II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 17 November 1981

relating to a proceeding under Article 85 of the EEC Treaty (IV/29.972 — Langenscheidt/Hachette)

(Only the French and German texts are authentic)

(82/71/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 of 6 February 1962 [1], and in particular Articles 6 and 8 thereof,

Having regard to the notification and application for negative clearance submitted on 6 November 1979 by Hachette SA of Paris and Langenscheidt KG of Berlin, concerning the agreements concluded by them on 31 March 1977 for the publishing and distribution of French-language courses on the German-speaking market,

Having regard to the publication of the essential content of the application [2] pursuant to Article 19 (3) of Regulation No 17,

Having regard to the opinion delivered on 17 September 1981 by the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 10 of Regulation No 17,

WHEREAS:

I

THE FACTS

The facts may be summarized as follows:

A. The undertakings

Librairie Hachette SA of Paris, hereinafter referred to as Hachette, is a public limited liability company which is the holding company, the parent company and the operational unit of the Hachette group, the major French publisher. The group also includes an extensive distribution network for books and publications in France and abroad. It has a number of subsidiaries in the common market, including Saarbach GmbH of Cologne (Federal Republic of Germany), hereinafter referred to as Saarbach, a wholly-owned subsidiary. The turnover of the Hachette group in 1980 was FF ... [3], including FF ... for its 'Books' division. Since the beginning of 1981 Hachette has been part of the MATRA group, whose main activities are in the military, space, data-processing, electronic and motor vehicle fields. In publishing, MATRA controls several periodicals and the Librairie Aristide Quillet, which publishes encyclopedias.

Langenscheidt KG of Berlin, hereinafter referred to as Langenscheidt, is a publishing house whose activities are primarily concerned with dictionaries, textbooks and foreign-language courses. Its turnover in 1980 was approximately DM ...

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 109, 12. 5. 1981, p. 2.

[3] In the published version of the Decision, some figures have hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

Langenscheidt-Hachette GmbH of Munich, hereinafter referred to as L-H, is the joint subsidiary set up under the agreements which are the subject of this proceeding. It was set up for the purpose of publishing and distributing books and other methods of teaching French on the German-speaking market. It has a capital of DM 20 000.

B. The agreements

On 6 November 1979, Hachette and Langenscheidt notified to the Commission three agreements which were concluded on 31 March 1977 for the publishing and distribution of French-language courses for the German-speaking market: an agreement between Langenscheidt, Hachette and Saarbach, (the 'general agreement'); an agreement between L-H and Hachette, (the 'commercial agreement'); and an agreement between Langenscheidt and L-H, (the 'services agreement'). In addition, there are implementing documents which are contained in four annexes to the agreements. The agreements came into force on 1 January 1978 and are intended to be valid until 31 December 1984. It is also laid down that the agreements will each remain in force as long as 50 % of the share capital of L-H is owned respectively by Hachette and Langenscheidt (for the general agreement), Hachette (for the commercial agreement) and Langenscheidt (for the services agreement).

1. *General agreement*

The agreement provides that Langenscheidt, Hachette and Saarbach will form a private limited liability company in the Federal Republic of Germany, to be known as Langenscheidt-Hachette GmbH, and lays down the following rules for its formation and operation:

— Langenscheidt and Hachette each own half of the DM 20 000 capital of Langenscheidt; Hachette's share is divided into two equal shares, in the names of Hachette and Saarbach respectively;

— Under the articles of association (Gesellschaftsvertrag) agreed between the parties, Hachette and Langenscheidt each appoint an official agent (delegierte Geschäftsführer) who is entitled to act alone as representative of the company;

— The agents must obtain the prior agreement of a general meeting for any derogation from basic company policy and for any transactions which are not part of the normal activity of the company;

— The activities of L-H consist of:

(a) the publication and sale of books and audiovisual aids for the teaching of French as a foreign language (FLET), specifically designed for the German-speaking market;

(b) the publication for the German-speaking market of titles selected from the lists of Langenscheidt, Hachette and, possibly, other publishers, in their original form or in adapted versions;

(c) the sale on the German-speaking market of Hachette's FLET list, as it existed when the agreement was concluded.

— Books and audiovisual aids for the teaching of French include, in particular: French courses for schools and further education, structurally-graded simple texts, reference books and monoglot dictionaries specially designed to complement French-language courses; publication of French-German bilingual dictionaries is not envisaged;

— The most important function of the new company is to initiate publishing ventures on its own account;

— The prices of works published by L-H are fixed by L-H in accordance with a pricing policy established jointly by the parties; Hachette's FLET titles, which are stored in Munich by L-H, are sold by that company at a price fixed in accordance with the applicable legal provisions;

— The publishing policy of L-H is determined, under the rules laid down in the agreement, by agreement between Langenscheidt and Hachette;

— Hachette and Langenscheidt are to keep each other informed of their publishing projects in the field of individual French-language courses (self-instruction material); Hachette has the option of adapting for the international market the works in this field published by Langenscheidt; titles in this field to be published by Hachette based on Langenscheidt's existing titles or those in preparation are to be published, where possible, under the name L-H.

2. *Commercial agreement*

The main provisions of this agreement, which governs the relations between Hachette and L-H, are as follows:

— L-H has the exclusive right to distribute Hachette's FLET publications and audiovisual aids on the German-speaking market;

— L-H may adapt any title from Hachette's FLET list for the German market, where this is feasible and necessary;

— Hachette will not in principle publish FLET works under its own name on the German-speaking market. It may do so, however, where L-H does not accept within 12 months a publication offered by Hachette;

— Any third party German importer may obtain from French dealers the works which are the subject of the agreement, and vice versa.

3. *Services agreement*

The main provisions of this agreement, which governs the relations between Langenscheidt and L-H, are as follows:

— Langenscheidt is responsible for distribution and promotion on behalf of L-H and will provide L-H with all the services necessary to carry on its activities (storage, invoicing, etc.);

— Langenscheidt will also provide L-H with the equipment or services it requires to prepare any FLET title prior to publication;

— Some works from Langenscheidt's list are to be published by L-H. Langenscheidt will provide such works under the same conditions as those laid down in the agreement between L-H and Hachette. Where Langenscheidt submits an offer of publication in writing to L-H and L-H does not accept within 12 months from the date of the offer, Langenscheidt is free to publish the work in its own name.

C. The economic situation

The market in question is that for French-language courses, both published works and audiovisual aids, for the German-speaking market.

In some Member States, French-language courses are published by undertakings established in those countries. In others, such as Belgium (Flemish-speaking areas) and Ireland, the requirements are met largely by imports from France. French publishers of French-language courses, of whom the most important, apart from Hachette, are Hatier, Bordas, Nathan and Larousse, hold a substantial share of the market in those countries alone. Hachette's share of the relevant market is less than .. % in common market countries other than France and the two countries named above.

Courses in French as a foreign language are, moreover, the only area of the foreign-language courses market in which Hachette has a substantial turnover in the common market countries other than France. Sales of language-teaching materials within the common market represent about .. % of the turnover of Hachette's 'Books' division. Hachette did not publish any monoglot French dictionaries until 1979. In 1980, it achieved a turnover of about FF ... in this field. As regards French-German dictionaries, Hachette achieved a turnover of FF ... in 1979, i.e. a negligible proportion of the turnover of its 'Books' division. In 1980, this turnover reached FF ... after the launching of a new series of dictionaries by Hachette.

There are some 20 publishers of language courses in the Federal Republic of Germany. Some 15 of these, including Langenscheidt, produce French language courses. The most important is Ernst Klett Verlag, whose share in the market for French-language courses in the Federal Republic of Germany is .. %. The other undertakings have market shares of about the same size as L-H's.

In 1977, before L-H was formed, sales by Langenscheidt of French-language courses in the Federal Republic of Germany represented DM .... The series entitled 'Le français actif', of which about .. copies were sold, and which was published by L-H after 1978, accounted for approximately DM ... of this total. Langenscheidt's share of the market in French-language courses in the Federal Republic of Germany was about .. % in 1977. Langenscheidt estimates its share of the market for language-teaching materials in the Federal Republic of Germany in 1979 at .. or .. %. As to dictionaries, French-German dictionaries represent about .. % of Langenscheidt's turnover and monoglot French dictionaries about .. %.

Before L-H was set up, Hachette's French-language courses were sold in the Federal Republic of Germany by its distributing subsidiary Saarbach. In 1977, Hachette had accordingly invoiced to Saarbach a turnover of about FF ..., representing the sale of about ... copies. According to the Commission's information, Hachette's share of the German market for French-language courses was about .. % in 1977. Sales of Hachette's language materials in the Federal Republic of Germany remained limited, partly because they were international materials — i.e. identical in all non-French-speaking countries — rather than being specifically designed for German-speaking students,

and partly because Saarbach was unable to build up an adequate distribution network, given that such products require special promotion, particularly among educational establishments. Langenscheidt, on the other hand, has a well-established sales network in Germany and a good knowledge of the educational market; indeed publishing and sale of text books form a major part of its activities.

Since L-H was set up, Saarbach has continued to act as Hachette's subsidiary for the distribution of periodicals and books which do not come under the agreements between Hachette and Langensheidt. It acts as one of L-H's wholesalers for books which come under the agreements.

In 1978, its first year of activity, L-H's turnover was DM ..., including DM ... for sales in the Federal Republic of Germany. This figure represents sales of about ... copies, including ... in the Federal Republic of Germany. L-H's 1980 turnover was DM ..., including ... for sales in the Federal Republic of Germany. This figure represents sales of about ... copies.

The breakdown of L-H's turnover is as follows:

— sales on the German-speaking market of titles from Hachette's FLET list: 39 %;

— publication on the German-speaking market of works from the lists of Langenscheidt, Hachette and other publishers:

(a) without adaptation: 30 %,

(b) adapted: 26 %;

— publication and sales of FLET works intended specifically for the German-speaking market: 5 %.

In 1980, L-H's share of the German market for French-language courses was about .. %. This share is appreciably less than that of the most important publisher on that market, Ernst Klett Verlag. In addition, there are some 10 other undertakings whose share of the market is comparable to that of L-H.

II

THE LEGAL ASSESSMENT

A. Applicability of Article 85 (1)

1. Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition whithin the common market.

2. Langenscheidt and Hachette are undertakings within the meaning of Article 85. The three agreements notified to the Commission, which provide for the setting-up of a joint subsidiary and govern the relations between that subsidiary and the two parent companies, are agreements between undertakings.

3. These agreements may affect trade between Member States to an appreciable degree. They relate to trade in books and publishing rights between France and the Federal Republic of Germany, which is of considerable economic value.

4. The question must, therefore, be examined whether the agreements have as their object or effect an appreciable restriction or distortion of competition within the common market.

5. Apart from language courses, Hachette mainly produces French-language publications (including publications partly in French, such as bilingual dictionaries) while Langenscheidt's main output, apart from language courses, is German-language school books and dictionaries (particularly bilingual dictionaries). The French- and German-language publications markets are separate since the products are not normally interchangeable, being intended by their very nature for two distinct categories of users, French-speaking and German-speaking readers.

6. Competition both now and in the future between the parent companies of the joint subsidiary is thus confined to language courses and French-German bilingual dictionaries. Restrictions on competition arising directly or indirectly from cooperation between the parent companies within the joint subsidiary are consequently unlikely to extend beyond those two products.

7. Each of the participants controls 50 % of the capital of the joint subsidiary, of which the articles of association state that all major decisions concerning its activities must be taken with the agreement of the general meeting. This implies concerted action between the two undertakings within the joint subsidiary.

8. The joint subsidiary's activities include the publication on the German-speaking market of French-language courses specially adapted for that market. The courses have been adapted by Langenscheidt and Hachette acting in cooperation. Hachette is to give up publishing FLET works on its own behalf on the German-speaking market, and Langenscheidt also

undertakes not to publish certain French-language courses on its own behalf. Hachette and Langenscheidt will again be able to publish the works in question independently if, after having been made a firm offer of publication, L-H has not accepted it within 12 months, but this clause relating as it does to an exceptional occurrence is not of such a nature as to nullify the restriction in question. Prior to the agreement Langenscheidt published French courses independently on the German market and Hachette could also do so at any time. The agreement consequently restricts competition by preventing Langenscheidt and Hachette, except in the exceptional case mentioned above, from publishing independently two complete French courses on the German market.

9. The joint subsidiary's activities also include the distribution on the German market of French courses, in particular Hachette's FLET courses. The prices at which the courses are to be sold are fixed by L-H, that is to say, by agreement between Hachette and Langenscheidt, and products sold by L-H on the German market are distributed by Langenscheidt. Hachette and Langenscheidt French courses, which before the agreement were distributed by two independent networks, are now distributed by a single network. Competition is consequently restricted also at the distribution stage.

10. The provisions of the agreements notified relating to the activities of the joint subsidiary consequently restrict competition between the two parent companies on the relevant market. The effect of this restriction of competition is appreciable because of the importance of the two parent companies and because their share of the relevant market, while limited, is not negligible.

11. The creation of the joint subsidiary may constitute a restriction on competition in the connected field of bilingual French-German dictionaries in which the parent companies are liable to extend their collaboration. However, this risk is limited as Langenscheidt and Hachette have already published such dictionaries individually and do not seem at present to have any cause to combine those activities. Moreover, Hachette has published a new French-German dictionary, separately from Langenscheidt, since the setting-up of the joint subsidiary.

12. The notified agreements also provide for exchanges of information between Hachette and Langenscheidt in the field of French self-instruction material. In so far as these exchanges of information are related to the activities of L-H, they are part of the normal collaboration of the two parent companies within the joint subsidiary. In addition the agreements provide that the two companies will be able to extend their collaboration in the aforesaid field. Hachette in particular has the option of examining the possibility of adapting works published by Langenscheidt in this area for the international market. Works to be published by Hachette which overlap Langenscheidt's existing works or those in preparation are to be published, where possible, under the name L-H. These are declarations of intent, without any binding effect, which could be enforced only by agreements between Hachette and Langenscheidt. Accordingly, these provisions do not constitute at this stage additional restrictions on competition.

B. Applicability of Article 85 (3)

13. Article 85 (3) states that the provisions of Article 85 (1) may be declared inapplicable to any agreement 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.

14. The agreements notified contribute to improving the production and distribution of French-language courses in the Federal Republic of Germany and thereby contribute to promoting knowledge of languages within the common market. Indeed, when Hachette's French-language courses were distributed in the Federal Republic of Germany by Saarbach, Hachette's share of the market in question was about .. %. Besides, Hachette's market share is now less than .. % in all the other countries of the common market in which French-language courses are published by publishers established in those countries (see above: I.C. The Economic Situation). The setting up of L-H enables Hachette's language courses to be distributed by Langenscheidt's commercial network, which should increase Hachette's penetration of the German market. Cooperation between Hachette and Langenscheidt will, in particular, make it possible to publish works which meet the specific needs of German consumers, in particular by adapting Hachette's international language-teaching materials.

15. Consumers derive fair benefit from these advantages, since they are able to obtain more easily, from Langenscheidt's sales network which is well-established and meets their requirements, the courses published by Hachette, which has a substantial technical capacity and experience in this field. This gives them more freedom of choice, since the two publishers acting jointly are better able to satisfy the specific requirements of German consumers and provide them with courses which are specially adapted for the German market.

16. While recognizing the positive effects which the agreements notified may have, the Commission must ensure that they do not involve restrictions which are not indispensable to the attainment of the desired objectives and that they do not enable the undertakings in question to eliminate competition in respect of a substantial part of the products concerned.

17. The-setting up of the joint subsidiary L-H enables Hachette to benefit from entry into Langenscheidt's German market. A special promotion compaign is necessary in order to present a product such as language courses, which are intended primarily for educational establishments, to consumers. The setting up by Hachette of its own distribution network to ensure the efficient distribution of its French-teaching materials on the German-speaking market has been shown to be insufficient in the light of the experience of its subsidiary, Saarbach, particularly in view of the limited demand on that market for French-language publications. The limited demand would not make it worthwhile for Langenscheidt to make the substantial investment necessary to develop original language courses. The preparation and publishing of entirely original works and works which are adapted, to a greater or lesser extent, to the needs of the German market, accounts for a large part of L-H's activities (approximately 30 % of its turnover). Such activities require close cooperation between Langenscheidt and Hachette, and this has led to the setting-up of a joint subsidiary.

18. The sphere of activity of the joint subsidiary is strictly confined to French-language courses, and to the German-speaking market.

Outside this sphere, Langenscheidt and Hachette continue to publish and market their publications, including language courses, independently. Within this sphere, L-H publishes only certain works of Langenscheidt and Hachette and, in other respects, acts only as distributor of Hachette's FLET works on the German-speaking market. These products may, moreover, be imported into that market by other undertakings and distributed through other channels, in competition with Langenscheidt's products and those published by L-H on the German-speaking market.

19. Monoglot French dictionaries are included in the joint subsidiary's field of activity, but it is specified that this concerns monoglot dictionaries which are specially designed to complement French-language courses. Therefore the inclusion of those dictionaries in the joint subsidiary's field of activity is necessary to attain the objective sought after.

20. The setting-up of the joint subsidiary is not an irreversible event. The agreements, in fact, state that they will each remain in force as long as 50 % of L-H is owned, respectively, by Hachette and Langenscheidt (for the general agreement), Hachette (for the commercial agreement) and Langenscheidt (for the services agreement). It is also stated that the agreements will expire on 31 December 1984.

21. The agreements notified do not, therefore, impose restrictions on the undertakings in question which are not indispensable to the attainment of the desired objectives.

22. The agreements notified do not afford the undertakings concerned the opportunity of eliminating competition in respect of a substantial part of the products in question. French-language courses published by Hachette in France may be freely imported into the Federal Republic of Germany by third parties, and works published by L-H may be obtained by French importers.

23. There are some 20 undertakings which publish language courses in the Federal Republic of Germany, some 15 of which publish French-language courses. The relevant market shares held by Hachette and Langenscheidt prior to the conclusion of the agreements in quesion were small. L-H's share of the market has remained appreciably less than that of the most important undertakings on this market, and the other undertakings have market shares comparable to that of L-H. The setting up of L-H does not, therefore, eliminate competition for a substantial part of the products in question; it tends rather to stimulate competition by replacing two undertakings which were not very competitive in this field with one undertaking which better corresponds to the requirements of the market.

24. All the conditions for the application of Article 85 (3), are, therefore, fulfilled.

C. Articles 6 and 8 of Regulation No 17

25. Article 6 of Regulation No 17 states that, whenever the Commission takes a decision pursuant to Article 85 (3) of the Treaty, it shall specify therein the date from which the decision shall take effect. Such date shall not be earlier than the date of notification.

26. Article 8 of Regulation No 17 states that a decision in application of Article 85 (3) of the Treaty shall be issued for a specified period and that conditions and obligations may be attached thereto.

27. The agreements in question were notified to the Commission on 6 November 1979, having entered into force on 1 January 1978 ; the proposed period of validity expires on 31 December 1984.

28. The Commission will have to review the advisability of maintaining the exemption when the activities of the joint subsidiary are sufficiently developed. It would be advantageous to undertake this review at the end of the period of validity proposed by the parties. It is thus appropriate to grant the exemption for the period 6 November 1979 to 31 December 1984.

29. In order to enable the Commission to ascertain that the conditions for the application of Article 85 (3) continue to be fulfilled during the period of exemption, the parties must be required to inform the Commission of any amendment to the agreements notified (including the annexes thereto), of the conclusion of any new agreement between them and of any extension of their cooperation, in the field of courses in French as a foreign language and in that of bilingual French-German dictionaries,

HAS ADOPTED THIS DECISION :

Article 1

Pursuant to Article 85 (3) of the Treaty establishing the European Economic Community, the provisions of Article 85 (1) are declared inapplicable for the period 6 November 1979 to 31 December 1984 to the agreements concluded on 31 March 1977 between Hachette SA, Langenscheidt KG and Langenscheidt-Hachette GmbH for the publishing and distribution of French-language courses on the German-speaking market.

Article 2

The persons to whom this Decision is addressed shall inform the Commission without delay of any amendment or addition to the agreements notified, including the annexes thereto, of the conclusion of any new agreement between them, and of any extension of the cooperation between them, in the field of courses in French as a foreign language and in that of bilingual French-German dictionaries.

Article 3

This Decision is addressed to the following undertakings :

— Librairie Hachette SA, 79 Bd St. Germain, F-75006 Paris ;

— Langenscheidt KG, Crellestraße 29-30, D-1000 Berlin 62 ;

— Langenscheidt-Hachette GmbH, Neusser Straße 3, D-8000 München 40.

Done at Brussels, 17 November 1981.

For the Commission

Frans ANDRIESSEN

Member of the Commission