

COMMISSION DECISION

of 19 December 1990

relating to a proceeding under Article 85 of the EEC Treaty

IV/33.133-B: Soda-ash — Solvay, CFK

(Only the French and German texts are authentic)

(91/298/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 Articles 3 and 15 thereof,

Having regard to the Commission Decision of 19 February 1990 to open a proceeding on its own initiative pursuant to Article 3 of Regulation No 17,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 19 (1) 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⁾,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

— Solvay et Cie SA, Brussels (Solvay),

— Chemische Fabrik Kalk, Cologne (CFK).

2. The infringement can be summarized as follows:

Infringement of Article 85 by Solvay and CFK

From a date unknown in about 1987 to at least 1989 Solvay and CFK have participated in an agreement and/or concerted practice contrary to Article 85 of the EEC Treaty by which, for each of the years 1987, 1988 and 1989, Solvay guaranteed CFK a minimum sales tonnage calculated by reference to a formula based on CFK's achieved sales in Germany during 1986 of 179 Kt and compensated CFK for any shortfall by purchasing from it the tonnages required to bring its sales to the guaranteed minimum.

B. The infringement of Article 85 by Solvay and CFK**PART I****THE FACTS****A. Summary of the infringement**

- (1) 1. The present Decision arises out of investigations carried out by the Commission in March 1989 pursuant to Article 14 (3) of Regulation No 17 at the premises of Community producers of soda-ash. By means of the said investigations and subsequent enquiries under Article 11 of Regulation No 17 the Commission discovered documentary evidence showing (*inter alia*) that an infringement of Article 85 of the EEC Treaty had been committed by the following undertakings:

1. Background

- (2) For details of the product and the soda-ash market, reference is made to Part 1. B of Commission Decision 91/297/EEC (Solvay-ICI) ⁽³⁾.
- (3) CFK is a subsidiary of Kali & Salz AG (BASF Group) and is one of three producers of synthetic soda-ash located in Germany. It currently has a production capacity of around 260 Kt. CFK's market share in Germany is around 15 %.

Solvay is by far the largest producer supplying the Germany market and has a market share of over 50 %. At all material times it conducted its soda-ash business

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

⁽³⁾ See page 1 of this Official Journal.

in Germany through its subsidiary Deutsche Solvay Werke (DSW). Until 1985 another Solvay subsidiary, Kali Chemie (KC) was also active in the soda-ash sector but its operations were then fully integrated in those of DSW.

In November 1989 Solvay announced plans to re-organize its activities in Germany by setting up a new wholly-owned holding company Solvay Deutschland GmbH controlling KC and holding 59,7% of the shares in Deutsche Solvay Werke. The arrangements do not affect the responsibility of Solvay for the infringement.

- (4) In 1985 DSW attempted to weaken the position of CFK in the German market by taking the business of some of its major customers, but the smaller producer compensated for the lost business by itself taking customers from Matthes & Weber, the other German producer.

During 1986 Solvay realized that CFK was applying a policy of price cutting in order to retain or regain market share. In a telephone conversation between DSW and Solvay's headquarters in Brussels on 24 October 1986, the possibility of an 'armistice' between Solvay and CFK was discussed. According to DSW, an 'armistice' with CFK would be impossible unless there was talk of a price increase in 1987. The position of Solvay Brussels was that CFK should be told that after a trial period of the 'armistice', perhaps in the second quarter of 1987, there might be discussions about a price increase.

Both Solvay and CFK insist that no 'armistice' was ever agreed (replies pursuant to Article 11). This denial has however to be judged in the light of the documentary evidence referred to in the following paragraphs.

2. The 'guarantee' agreement

- (5) An assessment of the soda-ash market prepared by DSW in March 1988, shows that the problems with CFK had by that time 'calmed down'. The documentary evidence discovered by the Commission shows that an agreement or arrangement had been made between Solvay and CFK by which Solvay 'guaranteed' CFK an annual minimum sales tonnage on the German market.

If CFK's sales in Germany fell below the guaranteed minimum, Solvay would buy the shortfall from CFK.

- (6) Originally, CFK's guarantee was set at 179 Kt, a figure apparently based on CFK's achieved sales in Germany during 1986. At the time, the parties did not

foresee that there would be any real growth in the German soda-ash market which in 1986 and 1987 was about 1 080 Kt in total.

For both 1987 and 1988, CFK's achieved sales were somewhat over its guaranteed minimum of 179 Kt (183 Kt and 180 Kt respectively). Indeed demand in Germany had started to increase beyond earlier expectations and by the end of 1988 it had become apparent that the total sales for that year would come to some 1 170 Kt, an increase of some 8,3% over the previous year.

As a result of the growth in demand, CFK demanded a minimum guarantee for 1988 and 1989 of 194 Kt. CFK was thus claiming retrospective 'compensation' for 1988 of 14 Kt (194-180) which after taking account of the credit for 1987 left 11 Kt. CFK's internal forecasts for 1989, as revised in January of that year, confirm that it had altered its original planning so as to provide for 'co-producer' sales in 1989 of 11 Kt.

Solvay had in fact purchased 2,5 Kt at the end of December 1988 leaving a balance of 8,5 Kt which CFK wanted it to buy during 1989.

- (7) In response to CFK's claim, Solvay offered maximum compensation for 1988 of 4 Kt instead of the 8,5 Kt. For 1989, it proposed that the guarantee be increased by only 5,3% instead of 8,3% by taking account of a 'neutral zone' of 3%. The guarantee for 1989 would thus be 190 Kt instead of the 194 Kt which CFK had originally demanded.

A meeting was held on 14 March 1989 attended by senior representatives of CFK and its parent company Kali & Salz on the one side and DSW on the other. It is highly significant that no official record or minute was made of this meeting and indeed no trace of it whatever exists at either CFK or Kali & Salz. However a brief handwritten note of this meeting was found at DSW. It is clear that the object was to resolve the one outstanding point, namely whether the compensation was to be made retrospective. There was no dispute about the basic machinery: the Solvay note reads 'Verständnis System: i.o.' ('Agreement system: OK'). Solvay, while proposing some changes, was satisfied with the way the scheme was working ('Schiff laufen lassen und nach vorn orientieren.'). It appears from the note that both sides had agreed that for the next eight months Solvay would purchase from CFK at the rate of 1 000 tonnes per month.

The compensatory mechanism was put into practice with Solvay buying in from CFK during the first half of 1989 the additional 8,5 Kt which had been claimed by CFK.

3. Arguments in defence

- (8) Both Solvay and CFK deny that any collusive agreement or arrangement was made between them. The incriminating documentary evidence found at DSW is explained by Solvay as referable to a scheme which was conceived on a wholly unilateral basis when it was considering acquiring CFK's business in about 1988. In order to maintain CFK as a going concern pending the negotiations (says Solvay), it calculated (again without any contact with CFK) the tonnage which that undertaking would need to sell on the German market in order to load its plant at a level that would guarantee its survival. (It is not however explained by Solvay why it should follow a policy that would lead it to pay a higher price for CFK's business than would otherwise be the case, nor, if it were only a matter of ensuring an optimal plant utilization rate for CFK, it should need to refer specifically to its sales on the German market.) This 'survival tonnage' Solvay assessed at 179 Kt for 1986. The frequent references in the documents to a 'claim' or 'demand' by CFK, and the very detailed calculations on this question do not, Solvay asserts, imply any contact with that undertaking any more than do the references to an 'offer' by Solvay or to a 'compromise'. As for the meeting between DSW and CFK and Kali & Salz on 14 March 1989 its purpose was simply to discuss the possible acquisition by Solvay of an interest in CFK's soda activities: only during this meeting did Solvay for the first time give an indication to CFK that it was considering helping that company to survive, but nothing concrete was agreed and nothing ever resulted from the meeting.

Solvay did not consider it necessary to propose that the persons involved be found in order to corroborate its factual arguments, nor did it request an oral hearing.

CFK for its part denied any involvement in collusion: it could give no explanation for the documents discovered at DSW, arguing that they were a matter for Solvay and not itself: there was nothing in its own documentation which could connect it with any collusive scheme.

- (9) The Commission rejects as entirely unbelievable the explanations advanced by Solvay which are in any case in complete contradiction with the terms of its own documents. It is also significant that some of the documents concerned were transmitted by telefax from DSW to Solvay headquarters in Brussels but no trace exists of their having been received. As for the arguments of CFK, it is well settled that documents found at one undertaking which incriminate another may constitute evidence against it as well as against the maker (Judgment of the Court of Justice in Cases 40-48, 50, 54-56, 111, 113 and 114/73, *Suiker Unie*

and others v. Commission ⁽¹⁾). In any case, there are several examples of detailed references in CFK's own documents which are echoed in the documents found at Solvay and which information could not have been known to Solvay unless it had been communicated to it. CFK was unable to provide any explanation for the coincidence of references in its documents and those of another producer.

PART II

LEGAL ASSESSMENT

A. Article 85 of the EEC Treaty

1. Article 85 (1)

- (10) Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings or 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.

Article 85 (1) specifically includes as examples of prohibited agreements those which directly or indirectly fix selling prices, limit or control markets, or share markets between producers.

2. Agreements/concerted practices

- (11) Article 85 (1) prohibits both agreements and concerted practices. In the present case, although nothing turns on the distinction between the two forms of prohibited collusion, the Commission considers that the arrangement between Solvay and CFK can most accurately be categorized as an 'agreement' within the meaning of Article 85 (1).

An 'agreement' may exist when the parties have reached consensus on a plan which limits or is likely to limit their commercial freedom by determining the

⁽¹⁾ [1975] ECR 1663, paragraph 164.

lines of their mutual action or abstention from action in the market. It is not necessary that the parties should consider it legally binding, and indeed where they are well aware of the illegality of their arrangement they clearly cannot intend it to have contractual force. No enforcement procedures are required; nor is it necessary for such an agreement to be made in writing.

3. *Restriction of competition*

- (12) In the present case it is self-evident that the agreement has the **object and effect** of restricting competition.

The purpose was clearly to achieve conditions of artificial market stability. In exchange for returning to pricing behaviour which was not considered by Solvay as disruptive, CFK was guaranteed a minimum share of the German market. By removing from the market the tonnage which CFK could not sell, Solvay ensured that price levels were not brought down by competition. It is clear from the documentary evidence that the arrangements were put into practice and had the intended effect. Such classic cartel-type arrangements by their very nature restrict competition within the meaning of Article 85 (1).

4. *Effect upon trade between Member States*

- (13) The fact that the minimum guaranteed tonnage related only to sales on the **German market** in no way excludes the application of Article 85. It is clear from the involvement of Solvay in Brussels that the arrangement was part of its overall policy for controlling the **soda-ash market** in the Community. The Solvay/CFK arrangement was intended not only to reduce competition in a major part of the Community but also to maintain the rigidity of the existing market structure and its separation along national lines. It is also quite possible that the tonnage taken by Solvay under the guarantee would otherwise have been placed by CFK in other Community markets.

5. *Conclusion*

- (14) The Commission therefore considers that Solvay and CFK have infringed Article 85 of the EEC Treaty by participating from about 1986 to the present time in an agreement by which Solvay guaranteed to CFK a certain minimum annual tonnage in Germany and purchased from it the quantities required to reach that minimum.

B. Remedies and sanctions

1. *Article 3 of Regulation No 17*

- (15) Where the Commission finds that there is an infringement of Article 85, it may require the undertakings concerned to bring such infringement to an end in accordance with Article 3 of Regulation No 17.

The arrangements in the present case were conducted in secret and despite the overwhelming documentary evidence both Solvay and CFK have continued to deny that any collusive arrangements were made between them. As a result, it is uncertain whether or not they have taken any steps to put an end to the collusion. It is therefore necessary, pursuant to Article 3 of Regulation No 17, to require Solvay and CFK to bring the infringement to an immediate end.

The parties must also be prohibited from any agreement or concerted practice having equivalent effect.

2. *Article 15 (2) of Regulation No 17*

- (16) Under Article 15 (2) of Regulation No 17, the Commission may by decision impose on undertakings fines of from ECU 1 000 to ECU 1 million, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85 (1) or Article 86. In fixing the amount of the fine, regard is to be had to both the gravity and the duration of the infringement.

(a) *Gravity*

- (17) In the present case the Commission considers that the infringement was a serious one. Market-sharing agreements are by their very nature considerable restrictions on competition. In the present case the parties restricted competition between them by means of a device intended to create artificial conditions of market stability. CFK's volume ambitions were accommodated without the tonnage in question having to be placed on the consumer market at competitive prices. The arrangements were also conducted in conditions of considerable secrecy.

(b) *Duration*

- (18) It is not possible, given the refusal of the undertakings to provide any information, to determine exactly when the guarantee agreement was made. The arrangements were first applied to CFK's sales for the year 1987. It is therefore appropriate to assess fines on

the basis that the agreement was concluded at some time during that year.

In determining the amount of the fine to be imposed on each producer, the Commission bears in mind Solvay's dominant market position as the leading producer in Germany and in the Community. Solvay considers that as such it has a particular responsibility for ensuring the 'stability' of the market. CFK is a relatively small producer of soda-ash but it was a willing partner in the collusive venture.

- (19) The infringement was deliberate and both parties must have been well aware of the obvious incompatibility of their arrangements with Community law.

Solvay has been the subject on several previous occasions of substantial fines imposed by the Commission for collusion in the chemicals industry: Decision No 85/74/EEC, Peroxides ⁽¹⁾; Decision No 86/398/EEC, Polypropylene ⁽²⁾; Decision No 89/190/EEC, PVC ⁽³⁾. Its activities in soda-ash have been the subject of scrutiny by the Commission in 1980 and 1982. Although at that time the Commission was more particularly concerned with Solvay's exclusive supply arrangements with customers, those responsible for the soda-ash activities cannot have been ignorant of the need to comply with Community law,

HAS ADOPTED THIS DECISION:

Article 1

Solvay et Cie (SA ('Solvay') and Chemische Fabrik Kalk GmbH ('CFK') infringed Article 85 of the EEC Treaty by participating from about 1987 until the present time in a market-sharing agreement by which Solvay guaranteed to CFK a minimum annual sales tonnage of soda-ash in Germany calculated by reference to CFK's achieved sales in 1986, and compensated CFK for any shortfall by purchasing from it the tonnages required to bring its sales to the guaranteed minimum.

Article 2

Solvay and CFK shall forthwith bring the infringement to an end (if they have not already done so) and shall in the future refrain from any agreement or concerted practice which may have the same or the equivalent object or effect.

Article 3

The following fines are imposed upon the undertakings named herein in respect of the infringement found in Article 1 hereof:

- (a) Solvay et Cie, Brussels a fine of ECU 3 million,
- (b) Chemische Fabrik Kalk, of Cologne, a fine of ECU 1 million.

Article 4

The fines imposed by Article 3 shall be paid within three months of the date of notification of this Decision to the following bank account:

No 310-0933000-43,
Banque Bruxelles Lambert,
Agence Européenne,
Rond Point Schuman 5,
B-1040 Brussels.

On expiry of that period, interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ecu operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, i.e. 14 %.

Should payment be made in the national currency of the Member State in which the bank nominated for payment is situated, the exchange rate applicable shall be that prevailing on the day preceeding payment.

Article 5

This Decision is addressed to:

- Solvay et Cie SA, 33 rue du Prince Albert, B-1050 Brussels;
- Chemische Fabrik Kalk GmbH, Kalker Hauptstrasse 22, D-5000 Cologne 91.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 19 December 1990.

For the Commission
Leon BRITTAN
Vice-President

⁽¹⁾ OJ No L 35, 7. 2. 1985, p. 1.

⁽²⁾ OJ No L 230, 18. 8. 1986, p. 1.

⁽³⁾ OJ No L 74, 17. 3. 1989, p. 1.