

COMMISSION DECISION

of 20 December 1974

relating to a proceeding under Article 85 of the EEC Treaty (IV/26.603 — Rank/
Sopelem)

(Only the English and French texts are authentic)

(75/76/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 notifications submitted on 9 February 1968, 30 December 1968 and 11 October 1971 pursuant to Article 4 of Regulation No 17 by 'Société d'optique, précision, électronique et mécanique (Sopelem)', Paris, of four contracts concluded by it on 1 September 1967, 17 December 1968 and 1 August 1971 with Rank Precision Industries Ltd (Rank), London.

Having regard to the communication to the Commission on 20 December 1973 of changes made to their agreement by the parties, taking the form of a new contract which entered into force on 1 December 1973, revoking and replacing the four earlier contracts;

Having regard to the publication in *Official Journal of the European Communities* No C 94 of 10 August 1974 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 pursuant to Article 10 of Regulation No 17 on 14 November 1974;

Whereas :

I

1. The products covered by the agreement are lenses and lens controls used in the motion picture industry and in television cameras which are developed and manufactured by the two parties and in which they hold or will hold, jointly or separately as may be appropriate, industrial property rights.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

2. The object of the arrangements set up under the agreement was to establish close cooperation between the two parties in the fields of research and development, manufacture and distribution of the relevant products. The main provisions of the agreement as it stands are as follows :

A. Research, development and manufacture

- (a) The parties coordinate their activities by continuing contact between their respective teams; they share research and development programmes and manufacturing projects by joint agreement as appropriate; they are to do all in their power to ensure that information exchanged for this purpose is kept secret, even after the expiry of the agreement.
- (b) 'Joint products', that is to say products obtained as a result of development work in which both partners have had a considerable share, are protected by jointly owned patents ('joint patents') to be applied for and maintained (e.g. by bringing actions for infringement) by agreement and jointly in the names of both companies, which share the costs equally. Each party is free to file applications for and protect at its own expense, but jointly in the name of both companies, any of the joint patents in any country it wishes if the other party has no interest in that market. After the expiry of the agreement the two companies may use freely all the joint patents. Third parties are allowed to manufacture joint products only where there has been prior agreement between Rank and Sopelem.
- (c) Each party carries out concurrently its own research, development and manufacturing activities in the same field, thereby giving rise to applications for patents in its own name which it undertakes to maintain in force and protect; such patents may be the subject of manufacturing licences between the parties, in respect of which royalties may be payable, or of sales under the conditions laid down in the agreement.

- (d) Each party may carry out on behalf of the other special research and development work against payment; each is free to carry out such work with or on behalf of third parties, provided that no confidential information received from the other party is communicated to those third parties.

B. Distribution

- (a) Both parties concurrently offer the entire range of joint products and their own products existing before or after the agreement, of which there is a non-exhaustive list in the agreement; for this purpose, the agreement distinguishes between 'Sopelem products' (that is, those products the patent rights in which belong exclusively to Sopelem, which are marketed by both parties under the specially created trade name Monital, which belongs exclusively to Rank) and 'Rank products' (the rights in which belong exclusively to Rank and which are marketed under its trade name Varotal and finally 'joint products' (which are marketed under the names Monital or Varotal, or any other name to be agreed on, depending on whether Sopelem or Rank manufactures these products). In practice, Rank sells Monital products with an indication as appropriate that they are developed or manufactured by Sopelem, and in all cases each party indicates their origin on the products it manufactures; on the termination of the Agreement Sopelem may purchase the trade name Monital for a reasonable price and Rank will be entitled to use it for a further two years only.
- (b) The relationship between the two parties is that of buyer and seller; each is free to make subdistribution arrangements and to determine selling and resale prices and conditions; during the currency of the agreement, however, information is to be exchanged systematically on the state of the market, the level of stocks and sales forecasts in order to align production with demand; each party must provide for all users in its own territory the same after-sales service, at no cost or for a fee as the case may be, on the same conditions in respect of products sold originally by the other party.
- (c) Sopelem is appointed the exclusive distributor of Monital products in the common market countries (except Denmark, Ireland and the United Kingdom) and in 21 other countries, and of Varotal products in France and in six African countries. Rank is appointed the exclusive distributor of Monital products in Denmark, Ireland and the

United Kingdom and elsewhere in the world (except North America, Brazil, China and the Comecon countries, where both partners are free to sell) and also of Varotal products in the common market countries (except France) and in the rest of the world (except the six African countries referred to above).

- (d) Neither party may maintain stocks nor promote the sale of Monital or Varotal products in any country in which the other party has been appointed exclusive distributor. Each party must forward to the other all inquiries for prices or orders from third countries in which that other party is exclusive distributor or relating to a delivery in those third countries; within the common market countries, each party is free to fulfil, at the prices and on the conditions it applies in its own territory, any unsolicited order coming from or intended for a country where the other party is exclusive distributor; in such cases the exporter must pay the other party a sum to cover the actual expense of free after-sales service incurred by the other party in its own territory.

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

- (a) The products covered by the agreement are technically advanced and highly specialized, and sales are determined as much by technical features as by price; the cost of producing them is mainly determined by that of the highly skilled manpower which is needed for design, checking and finishing; these products are usually supplied by the producer direct or through his sales network, chiefly to manufacturers of cinema and television equipment, who are fully aware of the identity and nature of the few major producers operating in the market; although there are in the common market about 40 manufacturers of optical instruments for photography, cinema and television broadcasting, there are relatively few large manufacturers of these specialist products, but between them there is active competition; the main manufacturers are:

- in France, Angénieux and Sopelem,
- in the United Kingdom, Rank,
- in Germany, Schneider and Zeiss,
- elsewhere, Canon and Nikon (Japan) and a few American companies.

Moreover, these products are aimed primarily at a market, namely the camera manufacturers, which is itself specialized. As there is no intermediate

trading stage, these manufacturers are in direct contact with their suppliers or the latter's networks. This means that they are particularly well placed as regards scope for choice and bargaining power *vis-à-vis* Rank, Sopelem and their competitors.

Rank's and Sopelem's sales together account for approximately 20 % of all sales of the products concerned within the territory of the common market.

(b) Sopelem has always maintained extensive research facilities; it concentrates on high-quality products and has extensive know-how at its command; its work on optical equipment for the cinema and for photography was formerly centred on small- and medium-sized lenses for amateur cinematography, but its biggest customers, the French manufacturers of ciné cameras, have seen their sales fall sharply in the past few years as a result of the influx of low-price products from third countries; Sopelem has therefore been using its technology to manufacture lenses for use in the professional motion picture industry, and the agreement with Rank was concluded with a view to expanding the market for these products, particularly through Rank's extensive distribution network. The products covered by the agreement do not account for a great part of Sopelem's sales (5 % in 1968, 6 % in 1973); the company has four other lines of business — laboratory equipment (metrological, optomechanical and refractometric), large apparatus (special apparatus designed and built to specification), optical instruments for military use, and hydraulic equipment; in 1973, its sales totalled FF 110 million, representing 25 % of total French production of the products concerned.

(c) Before the agreement with Sopelem the Rank Organization Ltd already had a division specializing in the study, manufacture and sale of large lenses; it is the leading British undertaking in the professional motion picture industry (production, distribution and cinemas throughout the world) and its range of operations includes the production of radio and television sets, high-fidelity systems, audio-visual educational equipment, precision instruments, copying machines (Rank-Xerox) and photographic equipment, while it is also active in the leisure industry (bowling alleys, restaurants, hotels, etc.); it has a worldwide distribution network and its total annual sales exceed £ 200 million (about 10 % of this is accounted for by the relevant products, for which it controls some 70 % of the UK market).

4. After studying the notification and the terms and manner of application of the contracts concluded

between Sopelem and Rank, as those contracts were at the time, the Commission on 26 June 1972 sent both parties a statement of objections to the agreement; the statement concerned the following provisions which were contrary to Article 85 (1) and did not satisfy all the tests for exemption under Article 85 (3):

- clauses absolutely prohibiting either party from exporting directly or indirectly the relevant products outside its sales territory, which raised an artificial barrier to trade in those products between France and the other common market countries;
- clauses restricting the freedom of the parties to administer their industrial property rights (application for, maintenance in force and protection against third parties of patents) and virtually preventing third parties from working with either of the parties in research and development programmes;
- clauses which involved either party being placed in appreciable danger of being put out of business in the event of termination of the agreement, and particularly that obliging them to refrain from using the trade marks and company name that they already used prior to the agreement.

5. Following this statement from the Commission, the parties concluded on 1 December 1973 a fifth contract revoking and replacing their earlier contracts.

6. The parties at the same time withdrew a proposal to replace the general prohibition on exports to one another's territories by a requirement that the exporting party must make a lump-sum payment to the other by way of indemnification, the amount and principle of such payment being in the opinion of the Commission incompatible with the rules on competition in the Treaty; the prohibition on exports is now replaced by a requirement that the exporting party must reimburse the other party; on production of the relevant invoices, for the actual expense of free after-sales service incurred.

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

II

Under Article 85 (1) of the Treaty, all agreements between 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. During the negotiations preceding the signing on 1 September 1967 of the first contract between Rank and Sopelem, neither undertaking was manufacturing the entire range of relevant products which are currently being supplied by both parties; on the contrary, Rank specialized mainly in large lenses and Sopelem in small and medium lenses. However, their experience in this field, the extent and quality of their research and development work, their skill in producing optical and precision instruments generally and the natural growth of their respective activities might well have led them to extend their ranges of products, making them direct competitors in the relevant product market. They must therefore be assumed to be potential competitors and the agreement to have been concluded between competing manufacturers.

2. The object and effect of the agreement is, through certain of its provisions, to restrict competition within the common market. Such restrictions have an appreciable effect on the market in the relevant products within the common market in that there is a limited number of large manufacturers operating in it, that two of them are closely coordinating their activities in the fields of research and development, manufacturing and distribution, and that in certain cases this coordination leads to specialization by the parties. These restrictive provisions are as follows:

- (a) the introduction of specialization, whereby each party allows the other to take over research and development work or manufacturing of certain categories of products under the agreement, eliminates that party as a developer or of those products;
- (b) the exclusive rights exchanged by the parties both as regards sales of their own products and of joint products within the territories allocated to them and as regards supplies of these products to be sold in their own territories tend to compel purchasers to seek products bearing the trade

names of the two undertakings from a single supplier, either Rank or Sopelem, depending on circumstances or their distribution network; this reduces the customer's range of choice and bargaining power; similarly, each party refrains from canvassing customers in the countries in which the other is exclusive distributor, and thus ceases to be an active competitor in such countries.

3. The agreement covers the development, production and sale of the products of two undertakings with headquarters in two Member States. The undertakings share between them the development, production and sale of the various products covered by the contracts; the reciprocal exclusive distribution arrangements prevent Sopelem from marketing Monital products freely in Denmark, Ireland and the United Kingdom and Varotal products in common market countries other than France; likewise, Rank is prevented from marketing Varotal products in France and Monital products in Germany, Benelux, France and Italy. Thus, the agreement affects trade between Member States for it has a direct impact on trade between them in such a way as could impede the attainment of the objectives of a single market.

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

III

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 coordination set in train between Rank and Sopelem, and especially the specialization of their respective manufacturing operations, has enabled both of them to secure economies of scale by improving productivity and profitability in these fields; furthermore, in the absence of the agreement, the two firms were unlikely to develop a product range as wide as they are now both able to offer; the agreement there-

fore helps to improve production. Moreover, the obligation to buy from and sell to each other has enabled each party to increase its sales in the other's territory by allowing access to each other's distribution network — mainly because of the experience and reputation of each party's network in its own territory; in particular in this case Sopelem was immediately able to use Rank's worldwide sales network. The agreement thus helps to improve distribution. Coordination and allocation of research and development work between the two undertakings have also enabled them to rationalize their activities in these fields, particularly by concentrating on projects suited to their equipment and experience and by making the other party responsible for certain types of work. The agreement thus helps to promote technical progress.

2. Since 1968 the agreement has been instrumental in increasing Rank's sales in France and Sopelem's export sales and in improving the quality of the products, service and service conditions to consumers. Each party offers customers a more extensive and technically more advanced range of products — a very important point where precision instruments are concerned. The presence of other big manufacturers and of effective competition on this market suggests that the improvements flowing from the agreement and the benefits accruing to consumers will be maintained.

3. In this case, the agreement contains no restrictions which are not indispensable to the attainment of the above objectives. The exclusive nature of the parties' reciprocal buying and selling commitments cannot be separated from other aspects of their cooperation, and it provides the best method of distribution, particularly as regards the storage, installation, display, after-sales service and guaranteeing of this highly specialized equipment. The fact that each party must refrain from manufacturing certain products entrusted to the other flows from that very specialization which is the reason for their increased productivity and satisfactory profits.

4. The fact that other large manufacturers are operating in France, the United Kingdom and throughout the common market and effectively competing with Sopelem and Rank (who are also in direct competition with each other on a large number of world markets) prevents a situation arising in which

Sopelem and Rank could eliminate competition in respect of a substantial part of the relevant products.

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

IV

1. The terms and manner of application by the parties of the four contracts concluded between 1 September 1967 and 1 August 1971, as contained in the various notifications submitted since 9 February 1968 and dealt with in the aftermentioned statement of objections by the Commission (cf. I (4)), were such that exemption could not be granted under Article 85 (3). The restrictive clauses contained in the four contracts then in force were not indispensable to the attainment of the benefits resulting from the agreement.

2. As stated in I (5) and I (6) above, the parties have removed all the restrictions preventing the application of Article 85 (3). The various contracts concluded between Rank and Sopelem between 1 September 1967 and 1 August 1971, which had been notified in accordance with Article 4 of Regulation No 17, were revoked and replaced by a new contract on 1 December 1973. This new contract, which was notified on 20 December 1973, was drawn up and is applied in such a way that the agreement satisfies all the tests of Article 85 (3), in accordance with the Commission's observations and within a reasonable length of time. Accordingly it is possible, under Article 6 (1) of Regulation No 17, to provide for the Decision pursuant to Article 85 (3) to have effect from 20 December 1973.

3. The period of validity of the Decision, to be fixed pursuant to Article 8 (1) of Regulation No 17, must be long enough to enable the agreement to produce results; a period of 10 years seems reasonable in this respect.

4. In view of the market share of the undertakings, their long-standing position as leaders in technological progress in a highly specialized industry and the recent opening up of markets following the accession of the United Kingdom to the EEC, the Commission should be enabled to assess, whenever necessary, the way the situation is developing in the market for the

relevant products as a result of the agreement. Rank and Sopelem should therefore be placed under obligation to report to the Commission on their activities every three years, the first three-year period to begin on 20 December 1973. The report should set forth all that is required to enable the Commission to appraise the way the agreement is operating and its effects on the relevant market, with particular reference to the maintenance of effective competition within 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 1 December 1973 between Sopelem, Paris, and Rank, London.

Article 2

This Decision shall have effect from 20 December 1973 and shall apply until 20 December 1983.

Article 3

The undertakings named in Article 1 shall, before 1 March 1977, 1 March 1980 and 1 March 1983 respectively, send a report to the Commission covering the preceding three-year period, the first of such periods

to run from 20 December 1973. These reports shall be such as to enable the Commission to assess the way the relevant market in the EEC is developing as a result of the agreement specified in Article 1, with particular reference to :

- (a) developments in the sales and market share of each undertaking in each Member State of the EEC ;
- (b) the development of trade between the Member States ;
- (c) price movements.

Article 4

This Decision is addressed to the following undertakings :

- Rank Precision Industries Ltd,
Millbank Tower, Millbank,
London SW1P 4QR ;
- Société d'optique, précision, électronique et mécanique,
125 Boulevard Davout,
75 Paris (20ème).

Done at Brussels, 20 December 1974.

For the Commission

The President

François-Xavier ORTOLI