II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 27 July 1992

relating to a proceeding under Article 85 of the EEC Treaty (Cases IV/32.800 and IV/33.335 — Quantel International-Continuum/Quantel SA)

(Only the English and French texts are authentic)

(92/427/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 Article 3 (1) thereof,

Having regard to the application submitted on 20 July 1988 by Quantel International (hereinafter called 'QLI') — now known as Continuum (hereinafter called 'QLI/C') — requesting the Commission to find, pursuant to Article 3 of Regulation No 17, that Quantel SA (hereinafter called 'QSA') had infringed Article 85 of the Treaty,

Having regard to the notification submitted to the Commission by QSA on 17 October 1989,

Having regard to the decision taken by the Commission on 4 July 1990 to initiate proceedings in this case,

Having given the undertaking concerned — QSA — the opportunity to make known its views on the objections raised by the Commission, in accordance with Article 19 (1) and (2) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 [2],

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

Whereas :

I. FACTS

A. The complaint and the notification

(1) On 20 July 1988 the Commission received a complaint from QLI/C concerning the refusal of its former parent, QSA, to allow access to the Community market for its laser products. QSA based its behaviour on a share transfer agreement and accompanying protocol of 17 and 26 July 1985, which QLI/C alleged to be in breach of Article 85 (1) of the Treaty.

(2) Following receipt of a letter dated 2 August 1989 from the Commission, outlining its preliminary objections to the agreement which was the subject of the complaint, QSA on 17 October 1989 submitted a notification of the agreements accompanied by a declaration to the effect that it was its intention to limit its claims to territorial protection to a period of five years from the time when the products were first put on the market, in order to comply with the requirements of Commission Regulation (EEC) No 418/85 [3], as amended by the Act of Accession of Spain and Portugal, which it was seeking to have applied to the agreement in question.

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No 127, 20. 8. 1963, p. 2268/63.
[3] OJ No L 53, 22. 2. 1985, p. 5.

The Commission informed QSA by letter dated 11 April 1990 that the agreement in question did not fall within the scope of the block exemption provided for by Regulation (EEC) No 418/85 and that QSA could not therefore avail itself of the non-opposition procedure provided for in Article 7 of that Regulation. That letter was the subject of an appeal to the Court of First Instance in Joined Cases T29 and T36/90.

(3) On 4 July 1990 the Commission decided to initiate proceedings; a statement of objections was sent to QSA on 30 April 1991, in which the Commission did not set out any argument in favour of withdrawal of the abovementioned block exemption (Article 10 of Regulation (EEC) No 418/85). On 8 April 1992, QSA and QLI/C terminated the abovementioned protocol by a settlement agreement between them. The Commission was not informed of this until 10 June 1992.

B. Judicial proceedings and proceedings before the national authority

(4) QLI/C lodged a complaint against QSA both with the Commission and with the French competition authorities. The Conseil de la Concurrence, which was seized of the matter on 30 May 1988, thus sent a statement of objections to QSA on 13 August 1990, and decided on 26 November 1991 to suspend judgment.

(5) For its part, QSA brought actions in the German, French and Swiss courts seeking injunctions to prevent QLI/C from selling in those countries. In Germany, QSA served an *ex parte* injunction on Optilas GmbH at a trade fair in Munich on 8 June 1989. This enjoined Optilas GmbH, QLI/C's distributor, and QLI/C from offering or selling laser products using the name 'Quantel International' in Germany. The judge hearing the action also took the preliminary view that the territorial allocation provisions of the agreement were valid and binding on QLI/C. The order was quashed, however, by the Munich Court of Appeal on 31 May 1990 after QSA had withdrawn its suit. In France, QSA applied to the Corbeil Essonne Commercial Court for the adoption of interim measures against QLI/C with a view to preventing 'any canvassing for sales and any marketing in Europe and in France of solid-state and dye lasers and of their scientific, medical and industrial applications' by QLI/C. Its application having been dismissed on 23 June 1988, QSA appealed. By judgment of 27 October 1988, the Paris Court of Appeal (fourteenth Chamber) reversed the decision of the lower court and ordered QLI/C and Optilas 'to cease canvassing for sales of and marketing in France solid-state and dye lasers and their scientific, medical and industrial applications'. This judgment was finally overturned by the Court of Cassation on 25 March 1991 on the ground that the agreement brought about a territorial allocation of markets between the companies 'from which there resulted a restriction of competition both under Community law and under domestic law, of which both the Commission of the European Communities and the French Conseil de la Concurrence were seized, this restriction being of such a nature as to render the agreement null and void ...'.

Finally, in Switzerland, QLI/C was prohibited from entering the Swiss market on grounds of unfair competition.

C. The parties

QSA

(6) QSA of Les Ulis, France, is an undertaking manufacturing lasers for scientific and research purposes. It was founded in 1970 by a scientist, Dr Georges Bret. QSA has a research section and a production facility. It is a member of the French defence and aerospace group Aerospatiale. QSA's turnover in 1985 was FF 52 million (ECU 7,4 million).

(7) At the time of the 1985 agreements, QSA was 93 % owned by Société Française d'Equipement de Navigation Aérienne (SFENA), with a turnover of FF 1 246 million (ECU 178 million).

(8) Sfena in turn was controlled by Aerospatiale. The composition of Sfena's ownership was as follows:

Siela	34,50 %,
Crouzet	23,07 %,
Aerospatiale	32,84 %,
Banks and individuals	9,50 %.

In 1985 Aerospatiale held 50,3 % Siela and 43,6 % of Crouzet. Thus in 1985 Aerospatiale held a 60 % control of Sfena, which itself held 93 % control of QSA. Such control was reflected in QSA's board of directors, which was composed of seven members,

of whom five were Aerospatiale or Sfena representatives. The turnover of the Aerospatiale group in 1988 was ECU 5,5 billion.

(9) Aerospatiale has now acquired full ownership of QSA through its wholly-owned subsidiary, Unilas.

QLI

(10) QLI, now known as QLI/C, of Santa Clara, California, is a former US subsidiary of QSA. It is engaged in production activities similar to those of its former parent QSA. QLI/C's lasers have been used by the American space agency NASA for tracking and position-fixing of satellites. QLI/C has been taken over by Hoya Corporation, a Japanese company specializing in optics, optical fibres and lasers.

(11) The turnover of QLI/C in 1985 was US$ 6,7 million (ECU 5,9 million).

D. The market

(12) The characteristic of the laser products which are the subject matter of this case is their ability to emit a remarkable quantity of light (energy) in an extraordinarily short time — from several nanoseconds (a billionth of a second) to a fraction of a picosecond (a millionth of a millionth of a second). They are used for scientific research in new areas such as non-linear optics, plasma physics, the measurement of ultra-short time, and precise measurement of great distances. This category of products, defined by laser medium, pumping mode and user application, constitutes the relevant market for the purposes of these proceedings, no other products being substitutable for them.

(13) In order to define the relevant market, it is necessary to analyse three major classifications : by laser medium (e.g. solid state, dye, gas), pumping mode (continuous or pulsed) and user application (scientific, medical or industrial/defence).

(14) 'Laser medium' : A laser may be focused through various mediums, including principally solid state (i.e. the laser is passed through crystals of a compound called yttrium aluminium garnet (YAG)), dye, and gas mediums (e.g. excimer, argon). Lasers within a given sub-category of laser medium cannot be substituted for lasers within another sub-category, except in marginal cases (see discussion below of excimer).

(15) 'Pumping mode' : two bus-categories exist — continuous pumping or pulsed pumping. (NB : pulsed pumping is not to be confused with the emission of pulsed light). Continuously pumped solid-state lasers are not substitutable for pulse-pumped solid-state lasers. Both QSA and QLI/C are limited to sales of pulse-pumped YAG lasers and dye lasers pulse-pumped by a YAG, emitting very powerful short pulses of light.

(16) The lasers manufactured by QLI/C and QSA are of the pulse-pumped type and emit very short pulses, which generate very high power. They are used either in experiments which require very precise time measurements (of the order of a billionth of a second) or very high power. These very high speed and power criteria are far beyond the limits of continuously pumped lasers and define a specific range of applications.

(17) 'User application' : user applications include scientific (sometimes referred to as R&D), medical and industrial/defence applications. Lasers used for R&D cannot be substituted for lasers for medical or for industrial/defence applications. QSA and QLI/C sell only to the scientific/R&D market.

(18) Consequently, the relevant market is the market of pulse-pumped YAG and dye lasers of very high power very short pulse for scientific research.

(19) Within the category of scientific/R&D applications, further refinements can be made depending on the light emission produced (i.e. short pulse, long pulse or continuous) or the wavelength produced. These light and wavelength characteristics, which are required to perform a given specific scientific requirement, often determine the choice of laser instrument. For instance, a category of gas-medium lasers (excimer) exists which when used to pump dye lasers produces relatively easily a certain range of ultraviolet and visible wavelengths that, in some circumstances, can compete with a YAG-pumped dye laser. As such, an excimer laser used to pump a dye laser is substitutable for a YAG laser used to pump a dye laser, but only within a very narrow range of applications. The vast majority of excimer applications are beyond this narrow dye-pumping application.

(20) Further proof of lack of substitutability (both as to continuous v. pulsed, and as to YAG v. excimer) is demonstrated by the following:

(21) 'Different technology': with respect to YAG laser v. excimer laser, and even though both categories operate on the pulsed mode, the YAG laser produces an infrared beam with very short pulses, whereas the excimer laser produces an ultraviolet beam with longer pulses. In scientific circles (i.e. among potential users of lasers for scientific or R&D purposes) it is taken for granted that pulses in the various regions of the light spectrum — e.g. infrared and ultraviolet — are used for completely different purposes, their interaction with matter being also completely different. For instance, infrared beams, which have very short pulses, are used in infrared spectroscopy and atmospheric sounding by lidar (light radar), whereas photochemistry and laser-induced fluorescence call for ultraviolet beams, usually with longer pulses.

(22) As to continuous laser v. pulsed laser, continuous lasers deliver steady average power, whereas pulsed lasers deliver high peak power. The average order of magnitude of peak power of a pulsed laser is one million times greater than that of a continuous laser and can even attain one billion. Thus, their applications are radically different. For instance, most of the R&D experiments in spectroscopy require a continuous dye laser, whereas most of the experiments in photochemistry require a pulsed laser.

(23) 'Different production units': the production of each category of laser requires specific fabrication equipment and a specific expertise. Consequently, a given production unit manufactures only one category of laser, i.e. either YAG lasers or excimer lasers. Coherent Radiation, the second largest American laser manufacturer with a strong line of YAG lasers for scientific applications, has acquired Lambda Physics, a German company which is the largest manufacturer of excimer lasers. Nevertheless, the production units remain separate, the YAG unit in the United States and the excimer unit in Germany.

(24) 'Use of the same distributor': laser manufacturers customarily arrange for distributors not to represent any competing product lines. Yet many distributors, in the Community and elsewhere, represent the solid-state/YAG product line of one company and the excimer product line of another company, in perfect agreement with the two separate manufacturers. Examples are: Optilas BV, Coherent Ltd, GMP, DB Electronics and Coherent Physik. If there were any serious overlap and competition between these two product lines, the distributors would not habitually represent both.

(25) On the basis of the above considerations, the relevant market in this case is defined as pulsed solid-state and dye lasers for scientific research.

(26) 'Position of the parties on the market': The European market for commercial lasers for research and development accounted, according to the specialized press, for between 40 and 44 % of the world market, while the market for pulsed solid-state and dye lasers accounted for just over 10 % of total laser sales in the scientific applications field, or approximately US$ 11,4 million (ECU 8,7 million). According to QSA, its sales on this market, excluding sales by its research division which resulted from one-off orders, come to US$ 1,92 million (ECU 1,5 million) in 1988, giving it a market share of around 16 %.

(27) QLI/C at present has negligible sales in the Community, not having access to the Community market owing to QSA's enforcement of the agreement at issue in the complaint.

E. The agreement

The original agreement

(28) In 1985 QSA, which had become a 93 % subsidiary of Sfena, itself a member of the French group Aerospatiale, was required by the latter to sell its US subsidiary. The founder of QSA, Dr Bret, formed a company called Laser Advances as a vehicle for the investors whom he had assembled for the purchase of QLI. Once the purchase was complete, Laser Advances was merged with and became Quantel International (QLI). The capital of QLI was then increased to admit new shareholders such as the French bank Paribas, and the French investment companies Scribe, Suez and Banexi.

(29) The purchase of QLI was effected by a share transfer agreement of 26 July 1985. The price paid for the shares was US$ 1,05 million. Accompanying the share transfer agreement was a protocol dated

17 and 26 July 1985, laying down certain arrangements for future production and sales of the two companies. The dispute arises from the terms of this protocol.

(30) According to its wording, the protocol was concluded as a result of the transfer of control of QLI and of the pre-existing relationship between QSA and QLI. It covered commercial aspects of the company's sale, such as price, terms of payment and the system, by which QLI ordered goods from QSA, and also contained an industrial section, whereby the parties agreed a measure of technology transfer between themselves and envisaged some common further development of products being developed at the time of the sale. Three categories of products were covered by the agreement, all of which were under development at the time of the agreement :

— the 'Datachrom' dye laser, which was acknowledged to have been financed and developed by QSA ; QLI was given a free licence for its territories ;

— long-pulse solid-state lasers, development of which was transferred to QLI with a free licence to QSA ;

— the 'Picochrom' laser, one component of which had been developed by QSA, the other being under development by QLI. When completed, both parties were to have access to the technology.

For these products, Article V laid down a division of markets worldwide, with the European market being reserved for QSA.

(31) The protocol contained a provision prohibiting QLI/C from using the know-how developed during the lifetime of the agreement in certain defined areas, namely application of CO_2 waveguide lasers and gyrolasers to the military, aeronautical and space sector, and variable curvature optics (Article I.2).

(32) The protocol also referred to the possibility of other laser products besides those specifically covered becoming the object of 'further common development', but only if a separate agreement was drawn up (Article IV). No such agreement was ever concluded.

(33) The 1985 agreement was for an initial period ending 31 December 1988, with the possibility of renewal by mutual agreement for a further period of three years. However, Article X provided that certain specific provisions, including Article V (allocation of territories), would continue to be applied — although it is not clear from the wording whether the intention was merely to carry certain provisions over for the duration of a prolongation, or that certain arrangements should survive the expiration of the agreements as a whole.

(34) QLI/C gave notice to QSA, as the expiration of the initial period of the agreement approached, that it did not intend to renew as it wished now to penetrate the European market. A renegotiated arrangement was agreed upon, whereby the European market became partially opened to QLI/C, selling through QSA's network of distributors. As regards the French market QSA was to become sole distributor for QLI/C in France for a period of three years from January 1989.

Acting on the new arrangement, QLI/C entered into distribution agreements in Germany, the Netherlands, the United Kingdom and Italy. However, on 17 March 1988 QSA wrote to QLI/C repudiating the renegotiated agreement and invoking Article X of the original protocol, saying that it had 'overlooked' the fact that the territorial allocation provisions in fact survived the expiration of the agreement. It subsequently approached several of its European distributors warning them not to distribute QLI/C's products within the Community and claiming exclusive ownership of the trademark and logo. The latter claim was strenuously resisted by QLI/C and became the subject of separate litigation.

(35) QLI/C counter-claimed that QSA's actions constituted unfair competition and amounted to a breaking-off of contractual relations, and asserted that Article V of the protocol in any case infringed Article 85 (1) of the EEC Treaty. It duly complained both to the Commission and to the French competition authorities. QSA brought actions in the French and German courts seeking injunctions to prevent QLI/C from selling in those countries (see recitals 4 and 5).

(36) In response to the complaint lodged by QLI/C, which the Commission transmitted to it for its comments, QSA maintained that the agreement either did not fall under Article 85 (1) because it was of minor importance within the meaning of the notice on agreements of minor importance [1], or alternatively that it was exempted under Article 85 (3), either under the doctrine established in Case 42/84, Remia [2] or by virtue of being in essence an agreement for research and development capable of obtaining the benefit of block exemption under Regulation (EEC) No 418/85.

(37) By letter dated 2 August 1989 the Commission informed QSA of its preliminary view that the agreements of 17 and 26 July 1985, as relied upon by QSA to prevent competition from QLI/C, infringed Article 85 (1) because the turnover limits in the Notice on agreements of minor importance were exceeded. Furthermore, they did not qualify for exemption under Article 85 (3). The Remia doctrine did not apply, *inter alia* because the agreements had not been notified. Regulation (EEC) No 418/85 did not apply because the agreements were not agreements whose primary object was cooperation in research and development.

The notified agreement

(38) On 17 October 1989, following receipt of this letter, QSA submitted a notification of the 1985 agreements accompanied by an explanatory note declaring that it was its intention now to limit its claims to territorial protection under the 1985 protocol to a period of five years from the time when the products were first put on the market within the common market, in order to comply with the requirements of Regulation (EEC) No 418/85. Acknowledging that there had been delays in finalizing development of products or part-products for which it (QSA) was responsible, which delays it however alleged were partly due to QLI/C's failure to transfer technology to it in accordance with the protocol, QSA laid down various starting dates from which the five-year protection would run, according to its estimates of when it would be in a position to put the various products on the Community market for the first time.

(39) The periods of protection claimed were as follows:

Product	First marketing by QSA (actual or forecast)	Protection to run until (+ 5 years)
Datachrom	July 1988	July 1993
Solid-state laser modules	December 1988	December 1993
Long-pulse solid-state lasers	July 1989	July 1994
Picosecond	December 1989	December 1994

(40) In its notification QSA also claimed the benefit of the application of the non-opposition procedure laid down in Article 7 of Regulation (EEC) No 418/85 — according to which the Commission's remaining silent for more than six months after the date of notification means that it is not opposed to exemption — without, however, indicating which of the agreement's clauses would have justified it.

By letter dated 11 April 1990 the Commission services informed QSA that the agreement did not, *prima facie*, satisfy the tests of Regulation (EEC) No 418/85 and did not therefore qualify for application of the non-opposition procedure. That letter was the subject of an appeal by QSA to the Court of First Instance in Joined Cases T29 and T36/90 (see recital 2).

II. LEGAL ASSESSMENT

A. Article 85 (1)

Geographical division of markets

(41) Article 85 (1) prohibits agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition within the common market. QSA and QLI/C are undertakings within the meaning of Article 85 (1), and the agreement and protocol of 17 and 26 July 1985 as relied upon by QSA have the object and effect of permanently depriving European consumers of access to QLI/C's lasers on the Community market. This is a restriction of competition contrary to Article 85 (1). Such a geographical division of markets, even as between a third country (the United States) and the Community, is capable of affecting trade between Member States if products are thereby prevented from entering the common market which would otherwise have been distributed in more than one Member State (Case 51/76, EMI Records v. CBS [3]). This distortion of

[1] OJ No C 231, 12. 9. 1986, p. 2.
[2] [1985] ECR 2545.
[3] [1976] ECR 811.

competition represents a serious infringement of Article 85 because, on a specific market, it contributes to the technological and commercial isolation of the common market from a third country, by preventing QLI/C from manufacturing and marketing those products.

(42) Article V of the protocol provides for a sharing of markets between the parties which is contrary to the very wording of Article 85 (1) (c). Even supposing that some degree of territorial protection may have been justified for a limited period after the sale of QLI to Laser Advances, i. e. a period which must be evaluated in the light of the circumstances of each individual case and may be from two to five years, in the present case such a restriction cannot, owing to its excessive duration, be considered necessary to ensure the transfer of the undertaking sold (Case 42/84, Remia). Moreover, in considering some protection to be sometimes justified in the context of the transfer of undertakings, the aim of the Commission and the Court has been to prevent the vendor, 'with his particularly detailed knowledge of the transferred undertaking', from being 'in a position to win back his former customers immediately after the transfer and thereby drive the undertaking out of business' (Remia, paragraph 19). These considerations do not apply in the present case as the agreement in question is designed to protect the vendor from the purchaser.

Appreciable effect on competition

(43) The agreement and the protocol are not covered by the Commission's Notice of 3 September 1986 on agreements of minor importance which do not fall under Article 85 (1). That Notice states that an agreement is deemed not to fall under the prohibition of Article 85 (1) if the participating undertakings have a combined market share of not more than 5 % and an aggregate turnover of not more than ECU 200 million. The turnover in question includes that of all undertakings which have a controlling interest in a party to the agreement, or in an undertaking controlling a party.

(44) As seen above, the market share ceiling is exceeded here, QSA alone having a market share of around 16 %. Furthermore, the aggregate turnover in this case far exceeds ECU 200 million, if the turnover of the controlling parent Sfena and its controlling parent Aerospatiale is taken into account, the latter alone having an annual turnover in the region of ECU 5 billion.

Accordingly, and contrary to QSA's submissions in its notification and in its reply to the statement of objections, the agreement's effect on competition is appreciable.

Regulation (EEC) No 418/85

(45) QSA has claimed to the Commission — in its replay to the transmission of the complaint lodged by QLI/C, in its notification and in its reply to the statement of objections — that the agreement and protocol of 17 and 26 July 1985 must be considered a research and development agreement, capable of benefiting from the block exemption provided in respect of such agreements by Regulation (EEC) No 418/85. This claim is not acceptable for several reasons.

(46) Regulation (EEC) No 418/85 applies to agreements entered into between undertakings for the purpose of 'joint research and development of products or processes and joint exploitation of the results of that research and development' (Article 1).

The specific purpose of the agreement and the protocol is not the implementation of an R&D programme by the two undertakings. It is clear from a reading of the share transfer agreement and accompanying protocol of 17 and 26 July 1985 (see recitals 30 and 31) that the purpose of the agreements was the transfer of a business and that the joint development provisions were purely ancillary to that sale. The products covered by the joint development provisions (Datachrom dye lasers, long-pulse solid-state lasers, Picochrom dye lasers) were all in varying stages of development by one or other of the parties at the time of the sale. It was normal to provide that the development of these products should be finished in the ways provided for under the parties' pre-existing relationship before the sale.

(47) With regard to other products (see recital 32), Article IV of the protocol states that 'they may become the object of common development. In such a case a specific agreement will be signed between QLI and QSA'. No such agreement has been notified to the Commission. The protocol cannot therefore be equated with a joint research and development agreement.

(48) Article 2 (a) of Regulation (EEC) No 418/85 also lays down as a condition for exemption that 'the joint research and development work is carried out within the framework of a programme defining the objectives of the work and the field in which it is to be carried out.'

The purpose of the Regulation, which is to encourage such activities by allowing — under certain conditions — costs and benefits to be shared, is not achieved in this case. Indeed, instead of increasing the research and development effort by combining the resources of the two parties to a common end, the agreement confines itself to determining the sharing of the benefits from work which thenceforth would be carried out independently by each party, according to the terms of the agreement itself. Thus, the intention is not a joint development, but merely to determine the conditions of separation of the two now-distinct undertakings and a sharing of the benefits from the work.

(49) Moreover, an agreement cannot be exempted if it contains clauses prohibited by the Regulation (Article 6). Two clauses in the agreements of 17 and 26 July 1985 fall into this category. In the first place, Regulation (EEC) No 418/85 permits only territorial restriction clauses which are limited to five years, whereas in this case the territorial division clause, as initially interpreted by QSA, was of unlimited duration, even if following the letter of 2 August 1989 it was unilaterally modified to limit its duration. In the second place, the agreement contained a field of use restriction between competitors (see recital 31) and a ban on even passive competition on the part of QLI/C ; these, contrary to QSA's submission in reply to the statement of objections, are prohibited under Article 4 (1) (e) and (f) of the Regulation.

B. Article 85 (3)

The notification made by QSA

(50) The agreement was not notified to the Commission until 17 October 1989, more than four years after they came into force and after the Commission had informed QSA of the unfavourable light in which it viewed them. That notification, although belated, confers immunity from fines in respect of the period subsequent to notification (Article 15 (5) of Regulation No 17).

It must therefore be considered, first, whether fines should be imposed in respect of the period prior to notification and, secondly, whether the notification by QSA of the 1985 agreement is capable of changing the Commission's legal assessment thereof.

Article 15 of Regulation No 17

(51) Although fines could be imposed in respect of acts taking place between the date of signature of the agreement (26 July 1985) and the date of its notification to the Commission (17 October 1989), it does not appear appropriate to do so in the present case, in particular because most of the products concerned in the protocol and the annexes thereto had not been placed on the market at the time of notification, their development having been delayed by both parties (see recital 38). The agreement therefore could only have had a very limited effect on the trade in these products.

The agreements' incompatibility with Article 85 (3)

(52) In the words of the Court of Justice (Joined Cases 56 and 58/64), Consten and Grundig v. Commission (1), the improvement in the production and distribution of goods, which is required for the grant of (individual) exemption, cannot be identified with all the advantages which the parties to the agreement obtain from it in their production or distribution activities, since the content of the concept of improvement is not required to depend upon the special features of the contractual relationships in question. This improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition.

The Commission points out that it was for QSA to demonstrate such advantages. In fact, neither in its notification nor in its reply to the statement of objections did QSA develop any argument along these lines, nor did it indicate to the Commission

(1) [1966] ECR 299.

any objective factors such as might have enabled the latter to evaluate the agreements' effectiveness by reference to an objectively ascertainable improvement in the production and distribution of its goods which might have compensated for the disadvantages caused by a restriction of competition.

(53) The restriction of competition resulting from the application of Article V of the proposal thus constitutes a barrier to market entry by an economic operator as it has had the effect of excluding QLI/C from a substantial part of the common market for a considerable length of time. This distortion of competition is not compensated by any technical and economic benefit deriving from the agreement between the parties in developing, manufacturing and marketing the products concerned.

Article V of the protocol, which expressly provides for market-sharing, is in fact fully in the logic of the commercial separation of the two companies. The fact that QSA later declared that it was limiting the duration of that provision to five years is, moreover, not enough to resolve the difficulty raised by the provision, because it is one of absolute sharing of markets, while Article 4 (1) (f) of Regulation (EEC) No 418/85, which is the inspiration for the five-year period, is considerably more limited, allowing only an obligation not to pursue an active marketing policy, and that only in respect of the products resulting from the agreement, which in any event must be one of joint research and development.

(54) As to the question whether the notification of these agreements as modified unilaterally by QSA makes it possible to regard the agreement and the protocol of 17 and 26 July 1985 as fulfilling the conditions laid down by Article 85 (3) of the EEC Treaty for individual exemption. Although QSA has reduced the term of territorial protection from an indefinite period to a period of five years from the date on which the products were first put on the market, the Commission notes that the length of the term of protection for each product claimed by QSA in its notification would be tantamount to granting it territorial protection against QLI/C for a total term, depending on the product, of between eight and nine and a half years from the date of sale of the undertaking. This term is far longer than the term of protection generally considered appropriate following an acquisition (as a rule, from two to five years), while, as already indicated (see recital 42), the Court's case-law allows protection only in the latter event and not in the contrary case, i. e. protection of the seller against the purchaser. It must, therefore, be considered to be excessive, even in the context of Article 85 (3).

Article 3 of Regulation No 17

(55) Pursuant to Article 3 of Regulation No 17, the Commission may, by decision, find an infringement of the provisions of Article 85 and oblige the undertakings or associations of undertakings concerned to bring it to an end.

Notwithstanding the belated settlement agreement between QSA and QLI/C, which came about approximately one year after the sending of the statement of objections and renders an order to cease applying Article V of the protocol superfluous, the Commission considers it appropriate to adopt a formal decision in this case. Such a decision may be taken even after the parties have terminated the agreements in question, in particular when the Commission is informed after several months' delay and after the completion of the entire administrative procedure (Judgment of 17 October 1972 in Case 8/72, Cementhandelaren v. Commission [1]).

In any event, in order to avoid the occurrence of analogous or equivalent infringements in future, it is necessary to clarify certain points of law connected with the present case. These concern, first, the scope of Regulation (EEC) No 418/85 and, secondly, the limits on the ancillary restrictions of competition which may be admissible in the context of a deconcentration of undertakings. It is also appropriate to re-affirm that an agreement with the object of technologically and commercially isolating the common market or a substantial part thereof from a third country is caught by Article 85 (1) and is not eligible for exemption (Decision 85/618/EEC, Siemens/Fanuc [2]),

HAS ADOPTED THIS DECISION:

Article 1

The agreement and the protocol of 17 and 26 July 1985 between Quantel International and Quantel SA infringed Article 85 (1) of the Treaty inasmuch as they established a sharing of markets.

[1] [1972] ECR 977.
[2] OJ No L 376, 31. 12. 1985, p. 29.

Article 2

The agreement and the protocol of 17 and 26 July 1985 did not fall within the scope of the block exemption of Regulation (EEC) No 418/85.

Article 3

This Decision is addressed to:

(a) Quantel SA,
Zone Industrielle de Courtaboeuf — BP 23,
F — 91941 Les Ulis Cedex;

(b) Continuum,
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Done at Brussels, 27 July 1992.

For the Commission
Leon BRITTAN
Vice-President