overall market share of 30 to 35% of all sales of the microscopes concerned in the common market with a particular emphasis on elementary levels and advanced stereo-microscopes.

(e) Prior to the agreement the parties were selling their microscopes in the EEC countries outside their traditional markets (France, Ireland and the United Kingdom) mainly via agents. In general the costs related to marketing and distribution of specialized precision instruments such as microscopes (at least above elementary levels) are high because it is important to have specialized distributors who possess the necessary technical skill to handle the instruments and also to provide a satisfactory after-sales service. Furthermore, it is important to maintain a sufficient stock of the instruments as well as having adequate facilities to demonstrate them to possible customers.

6. The Commission has received no comments from third parties following publication of the summary of the notification.

II. Applicability of Article 85 (1)

Under Article 85 (1) of the Treaty all agreements between undertakings, decisions by associations of undertakings and concerted practices 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 are prohibited as incompatible with the common market.

1. In the time preceding the establishment of a joint venture company and the conclusion of the distributorship agreements Sopelem and Vickers were both manufacturing a wide range of microscopes, of which some were competing with each other but with most of them being only complementary. Although there is only an overlapping of the parties' instruments at the elementary level and although only Sopelem is manufacturing stereo-microscopes, both parties have a certain amount of expertise and skill in producing the products con-

cerned. Thus, when the extent and quality of their research and development work in this field is also taken into consideration, they would have been able to extend as part of their respective activities their ranges of products, thus becoming direct competitors in the production of microscopes for similar purposes. Apart from being actual competitors for elementary microscopes, they were, at least to a certain extent, potential competitors on other levels in microscopy and the agreement has therefore been concluded between competing manufacturers.

2. The agreement has as its object and effect the restriction of competition within the common market:

(a) the technical cooperation and exchange of expertise in research and development will eliminate competition between the parties in research and development;

(b) standardization of various parts of the microscopes and specialization in their production, taking into account each party's special knowledge and expertise, will affect the ability of both parties to remain active on the market as an independant developer and manufacturer of microscopes or parts. This will be even more so if completely new instruments, such as the M 17, are developed and manufactured on a common basis;

(c) the distribution arrangement whereby Vickers has been appointed the sole distributor of both parents' products in Ireland and the United Kingdom and the establishment of a single sales joint-venture (Nachet) the sole distributor of Sopelem and Vickers microscopes in the rest of the common market will imply a common price policy and consultation between the parties. Although their products are treated without differences in the sales organization, it will deprive each of the parties of an autonomous marketing activity in certain parts of the common market, which would have been possible were they acting separately. Thus the fact that Sopelem and Vickers refrain from soliciting orders in the countries where Nachet or Vickers have been appointed the sole distributor will affect the level of inter-brand competition in such countries. The number of active suppliers of the microscopes concerned has been reduced on each of the abovementioned parts of the common market; thus the products of Sopelem and Vickers will be marketed on each of those parts by one supplier only, Nachet or Vickers.

3. In view of the existing competition on the relevant market, where there is a number of large and important manufacturers of these microscopes (see I, 1) operating within the common market, the effects of the restrictions are limited but still appreciable although the significance of some of them can only be properly appraised after some time. In fact neither Sopelem nor Vickers are among the large manufacturers of microscopes but they are both economically and technically important companies which have now established a cooperation in research and development and distribution of these microscopes involving also a standardization of parts and specialized division of these instruments for which they both have sizeable market shares in their home countries.

4. The agreement involves competing undertakings from two different Member States which have previously been operating independently on the various Community markets. It covers research and development as well as distribution of products manufactured in two Member States and which can be, and are, dealt with in trade between all Member States. Nachet, as well as Sopelem itself, is prevented from actively marketing Sopelem products in Ireland and the United Kingdom. Likewise, Vickers is prevented from marketing its products in the continental Member States of the common market. Thus marketing will proceed in a different manner and also from different places than it would have done if the joint distribution arrangement had not been set up.

The agreement therefore affects trade between Member States since it will have a direct impact on inter-State trade.

5. The agreement comes within the terms of Article 85 (1) of the Treaty.

III. Applicability of Article 85 (3)

Under Article 85 (3) of the Treaty the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement or concerted practice between undertakings which contributes 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 does 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. The technical cooperation and the exchange of research expertise and know-how will enable both Sopelem and Vickers to secure the development and

maintenance of a more comprehensive and technically advanced range of microscopes than they have been able to offer before the agreement was made because they can avoid carrying out concurrently the same research and development work and put an emphasis on the fields in which they each had achieved the better results. But, at the same time, their knowledge of research and technical expertise will not be reduced since they will currently be informed by the other party to the agreement of experience gained by him.

In connection with the specialized division of production they will also be able to concentrate on the production of the microscopes and accessories for which their expertise, technical skill and equipment is best suited.

The standardization of various parts of the parties' microscopes will increase the interchangeability of these parts and will enable the parties to save costs because they avoid having identical production facilities, tools and machines for the manufacture of the same parts.

It should also be taken into account that Sopelem would have abandoned the production of microscopes completely if the agreement with Vickers had not been set up. The reason for this was that Sopelem found its research and development costs too high for this minor part of its production to be reasonably profitable. The agreement has, therefore, contributed to maintaining a competitor on the market for microscopes, and makes it likely that Sopelem will have a stronger position in the future as an independent manufacturer. By virtue of offering the possibility of an extended and more comprehensive range of microscopes as well as by the specialization, the agreement furthermore offers each of the parties to it the possibility to improve his technical competence and therefore improves their individual competitive situation after a termination of the agreement. Thus the agreement helps to improve production and also to promote technical progress.

2. The distribution system envisaged by the agreement is likely to enable Sopelem, Nachet and Vickers to increase their sales in the other's territory because of the access to the other's sales and distribution network which will be more efficient and better geared to that particular market.

In view of the very small market shares which the parties have achieved outside their home markets the costs of maintaining efficient and satisfactory independent distribution systems in the various Member States were disproportionately high.

The common distribution system set up under the agreement reduces these high costs because the parties avoid setting up or maintaining concurrent individual distribution networks in the same country.

The efficiency of the distribution system will be increased because the distributor appointed for the various countries will be the one who previously had the better sales network and the most well established business relations in those particular countries.

Furthermore, the after-sales service, which according to the agreement is carried out by the distributor, will be more rational because the parties avoid expensive concurrent service organizations in the same countries.

The agreement ensures that both parties' instruments will be present at the same time on markets other than the parties' traditional ones, which will enable customers to see them together. Prior to the agreement this was not the case.

The agreement, therefore, contributes to improving the distribution in the common market of the microscopes falling under the agreement.

3. The technical cooperation will enable both Sopelem and Vickers to offer a more satisfactory range of microscopes and services which is important for precision instruments. The reduction of costs arising from the uniting of their distribution network as well as from the specialization and concentration in their research and development work will furthermore enable both to supply such instruments and after-sales service at lower costs than before the agreement was made. The existence in the common market of several technically advanced, larger and economically stronger competitors will ensure that the consumers will have at least a large part of the advantages of the reduced costs transferred to them. The technical cooperation, the standardization of the parties' instruments and the subsequent greater interchangeability of certain parts and accessories for the instruments concerned will also allow the consumers an increased use of these instruments without increased purchasing costs, because they can add a greater number of accessories and special devices manufactured by both Sopelem and Vickers to the standardized instruments.

Because of the competitiveness, the economic strength and the production capacity of their major competitors,

Sopelem and Vickers are bound to transfer the economic advantages to the consumers and the latter are therefore assured benefits from the agreement.

4. The agreement contains no restrictions which are not indispensable to the attainment of the abovementioned objectives.

Technical cooperation, coordination and exchange of expertise in research and development are necessary for Sopelem and Vickers to maintain a sufficiently comprehensive and continuously competitive range of microscopes at reasonable costs which are competitive in particular with those of their Japanese competitors and also to enable them to maintain and expand their market position which might increase competition on the relevant product market. These arrangements were indispensable too in retaining Sopelem as a developer and manufacturer in the field of microscopy.

Because of their small market shares and not very competitive products both parties found it difficult to achieve sufficient sales to make a technically sufficient independent distribution system economic outside their traditional markets.

Therefore and in order to obtain fully the advantages of the technical cooperation it has been necessary for the parties to cooperate in their sales and distribution activities too, and at the same time to make sure that the distributor was technically competent to manage the distribution and after-sales service even of the most complicated instruments.

Nachet has been appointed the sole distributor in the continental countries of the common market where this company also had the better network before the agreement. For the same reason Vickers has been appointed the sole distributor in Ireland and the United Kingdom. This system, however, is operated very flexibly in that Vickers is temporarily handling distribution in the Federal Republic of Germany where it had the best business relations of the parties.

Furthermore, common sales and distribution are necessary for Sopelem and Vickers not only to maintain their present market positions but, in particular, to create the commercial background necessary to penetrate and expand their business in those parts of the common market where their individual and even combined positions are insignificant and where German and particularly Japanese competitors constantly have been increasing their market shares.

The restrictive effects of the distribution system on intra-brand competition and inter-brand competition between Sopelem and Vickers will only be minimal and will be counterbalanced by the advantages flowing from it, because the two parties' microscopes are far more complementary than competitive and because, although some of the component parts of their microscopes are interchangeable the microscopes as such, at least above the elementary level, are not and are not considered to be so by the consumers either. Furthermore, the users of the microscopes are universities, hospitals, research institutes and research departments in the industry which are all technically competent and qualified to appraise the instruments offered and to choose the one which has the necessary quality and meets their specific requirements no matter what is the name of the instrument.

During the investigation carried out by the Commission, the parties explained that, in view of the particular character of their other activities, they do not envisage any extension of their cooperation beyond the field of microscopy as covered by the agreement and, in fact, such extension would be difficult because of various differences in their production, in particular in the armaments field.

It should also be noted that the two parents have not been excluded from carrying out individual research and development. Furthermore, they will be free to exploit the results of research and development, both their own and those of the other party, without restriction after the termination of the agreement.

Consequently, all the provisions of the agreement falling under Article 85 (1) have been necessary to bring about the abovementioned advantages.

5. Neither Sopelem nor Vickers, although important companies, is among the major manufacturers of microscopes operating in the common market. Their competitors in this field are numerous and important, several of them holding market shares by far exceeding not only the individual, but also the combined shares of Sopelem and Vickers even in their home markets. In particular the position of German and Japanese manufacturers prevents a situation arising in which Sopelem and Vickers could eliminate competition in respect of a substantial part of the relevant products.

6. Accordingly, all the conditions necessary for a Decision pursuant to Article 85 (3) are fulfilled.

IV. Applicability of Articles 6 (1) and 8 (1) of Regulation No 17

1. The agreement came into force on 17 April 1975 and was notified on 26 February 1976. According to

Article 6 (1) of Regulation No 17, a Decision pursuant to Article 85 (3) cannot take effect from an earlier date than the date of notification. Thus this Decision may take effect from 26 February 1976.

2. In view of the time it takes to develop new instruments in this field the period of validity of the Decision, which must be fixed pursuant to Article 8 (1) of Regulation No 17, should be long enough to enable the agreement to procedure the benefits reasonably to be expected therefrom. In this respect a period of five years seems reasonable.

3. In view of the general market strength of the undertakings involved, as well as the nature of the restrictions on competition flowing from the agreement, the Commission should have the opportunity to assess the development on the market for the products in question as a result of the agreement.

Sopelem, Vickers and Nachet should therefore be placed under the obligation to send annual reports to the Commission on their activities in the field covered by the agreement during the period of validity of the Decision. However, the first report shall only be submitted after the expiry of the first three year period of the agreement.

The reports shall give the Commission all the information necessary to appraise the operation of the agreement, its practical results and its effects on the relevant market with particular reference to the maintenance of effective competition the EEC.

HAS ADOPTED THIS DECISION:

Article 1

The provisions of Article 85 (1) of the Treaty establishing the European Economic Community are hereby declared pursuant to Article 85 (3) thereof to be inapplicable to the agreement concluded on 17 April 1975 between Société d'optique, précision, électronique et mécanique (Sopelem) S.A., Vickers Ltd and Microscopes Nachet S.A.

Article 2

This Decision shall have effect from 26 February 1976 and shall apply until 26 February 1981.

Article 3

The undertakings named in Article 1 shall every year before the end of February send a report to the Commission covering the preceding year. The first of these reports shall be submitted before the end of April 1978 and shall cover the period from 17 April 1975.

The reports shall contain detailed information about:

(a) the practical results in respect of the parties' cooperation and exchange of expertise in research and development of the instruments covered by the agreement;

(b) the developments in the production, sales and market shares of each of the parties in each of the Member States of the EEC for each these instruments;

(c) the development of trade in these instruments between the Member States in particular in those Member States where prior to the agreement the sales of the parties had been minimal;

(d) price movements, in particular the prices charged by the parties for the instruments covered by the agreement;

(e) any changes in the nature of the agreement or extension of the parties cooperation to other fields of activity.

Article 4

This Decision is addressed to the following undertakings:

— Société d'optique, précision, électronique et mécanique (Sopelem) SA of Levallois-Perret,

— Vickers Ltd of London,

— Microscopes Nachet SA of Levallois-Perret.

Done at Brussels, 21 December 1977.

For the Commission

Raymond VOUEL

Member of the Commission