COMMISSION DECISION

of 29 October 1982

relating to a proceeding under Article 85 of the EEC Treaty (IV/30.517 — Amersham Buchler

(Only the English and German texts are authentic)

(82/742/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 made to the Commission on 21 December 1981 by Amersham International Ltd on behalf of that company and of Buchler GmbH concerning the formation of a joint venture company,

Having regard to the publication of the summary of the notification [2], pursuant to Article 19 (3) of the said Regulation No 17 to which no observations from third parties were received by the Commission,

Having regard to the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions delivered on 7 September 1982 in accordance with Article 10 of the said Regulation No 17,

Whereas :

I. THE FACTS

A. THE AGREEMENTS

1. On 21 December 1981, Amersham International Ltd (Amersham), an English company, notified the following agreements :

   (1) Company Contract of Amersham Buchler GmbH & Co. KG of 16 August 1971, superseded by Company Contract of Amersham Buchler GmbH & Co. KG of 29 November 1974 ;

   (2) Company Contract of Amersham Buchler GmbH of 16 August 1971, amended on 20 December 1971, superseded by Company Contract of Amersham Buchler GmbH of 18 December 1972 ;

   (3) Contract between Buchler & Co. and Amersham Buchler GmbH & Co. KG of 13 October 1971, superseded by Contract between The Radiochemical Centre Ltd (TRC Ltd), The Radiochemical Centre GmbH (TRC GmbH), Buchler & Co. KG and Amersham Buchler GmbH & Co. KG of 20 December 1978 ; and

   (4) Exclusive distributorship agreement between The Radiochemical Centre Ltd and Amersham Buchler GmbH & Co. KG of 20 December 1978.

   The agreements under (1) and (2) were made for the founding of a joint venture company named Amersham Buchler GmbH & Co. KG, with Amersham Buchler GmbH being the unlimited liability partner.

   The agreements under (3) provide that the joint venture should buy Buchler's radioactive product business and that it should receive know-how and expertise from Amersham and Buchler. By the agreement under (4), the joint venture is appointed the exclusive distributor of Amersham for the Federal Republic of Germany including West Berlin.

   With respect to these agreements, Amersham made an application to the Commission for negative clearance, or, failing that, an exemption under Article 85 (3).

2. The joint venture was formed jointly by :

   (a) TRC GmbH, a 100 % subsidiary of Amersham (formerly TRC Ltd) ; and

   (b) Buchler GmbH (formerly Buchler GmbH & Co. KG).

   TRC GmbH holds 60 % and Buchler holds 40 % of the capital of the joint venture. The agreements have the object of establishing a joint venture for the manufacture and marketing of radioactive material and products, and in particular of radiochemical products for research purposes, radiopharmaceutical products, and radiation sources.

[1] Official Journal Special Edition 1959—1962, p. 87.
[2] OJ No C 110, 1. 5. 1982, p. 3.

The agreements provide that the founding parties may not compete with the joint venture. In case a competitor gains control over one of the parties, the other party may require that the former cease to be a party to the joint venture.

3. Before entering into these agreements, Amersham (then : The Radiochemical Centre) acted as a commercial department within the United Kingdom Atomic Energy Authority (UKAEA), a body controlled by the UK Government. This Centre had responsibility for research, development, manufacture, use and disposal of radioisotopes. In 1971, the commercial activities of the UKAEA in the field of radioisotopes were transferred to a newly-created corporate entity, The Radiochemical Centre Ltd (TRC Ltd), which later changed its name to Amersham International Ltd. The UKAEA assured TRC Ltd access to its nuclear facilities and granted TRC Ltd the right to act as the commercial representative for all commercially-applicable radioactive products emanating from the facilities of the UKAEA.

Buchler had acted for Amersham as sole distributor for Germany since 1960. Traditionally, Buchler had been producing radioactive sources derived from naturally-occurring radioactive materials, especially radium. Other branches of production have included and continue to include radiation protection equipment, irradiation devices for use in medicine, research and industry as well as the making of Quinidine salts and Quinidine.

4. In 1971, Amersham (then : TRC Ltd) and Buchler agreed to establish Amersham Buchler GmbH & Co. KG. Buchler transferred its radioactive product business to the joint venture but remained an independent producer as regards its other product lines.

The principal task of the joint venture is to distribute in Germany the products made by Amersham. It is to ensure the high standards of safe handling during transport and storage which radioactive products require. Moreover the joint venture provided the basis for creating a waste disposal service for the radioactive waste of which most customers could not dispose of otherwise. Amersham sells its products in other Member States through other distributors.

B. THE MARKET

5. Amersham Buchler's total sales for the fiscal year 1980/81 amount to ..... [1]. This represents an estimated share of the German market for radioactive products of 17·8 %, the overall volume of that market being estimated at ..... Amersham Buchler's biggest competitors on the market are ....., and ..... with estimated market shares of 13·5 %, 11·5 %, and 11·3 %, respectively. The remaining 45·9 % are distributed among more than 17 other companies.

II. LEGAL ASSESSMENT

A. APPLICABILITY OF ARTICLE 85 (1)

6. The agreements notified by Amersham have as their object or effect the prevention, restriction or distortion of competition within the common market. However, the prohibition in Article 85 (1) may be declared inapplicable in the present case in accordance with Article 85 (3).

7. The agreements setting up the joint venture fall within the ambit of Article 85 (1) because they limit competition between Amersham and Buchler. Before 1971, they had been competitors although not over the entirety of their respective product lines. Amersham produced a wide variety of radioactive products including radiopharmaceuticals, clinical reagents, radiochemicals and radiation sources derived from nuclear reactors or the company's own cyclotron.

Only part of Buchler's turnover, on the other hand, was attributable to the production of radioactive materials, and that part consisted mainly of radioactive sources derived from naturally-occurring radioactive materials such as radium. The overlap therefore concerned only one out of four sectors of Amersham's activity, namely the radiation sources.

8. As regards potential competition, Buchler was not able to expand into the product lines manufactured by Amersham. Buchler's radioactive source, plant and equipment were largely outdated and Buchler lacked the financial resources necessary to modernize this part of its operations. Therefore, as far as Buchler is concerned, the formation of the

[1] In the published version of the Decision, some figures or names of undertakings have hereinafter been omitted, pursuant to Article 21 (2) of Regulation No 17 concerning non-disclosure of business secrets.

joint venture did not exclude potential competition to a considerable extent. As regards Amersham, the cooperation with Buchler may have reduced its interest in expanding, e.g., into the radiation protection business, but this product is not closely related to Amersham's product lines. The probability of expansion into this field was therefore not very high.

9. Accordingly, the restrictive effect on competition of the joint venture, while appreciable, is not of great severity.

10. The agreements affect trade between Member States since they were concluded between a British and a German company and concern a considerable amount of exports from the UK to Germany. Before the creation of the joint venture, i.e. in fiscal year 1969/70, Amersham's sales to Germany amounted to £ 409 000. In 1980/81, its sales to Germany had risen to £ 3·1 million or 6·7 % of the market.

B. APPLICABILITY OF ARTICLE 85 (3)

11. The agreements fulfil the requirements laid down in Article 85 (3).

For the reasons given in this paragraph and in paragraph 13, the joint venture contributes to improving the production and distribution of goods since it enables Amersham to produce and market a much greater variety of products in Germany than before. Radioactive products require a high level of know-how in manufacture and marketing. They are perishable products having a limited useful life of a few days or weeks only. Most of them cannot be stockpiled so that a rapid and efficient system of accepting and executing orders has to be established. Moreover, the products have to fulfil stringent national and international requirements as regards packaging, labelling, transport and storage. Finally, the customers expect the producer to take back their radioactive waste and to dispose of it safely. Because of these factors, Amersham could no longer rely on a simple distributor since such a distributor could not be expected to provide all the necessary services and to invest considerable sums in the waste disposal service. The formation of the joint venture solved these problems and permitted Amersham a better market penetration with an increased number of products being marketed in Germany.

12. It is to be expected that the consumer receives a fair share of the resulting benefit since the competitive pressure — increased by Amersham's improved market penetration — will ensure that at least part of the resulting profits are transferred to the consumer. Amersham Buchler's market share of about 18 % of the German market does not enable it to prevent a transfer of the profits to the consumer, especially since it is in competition with very powerful companies such as ..... and others with market shares of 13·5 %, 11·5 % and 11·3 % respectively.

13. The restrictions on competition resulting from the setting-up of the joint venture are indispensable to the attainment of the objectives described in paragraphs 11 and 12 above.

Until the time when the agreements were made, Amersham had been essentially a government agency rather than a commercial enterprise. The joint venture allowed Amersham to enter the German market more quickly and effectively and at a lower cost than would have been the case had it established a subsidiary on its own. Buchler had been Amersham's distributor in Germany since 1960 and had obtained all Amersham's German customers for it. It would have been expensive (perhaps involving substantial compensation) for Amersham to end its relationship with Buchler and set up a subsidiary to form its own links with German buyers. Buchler contributed an established sales force, production facilities and a good knowledge of the German market. It had long-established contacts with customers such as hospitals, industry and researchers and was fully informed about their individual technical needs: in this industry products must be suited to the needs of particular buyers. Moreover, Buchler was familiar with the stringent requirements of German law concerning storage and handling of radioactive products. It would have been difficult and costly for Amersham to meet these requirements and to establish a sales force and production facilities comparable to those of Buchler. The intended improvement of production and distribution could thus not have been achieved otherwise.

In this case, the non-competition clause does not add to the normal non-competition effect implicit in a joint venture of this kind. It ensures that Amersham and Buchler do not jeopardize the functioning of the joint venture or the amortization of its investments. On the other hand, the parties are not prevented from expanding into each other's product lines not covered by the agreements; Amersham is for example, free to start the production of radiation protection equipment.

14. The agreements do not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question. Their market share on the German market is about 18 % and they face competition from a number of other powerful companies (see point 12 above). By way of comparison, the total assets (in 1981) of ..... , one of Amersham Buchler's strongest competitors, amounted to $ 2 063 million, whereas Amersham Buchler's total assets amounted to ..... , Amersham's to $ 87·6 million and Buchler's to $ 17·5 million. In view of the large resources available to its competitors, Amersham Buchler is not able to eliminate competition in this field.

In all these circumstances the objective benefits of the agreement outweigh its relatively limited impact on competition.

C. ARTICLES 6 AND 8 OF REGULATION NO 17

15. In accordance with Article 6 of Regulation 17, this Decision is to take effect as from the date of notification, i.e., as from 21 December 1981.

16. In view of the relatively balanced market situation and the rather limited impact of the joint venture's foundation on the competitive conditions in the common market, it is justified to grant the exemption for a period of 15 years (Article 8 (1) of Regulation No 17).

17. 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 material amendment to the agreements notified, of the conclusion of any new agreement between them and of any extension of their cooperation (Article 8 (1) of Regulation No 17),

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 hereby declared inapplicable for the period 21 December 1981 to 20 December 1996 to the following agreements:

1. Company Contract of Amersham Buchler GmbH & Co. KG of 29 November 1974;
2. Company Contract of Amersham Buchler GmbH of 18 December 1972;
3. Agreements comprised in a contract concerning know-how and expertise concluded between The Radiochemical Centre Ltd, The Radiochemical Centre GmbH, Buchler & Co. KG and Amersham Buchler GmbH & Co. KG of 20 December 1978; and
4. Exclusive distributorship agreement between the Radiochemical Centre Ltd and Amersham Buchler GmbH & Co. KG of 20 December 1978.

Article 2

The undertakings to which this Decision is addressed shall inform the Commission without delay of any material amendment or addition to the agreements notified, of the conclusion of any new agreement between them, and of any extension of the cooperation between them.

Article 3

This Decision is addressed to the following undertakings:

1. Amersham International Ltd,
   White Lion Road,
   UK-Amersham
   Buckinghamshire HP7 9LL;
2. The Radiochemical Centre GmbH,
   Gieselweg 1,
   D-3300 Braunschweig;
3. Buchler GmbH,
   Harxbütteler Straße 3,
   D-3300 Braunschweig;

4. Amersham Buchler GmbH,
Gieselweg 1,
D-3300 Braunschweig;

5. Amersham Buchler GmbH & Co. KG,
Gieselweg 1,
D-3300 Braunschweig.

Done at Brussels, 29 October 1982.

For the Commission
Frans ANDRIESSEN
Member of the Commission