

COMMISSION DECISION

of 21 December 1973

relating to a proceeding under Article 85 of the EEC Treaty (IV/795 — Kali und Salz/Kali Chemie)

(Only the German text is authentic)

(74/17/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, 1, 3 and 6 thereof;

Having regard to the Commission Decision of 17 November 1972 to institute proceedings on its own initiative under Article 3 of Regulation No 17 with respect to the agreement reached on 6 July 1970 between Kali und Salz AG, Kassel, and Kali Chemie AG, Hannover, concerning the sale of potash products;

Having regard to the notification of the said agreement to the Commission on 8 May 1973;

Having in accordance with Article 19 of Regulation No 17⁽¹⁾ and Regulation No 99/63⁽²⁾ heard the undertakings concerned; and

Having regard to the Opinion of the Advisory Committee on Restrictive Practices and Monopolies delivered on 21 November 1973 in accordance with Article 10 of Regulation No 17,

WHEREAS:

I**The Facts**

Until 1970 the sale of straight potash fertilizer produced by German potash producers was conducted within the framework of the sales organization Verkaufsgemeinschaft Deutscher Kaliwerke (VDK). All German potash producers belonged to VDK and these consisted of several companies now incorporated into the BASF group (Badische Aluminium- und Soda-fabrik) and also Kali Chemie AG, which belonged then, as it does now, to the Solvay group. The members of VDK were obliged to sell their potash products on the domestic market and the export market through that organization alone, with the exception of those quantities intended for the production of compound fertilizer.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

In 1970 the BASF group reorganized its potash interest. The potash works belonging to Wintershall and Salzdettfurt were transferred to Kali und Salz and VDK was dissolved on 31 December 1970. This left Kali und Salz and Kali Chemie as the only two potash producers in Germany; Kali und Salz's annual production amounts to 2 100 000 tons and that of Kali Chemie to 300 000 tons of potassium dioxide, representing about 87.5 % and 12.5 % respectively of the German potash production.

On 6 July 1970 Kali und Salz and Kali Chemie concluded an agreement which became effective on the 1 January 1971 and provided for the following arrangements:

Kali und Salz buy the potash output of Kali Chemie up to a maximum of 280 000 tons of potassium dioxide per year, less the quantities required by Kali Chemie for its own purposes. If the annual output of Kali und Salz and Kali Chemie exceeded 2 300 000 tons of potassium dioxide, Kali Chemie had an option to sell to Kali und Salz an additional quantity amounting to 20 % of the first 100 000 tons of the surplus output and 10 % for quantities over that amount. If the total output fell short of 2 100 000 tons Kali und Salz's commitment to buy was reduced by 10 % of the reduced output.

Kali und Salz was to draw up a provisional quantitative programme for two years in advance, to serve as a guide for Kali Chemie production and Kali und Salz's medium-term sales programme. Details as to quality, quantity and delivery date were to be decided annually in advance by agreement between the parties. The buying price for the quantities delivered would be agreed upon for a calendar year at a time.

The agreement was to remain valid until 31 December 1980, and might be extended beyond that date.

Specialization was introduced within the framework of the former VDK in order to rationalize production. As a result of a division of production, Kali Chemie manufactures only two different products, namely magnesium kainite and non-granulated potash

containing either 50 %, 54 % or 60 % potash, while Kali und Salz offers a more comprehensive range, especially those granulated types preferred by European farmers.

Kali Chemie is to an increasing extent processing potash from its own output, using the Rhenania-Phosphate it produces in a compound fertilizer known as RHE-KA-PHOS. Production of this substance has increased from 105 000 tons in 1971 to 119 000 tons in 1972. It is now sold by Kali Chemie alone, whereas formerly it was also sold through VDK. In addition Kali Chemie sells about 16 000 tons of potash to a manufacturer of compound fertilizers in which Kali Chemie has a substantial participation. It then sells the remainder of its production, amounting to about 170 000 tons (56 %) to Kali und Salz under the terms of the above agreement.

Kali und Salz sells potash products from its own production and that of Kali Chemie on both the national market (in 1971/72 1 311 000 tons) and on export markets (in 1971/72 1 056 000 tons). The common market countries to which these products are exported are Denmark, The United Kingdom, Belgium, Luxembourg, the Netherlands and (certain types only) France. It also exports to a number of non-member countries. Of the export total 125 000 tons is produced by Kali Chemie.

Apart from about 7 % supplied for use in industry, about 40 % of the quantity sold on the German market (a percentage which decreased progressively initially, but which since 1970/71 has shown a relative increase) is used for agricultural purposes as simple fertilizer, and the rest (50 % in 1965/66, 56 % in 1970/71 and 56 % in 1971/72) is used in the production of compound fertilizers. A large proportion of supplies for the production of compound fertilizer (about two-thirds) is intended for BASF and the producers of NPK- and PK-fertilizer belonging to this group. In addition, deliveries are made to VEBA, Hoechst and other smaller producers.

The following is an outline of potash production within the Community; other than production by Kali und Salz and Kali Chemie :

- (i) In France, the Société Commerciale des Potasses et de l'Azote (SCPA) has an annual total production of 1 800 000 tons, a figure considerably higher than national consumption. This company holds the legal monopoly for the sale of potash fertilizer in France as well as a monopoly for the export and import of the product. Upon the recommendation of the Commission made on 25 November 1964 under Article 37 of the EEC Treaty the French Government initiated the necessary measures of adjustment and will formally abolish by law the import monopoly with respect to intra-EEC trade.
- (ii) In Italy there is a relatively small production of about 160 000 tons per annum. The Italian

demand for potash is not great and is approximately in the same range as in Belgium/Luxembourg, the Netherlands and Denmark.

- (iii) The United Kingdom, which has been the largest importer of potash into the EEC (some 450 000 tons annually) expects shortly to become an exporter as the company Cleveland Potash Ltd., in which ICI has a substantial participation, is now bringing into operation plants with a total capacity of 600 000 to 900 000 tons per annum. Having regard to the present consumption of potash in the United Kingdom, this country may well become an exporter rather than an importer in the near future.

Outside the Community the most important potash producers are :

	<i>million tons potash oxide annually</i>
USSR	5
Canada	3.9
German Democratic Republic	2.5
United States	2.4
Israel	0.6
Spain	0.5 (1).

In spite of lower production costs due to more favourable geological conditions, imports from these countries to the EEC appear to be only on a limited scale. The most important importing member countries of the EEC are Benelux and, for the present, the United Kingdom.

Within the Community, imports from non-member countries to member countries do not equal exports to other member countries by France and the Federal Republic of Germany (the two countries which at present have a surplus). In each of the latter countries sales are concentrated in a single organization, namely SCPA and Kali und Salz. These two firms supply more than 60 % of the imports into Benelux and about 40 % of the imports into Italy. The majority of such imports were handled by sole agents in the importing countries namely Nederlandse Kali-Import Maatschappij in the Netherlands and Sali Potassici in Italy, with which both suppliers or their group and holding companies are financially and personally linked. In Belgium, imports are handled by two firms working in close cooperation : Belcopotasse, indirectly a subsidiary of Kali und Salz, and Cogepotasse in which Solvay/Belgium has a 25 % share and SCPA an interest of 49.3 % through a holding company.

Imports of potash into Germany which were never very large have recently shown a marked decrease — from 3 % in 1967/68 to about 0.8 % in 1970/71.

An agreement between Kali und Salz and SCPA, concerning commercial and industrial cooperation, and in particular as regards the exchange of information on sales and production was terminated by the Commission in a Decision of 11 May 1973 (2). The

(1) One of the Spanish potash producers is a subsidiary company of Solvay. The Spanish production is sold centrally through the Commercial de Potasas S.A.

(2) OJ No L 217, 6. 8. 1973, p. 3.

parties were obliged in consequence to stop selling in the Netherlands and Italy through a joint distributor and — in the case of SCPA — selling in the Federal Republic of Germany through a firm controlled by Kali und Salz.

II

Applicability of Article 85 (1)

The agreement of 6 July 1970, between Kali und Salz and Kali Chemie has as its effect the restriction of competition within the Common Market.

The agreement gives the right to Kali Chemie on a long-term basis — until the end of 1980 with the possibility of an extension — to sell its entire potash production to Kali und Salz for resale by them. Even though Kali Chemie is not bound under the agreement to sell all its potash products through Kali und Salz and may therefore decide what quantities should be delivered to Kali und Salz, it has in fact sold to them all its production of potash except for such amounts as are required for its production of a compound fertilizer.

This is similar to the previous situation in VDK, when Kali Chemie had transformed part of its potash production and sold the remainder to VDK. In that case VDK were obliged to charge the quantities intended for transformation to the sales quota of Kali Chemie. The present situation has not altered except for the fact that the amount of output which Kali Chemie transforms has increased.

With the exception of those quantities transformed by Kali Chemie, practically the whole supply of straight potash fertilizer in Germany is concentrated in the hands of Kali und Salz. As a result all competition is excluded between the only two German potash producers selling their products to (i) farmers and (ii) producers of compound fertilizer. The agreement permits Kali und Salz to take into account, for its sales forecasts, the quantities supplied by Kali Chemie, which represent 13 % of German consumption or the total potash consumption of Belgium or Denmark. Kali und Salz is therefore able to determine at its own will the utilization of the product as well as its destination and is further able to apply the same prices and conditions of sale to both products of its own output and that of Kali Chemie.

The agreement may also affect trade between Member States. A considerable proportion of the quantities put at the disposal of Kali und Salz by Kali Chemie are exported to other Member States. The Netherlands are just as accessible, in relation to the Kali Chemie works, as Belgium/Luxembourg and Denmark. Demand in those countries centres on types of product which are suitable for the production of compound fertilizer, which could be supplied by Kali Chemie, but are in fact supplied through Kali und Salz. The fact that Kali Chemie potash products are not exported at the moment to such easily accessible

areas as the Netherlands is primarily due to the nature of the arrangement Kali und Salz has made for re-sale. The agreement enables Kali und Salz to dispose of the quantities not required by Kali Chemie itself, treat them as their own supplies and centralize the national supply. The agreement covers the entire territory of the Member States and by its very nature affects trade between Member States in such a way as to prejudice the achievement of the purposes of a unified inter-state market.

The Agreement notified therefore falls within the prohibition in Article 85 (1).

III

Non-applicability of Article 85 (3)

The two firms involved have submitted that should the Agreement of 6 July 1970 be prohibited under Article 85 (1), as being incompatible with the common market, it should be held to have fulfilled the requirements of Article 85 (3), and they submit that the provisions of Article 85 (1) should therefore be declared inapplicable in the case of that Agreement.

The grounds put forward in support of this submission were:

1. The Agreement enables Kali Chemie to sell its surplus potash through the Kali und Salz organization as Kali Chemie has no suitable sales network of its own. Straight potash fertilizer could not be sold successfully at the same time as the competitive RHE-KA-PHOS-fertilizer through the same sales network. Kali und Salz also sells a comparable product (Thomas-Kali) through a separate sales organization. The agreement allows Kali Chemie to restrict itself to its own potash range which has always for technical and geological reasons been limited and permits the optimum rationalized production of these products at low production costs. It further allows the exploitation of suitable sales locations, the reduction of distribution costs relating to stockage, advertising and advisory services, and the rationalization of freight, resulting in considerably lower costs. Kali Chemie's commercial policy with regard to fertilizers concentrates on the sale of PK fertilizer, the development of which requires the use of potash components at low cost, a development which in the long term can only be achieved by the guaranteed sales provided for in the agreement. If Kali Chemie were to conduct its own sales, it would mean expanding the range of products, enlarging warehouses, increasing advertising, and arranging technical advice for customers. Such essential investment could not be justified economically.
2. With the help of quantities supplied by Kali Chemie, Kali und Salz can, it is asserted, more easily deal with those fluctuations in demand which occur in the peak periods of autumn and spring. The storage facilities at the various

marketing stages and those of the customer were insufficient; those who resell the goods therefore depend on the industry being able to deliver promptly, and it must make extensive storage capacity available. Buyers of potash for the manufacture of compound fertilizer and for industrial processing gave no undertaking in the annual agreements concluded with them to purchase specific quantities at periods based on the production schedule of the potash works. As the proportion of freight cost amounts to 14 to 40 % of the price charged to the customers, the fullest advantage must be taken of a central distribution of orders. For example, magnesium-kainite could be advantageously supplied from the Kali Chemie works in the north, and from the Kali und Salz works in the south (in individual cases, savings of up to 34 % are claimed). As two-thirds of the supplies for the manufacture of compound fertilizer go to the BASF group's plants, considerations of freight economy have priority. If Kali Chemie conducted its own sales, it could not expect to sell its products to that group. Moreover, even selling on an independent basis to other compound fertilizer manufacturers as bulk buyers could not guarantee any definite long-term sales opportunities.

3. The customers share the advantages of the agreement, as the potash supply is more plentiful, more flexible and more accessible: freight is rationalized, and the lack of sales risks and the use of Kali Chemie production facilities at low cost enables potash to be used cheaply in the production of RHE-KA-PHOS, and permits this fertilizer to be offered at a more attractive price than would otherwise be possible. The agreement includes no obligation to sell through Kali und Salz and leaves Kali Chemie completely free in its production and marketing decisions.
4. No opportunity is afforded to eliminate competition in respect of a large proportion of the products involved. Straight potash fertilizer and compound fertilizer serve the same purpose and, for the user, are at all times interchangeable; between them there is genuine competition based on interchangeability. This can be seen from the decrease in the proportion of potash ioxide-fertilizer in Germany from 62.3 % in 1960/61 to 42.1 % in 1971/72. Moreover, there is strong competition within the other Member States where only 10 % (265 000 tons) of the demand (2 573 000 tons in 1971/72) is covered by goods from Kali und Salz and Kali Chemie.

These arguments put forward by the parties cannot be accepted by the Commission. On the one hand Kali und Salz is a very important potash producer which, even without the quantities sold by Kali Chemie, is in a position to adopt rationalization measures without an agreement of this kind. On the other hand, Kali Chemie belongs to the important Solvay Group, which also has potash interests outside Germany in Belgium and in Spain. Kali Chemie could sell its straight potash fertilizer independently and influence

competition so as to give customers a greater possibility of choice. In the past Kali Chemie was able to take over the distribution of its RHE-KA-PHOS-fertilizer which was until then sold through the common sales organization VDK. The result was an essential promotion of the sale of this fertilizer. An independent sale does not necessitate the ability of Kali Chemie to offer its products at attractive prices throughout the whole of the competitor Kali und Salz's sales area. Neither can a common distribution be justified by the fact that Kali Chemie does not dispose of a complete range of all types of potash fertilizers. There is no reason to suppose that, were Kali Chemie acting on its own, it would be obliged, under pressure of customers requirements, to manufacture products whose cost of production would either in themselves be excessive or would have an unfavourable effect on prices.

The Commission thus considers that the agreement reached by the parties contains no advantages to balance the disadvantages to competition which result from the centralization of sales. The agreement does not contribute to improving distribution while allowing consumers a fair share of the resulting benefit and accordingly, does not fulfil the first two conditions required for the application of Article 85 (3). However, it is not necessary to examine this question further in all details since the declaration of inapplicability of Article 85 (1) must in any case be refused because the agreement affords the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The agreement gives Kali und Salz an opportunity to improve on its strong position in the potash sector (at present its own production amounts to 87.5 % of German production) by becoming the sole supplier of straight potash fertilizer to the German market, a substantial part of the common market. There is no appreciable pressure of competition from the small amounts imported.

There is no substitute for potash in the production of compound fertilizer and certain industrial purposes. The supplies referred to already constitute about 60 % of the total domestic sales. As far as the sale of straight potash fertilizer for direct agricultural use is concerned, the farmer can, of course, theoretically choose between simple potash fertilizer and compound fertilizer containing potash. There are, however, various factors concerning use which all point to the desirability of using straight potash fertilizer. They are such considerations as the state of the soil, the labour element, weather and price.

Available statistics show that straight potash fertilizer is still very much in demand and that many consumers do not consider compound fertilizer as a substitute because it is more expensive. The quantities of straight potash fertilizer sold having decreased between 1960/61 and 1968/69 have since been increasing as the following statistics show:

Consumption of potash oxide in German agriculture ⁽¹⁾
(in 1000 tons of potash oxide)

	1949/1950	1960/1961	1965/1966	1968/1969	1970/1971	1971/1972
Straight fertilizer	560.7	626.8	598	452.8	464.7	518.8
Compound fertilizer	28.8	379.7	585	593.1	719.9	714.7

⁽¹⁾ Source : Federal Statistic Office.

An examination of the consumption figures for the nine Member States shows a somewhat parallel increase in the sales of straight potash fertilizer as compared with sales of compound fertilizer containing potash :

	1968/1969	1969/1970	1970/1971
Straight fertilizer	1 702.7	1 710.9	1 851.4
Compound fertilizer	1 829.2	1 984.9	2 145.4

Source : F A O.

Although it is a fact that a small number of farmers may in some years buy straight fertilizer and in others compound fertilizer, this does not alter the view that the relevant market to take as the basis for the decision in these proceedings is that of straight potash fertilizer.

The agreement between the parties of 6 July 1970 cannot be exempted under Article 85(3). The said agreement therefore constitutes an infringement of Article 85 and the parties must bring it to an end by virtue of Article 3 of Regulation No 17,

HAS ADOPTED THIS DECISION :

Article 1

The agreement of the 6 July 1970, concluded between Kali und Salz AG and Kali Chemie AG, concerning

the distribution by Kali und Salz AG of the straight potash fertilizer of Kali Chemie AG, constitutes an infringement of Article 85(1) of the Treaty establishing the European Economic Community.

Article 2

The application for an exemption under Article 85(3) is refused.

Article 3

The undertakings named in Article 1 are required to bring the stated infringement to an end.

Article 4

This Decision is addressed to the following undertakings :

1. Kali und Salz AG
D — 35 Kassel 1 Friedrich-Ebert-Straße 160
2. Kali Chemie AG
D — 3 Hannover Hans-Böckler-Allee 20.

Done at Brussels, 21 December 1973.

For the Commission

The President

François-Xavier ORTOLI