II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 14 December 1993

relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89

(Case No IV/M.308 — Kali+Salz/MdK/Treuhand)

(Only the German text is authentic)

(Text with EEA relevance)

(94/449/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1], and in particular Article 8 (2) thereof,

Having regard to the Commission Decision of 16 August 1993 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations [2],

Whereas :

(1) The notification in question concerns the proposed joint venture between Kali und Salz (K+S) and the Treuhandanstalt (Treuhand), which will combine the potash and rock-salt activities of K+S and Mitteldeutsche Kali AG (MdK).

(2) After examining the notification, the Commission found that the plan fell within the scope of Council Regulation (EEC) No 4064/89 (the 'Merger Regulation') and raised serious doubts as to its compatibility with the common market. The Commission therefore decided, on 16 August 1993, to initiate proceedings pursuant to Article 6 (1) (c) of the merger Regulation.

(3) By letter dated 5 August 1993 the Commission informed the parties involved of its decision to continue the suspension of the notified merger in whole, pursuant to Articles 7 (2) and 18 (2) of the merger Regulation, pending its final decision in the matter.

I. THE PARTIES

(4) K+S, a subsidiary of the chemicals group BASF, is primarily engaged in producing potash (including specialty products), potash- and salt-based industrial products, and salt and in providing waste disposal services. The potash and rock-salt activities of the former German Democratic Republic (GDR) are combined in MdK. MdK's sole shareholder is the Treuhand, an institution incorporated under public law whose task is to restructure the former GDR's State-owned enterprises so as to make them competitive and then to privatize them.

[1] OJ No L 395, 30. 12. 1989, p. 1. (corrected version, OJ No L 257, 21. 9. 1990, p. 14).
[2] OJ No C 199, 21. 7. 1994, p. 5.

II. THE PROJECT

(5) MdK will be converted into a private limited company (GmbH). PROJECT will make a non-cash capital contribution to this company in the form of its potash and rock-salt activities. The Treuhand will make a cash contribution of DM 1 044 million. Out of this amount DM 196 million will be paid by the Treuhand as a contribution for its share of 49 % in the joint venture and DM 848 million will be assigned to the capital reserves earmarked for investments, repairs and expected future loss compensation. K+S will hold 51 % and the Treuhand 49 % of the share capital and voting rights in the joint venture thus created.

(6) Should the joint venture's losses exceed the amounts provided for in the business plan agreed by the parties concerned, the Treuhand will bear 90 % of such losses in 1993, 1994 and 1995, 85 % in 1996 and 80 % in 1997, up to a ceiling of DM 150 million. Pursuant to the EC State aid rules the German Government notified to the Commission the aid granted by the Treuhand to the joint venture. The compatibility of that aid with the State aid rules will be decided in the course of separate proceedings.

III. THE MERGER

(7) The joint venture MdK GmbH will be jointly controlled by K+S and the Treuhand. Although K+S holds 51 % of the voting rights and is to be responsible, according to the underlying framework agreement for managing the venture, a number of market-related strategic decisions require the approval of the Treuhand. K+S and the Treuhand have together drawn up a detailed business plan for the joint venture for the next five years. Any substantial deviation from the measures provided for in that plan requires 75 % majority approval in a General Meeting, giving the Treuhand a right of veto. The following decisions are likewise subject to Treuhand's right of veto : the disposal and acquisition of enterprises and establishments, the acquisition and sale of land worth of more than DM [...] (1), the conclusion of long-term contracts establishing joint venture commitments exceeding DM [...] (2), the adoption of the annual budget, and borrowing and lending. Taken together, therefore, the rights of assent given to the Treuhand far exceed the normal protection of the rights of minorities and give it a share in the determination of the joint venture's market behaviour.

(8) Nor will the joint venture, which is jointly controlled within the meaning of Article 3 (3) of the merger Regulation, lead to coordination of the competitive behaviour of the parties concerned, since both K+S and the Treuhand are withdrawing from their potash and rock-salt activities — activities which will continue to be carried out only by the joint venture. The project therefore constitutes a concentration in the form of a concentrative joint venture within the meaning of Article 3 of the Regulation.

IV. COMMUNITY DIMENSION

(9) In the last financial year the BASF group, whose aggregate turnover is relevant for K+S according to Article 5 (4) of the Regulation, realized a total worldwide turnover of some ECU 22 billion and a Community turnover of approximately ECU 13 billion. The business turnover attributable to the Treuhand for the purposes of Article 5 also amounted to more than ECU 250 million in the Community. As the Treuhand is an undertaking within the meaning of the merger Regulation, the turnover of those undertakings in which it has rights within the meaning of Article 5 (4) has to be attributed to it. There is no need to determine whether, in the light of recital 12 of the Regulation, Article 5 is to be interpreted restrictively for cases involving the Treuhand's undertakings, since in the case in question the Treuhand is itself an undertaking with a direct interest. But even if it were assumed that there were within the Treuhand a number of economic units with independent power of decision within the meaning of recital 12, the lowest conceivable organizational level that would constitute such an economic unit would be a directorate. In the last financial year, the undertakings of the extractive industries' directorate responsible in the case in question had a turnover of more than ECU 3 billion in the Community.

(10) In the last financial year, the BASF group achieved less than two thirds of its Community turnover in Germany — the Member State in which it recorded its highest turnover. The conditions which, according to Article 1 (2) of the Regulation, must be met before a concentration can have a Community dimension are therefore fulfilled. During the

(1) Deleted business secrets.
(2) Deleted business secrets.

first phase of the investigation, the Treuhand and the German Government after initial reservations, stated expressly that, in their view, the planned merger fell within the scope of the merger Regulation.

V. APPRAISAL PURSUANT TO ARTICLE 2 OF THE MERGER REGULATION

(11) The notified concentration essentially concerns the following product areas :

— potash products for agriculture (K_2O content of up to 62 %), which account for 54 % of the aggregate turnover of K+S and for 81 % of the aggregate turnover of MdK,

— potash products for industrial applications (industrial potash, K_2O content of more than 62 %, which account for 3 % of the aggregate turnover of K+S),

— magnesium products (8 % of the aggregate turnover of K+S and 3 % of the aggregate turnover of MdK),

— salt (9 % of the aggregate turnover of K+S and 15 % of the aggregate turnover of MdK).

With regard to the industrial potash and salt sectors, the Commission has come to the conclusion that the merger will not create or reinforce a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part thereof. In the case of industrial potash, this conclusion is based on the fact that MdK is clearly only marginally active in this product area, so that no appreciable strengthening of K+S's *de facto* monopoly of these products in Germany is to be expected. As to salt products, although in some market segments the merged entity will become the most important German producer, alternative supplies are available from sources within and outside Germany, including important competitors such as Solvay and AKZO. The following discussion therefore focuses only on the other product areas mentioned.

A. Relevant product market

1. *Potash*

(12) Potash is a mineral fertilizer which is either used directly in agriculture or is applied to the soil together with other plant nutrients, particularly nitrogen and phosphate, in the form of compound fertilizers (NPK fertilizers). In both cases potash cannot be replaced by other nutrients.

(13) Potash-bearing crude salt is mined and processed to produce the marketable standard product potassium chloride. The bulk of this standard product is mixed with other nutrients to produce compound fertilizers. As a result of subsequent granulation processes, the standard product is made into granules which are used predominantly for direct application in agriculture. The additional ganulation and sifting costs amount to approximately DM [...] (1) per tonne of K_2O. This means that the price of granulated potash is approximately 10 % higher than that of the standard product.

(14) Besides this not inconsiderable price difference, there are two different groups of customer for the two types of potash product : there is demand, on the one hand, from agriculture and the farming trade for granulated potash and, on the other, from producers of compound fertilizers for the standard product. While, for buyers of the granulated material, potash is the end product, for the compound fertilizer industry the standard product simply represents one of a number of primary products such as nitrogen and phosphate. Accordingly, the competitive conditions for potash differ between the two customer groups. The Commission has, however, come to the conclusion that granulated potash and the standard product belong to the same relevant product market. Potash producers generally supply both potash products and have the granulation plant necessary to produce granulated material from the standard product. Subject to the limits imposed by the capacity of such granulation plant, they are therefore in a position to change the volume of output of the two products according to the sales position. It would therefore appear that there is a relatively high level of supply-side substitutability between the two products, which differ only in respect of an additional processing step for the granulated material.

(15) There are many different potash products (e.g. 'Kali 40', 'Kali 60', 'Korn-Kali') depending on the K_2O content and the presence of other minerals (e. g. magnesium). Objectively, these various potash products are largely interchangeable as far as the customer is concerned. In the various Member States, however, there are in some cases marked preferences for certain potash products (e. g. for 'Korn-Kali' in Germany).

(1) Deleted business secret. Exact figure based in part on information provided by the parties.

(16) It would appear, however, that potassium sulphate products constitute a distinct relevant market. Various crops (e.g. tobacco, fruit, vegetables) are highly chloride-sensitive or are chloride-tolerant only to a limited degree. Potash in chloride form (MOP) can be used only to a limited extent for such crops; they therefore require potash products in sulphate form (SOP). SOP is obtained from MOP through various processes. As the conversion costs are considerable, the price of SOP is at least twice that of MOP.

(17) In the final analysis, however, it does not matter whether MOP and SOP should be assigned to different relevant markets. The analysis of the market for MOP does not differ markedly if the comparatively small quantities of SOP sold are included in the market for MOP. This would lead to slightly higher market shares for K + S and the French competitor SCPA on the market as a whole.

2. *Compound fertilizers (NPK)*

(18) Compound fertilizers contain two or — at most — all three primary nutrients (N, P, K) and, in some cases, also secondary or trace nutrients. There is a wide range of NPK fertilizers with widely differing combinations of the primary raw materials nitrogen, phosphate and potash (e.g. 15 + 15 + 15, 13 + 13 + 21, 20 + 10 +10). To some extent, the components of compound fertilizers are physically mixed (so-called 'bulk blends'). Predominantly, however, compound fertilizers are produced on a large industrial scale in chemical works. The chemical mixing process produces granules of a constant size and uniform nturient content. The danger of segregation during transport and storage in thus avoided and equal distribution on the land is guaranteed.

(19) After defining a relevant market for potash in the merger notification, which covered the standard product and granulated potash (including special types of product), the parties have now stated that the relevant market also includes compound fertilizers and in particular the NPK fertilizers produced through chemical processing. As justification for this, they argue that straight potash and NPK fertilizers are interchangeable where agriculture is the end customer and that the relevant market is therefore that for fertilizers containing potash. In order to calculate the market shares on this market, so the parties argue, the respective potash proportions would have to be separated out from the sales of compound fertilizers and assigned to the producers of those compound fertilizers. The parties cite a Court of Justice judgment of 14 May 1975 in Joined Cases 19 and 20/74 [1]. In that judgment, the Court merely found, however, that a Commission decision in which the elimination of competition through a marketing agreement was based, among other things, on the claim that there was a market for straight potash fertilizer was insufficiently justified. Furthermore, the judgment was based, among other things, on an expert opinion which anticipated that the market in straight potash fertilizer would be reduced within a few years in the Community to insignificant proportions from an economic viewpoint [2]. This has clearly not happened.

(20) The Commission has serious doubts whether this form of market definition now put forward is appropriate. As already pointed out, there are two groups of customers for potash used for agricultural purposes: the producers of compound fertilizers (NPK producers) and the agricultural community. Taking the Community as a whole, the NPK producer group accounts for some 60 % of potash sales and the agricultural community for 40 %. It is clear that for the NPK producers potash and compound fertilizers are not interchangeable, potash being a primary product used in the production of compound fertilizers.

(21) While a farmer is able to add nitrogen, phosphate and potash to the soil as straight fertilizers or to use those minerals together as NPK fertilizers in a single operation, the extent to which use can be made of those alternatives depends on the soil properties and type of crop in question. However, the possibility that either straight fertilizers or NPK fertilizers can be used does not mean that, from the farmer's viewpoint, potash belongs to the same relevant market as NPK products. This applies equally to straight nitrogen and straight phosphate fertilizers are compared with NPK fertilizers. NPK fertilizers can replace all three straight fertilizers together only to a limited extent. This is due to the fact that a farmer who no longer wants to use straight potash would also in that case no longer be able to use straight nitrogen or phosphate.

(22) However, the three primary nutrients — nitrogen, phosphate and potash — are each subjet to completedy different market and competitive conditions. The price of nitrogen is essentially a function of the price of natural gas. The most important intermediate product for nitrogenous fertilizers is ammonia, for which natural gas is the most important raw material in the processing operation. The share of world nitrogen production attributable to the developing and eastern European countries is incomparably higher than, for example, in the case of potash (developing countries' share of nitrogen production in 1990: 42 %, compared with 3 % for potash).

[1] [1975] ECR 499.

[2] *Loc. cit.* 511.

(23) Phosphate fertilizer is made from crude phosphate which is found primarily in the United States of America and the North African countries. There are no workable crude phosphate deposits in the European Community. Potash deposits are found mainly in North America, the Soviet Union and Europe. Potash fertilizer is produced from mined potash salts.

(24) Taking the raw materials used, therefore, the production price of NPK fertilizers is subject to many other factors compared with the production price of potash fertilizer. Furthermore, NPK fertilizers are also in qualitative and price terms a different product form the sum of the primary nutrients used. The costly chemical process needed to produce NPK fertilizers means that their price is higher than the sum of the same nutrients used as straight fertilizers.

(25) Even if the suppliers of potash were to take account of the prices of NPK fertilizers in setting their prices, the factors involved in the pricing of NPK fertilizers — itself admittedly dependent in turn to some extent on the price of potash — are too diverse for there to be any expectation of a parallel movement between the prices of NPK fertilizers and potash products. This is also shown by a comparison of the Food and Agriculture Organization (FAO) figures for the prices of individual NPK fertilizers and potash prices on the German market during the period 1981 to 1990 (see Annex I).

(26) In their reply to the Commission's communication pursuant to Article 18 of the merger Regulation and in support of their argument that straight potash and NPK fertilizers belong to the same product market, the parties made a graphic presentation of the price development of the individual components N, P and K in Germany during the periods 1980/81 to 1991/92 (Annex II). They subsequently aggregated the prices of the three components into an assumed N + P + K 15 – 15 – 15 fertilizer, that is 15 % N, 15 % P_2O_5 and 15 % K_2O, and compared the development of this aggregate price with the actual prices for corresponding NPK fertilizers over the same time period (Annex II) [1]. According to the parties, the similarities in price development shown in Annex III demonstrate that straight potash and NPK fertilizers are subject to the same competitive pressures.

(27) The Commission does not share this view of the parties for the following reasons. Annex III makes a comparison between the prices for NPK fertilizers and an aggregate price for all three main components. However, in order to demonstrate that NPK fertilizers and straight potash are subjet to the same competitive pressures, a comparison between the prices of NPK fertilizers and the prices of straight potash would be more appropriate. This comparison has been made by the Commission (see Annex I) and shows that the two prices do not develop in parallel.

(28) The Commission's findings shown in Annex I are confirmed by Annex II which the parties themselves have provided. According to Annex II, while there are similarities between the development of the average prices for N and P, the price development of potash follows a completely different pattern and remains relatively stable over the given time period. Moreover, the prices for potash are much lower than the prices for N or P. This indicates that, compared to other ingredients, the price of potash is much less important in terms of total costs and would not therefore be expected to affect the price of NPK fertilizers to a significant degree.

(29) In view of the above, the Commission has come to the conclusion that the market definition originally put forward by the parties should be maintained. According to that definition, there is a relevant market for potash, covering potash supplies to the agricultural community and to the producers of compound fertilizers.

3. *Magnesium products*

(30) The production of magnesium products is linked to potash extraction and processing. Such products can be used in industry or as fertilizers in agriculture. When used for industrial purposes, they can be replaced only very rarely by other minerals. In plant nutrition, magnesium constitutes an essential nutrient which is not interchangeable with others. The product group comprises magnesium sulphate, bitter salt, mangesium chloride and kieserite. The Commission considers that magnesium products as a whole belong to a different relevant market than, for example, potash products.

[1] Both Annexes provided by the parties are based on the data of the Federal Office of Statistics regarding the consumption of commercial fertilizers. Annex I was prepared by the Commission on the basis of a different source, that is, FAO statistics. The data for MOP are based on prices per K_2O, while the data for NPK are based on prices per tonne effective of compound fertilizers.

B. Relevant geographic market

1. *Potash*

(31) In the Community, potash is extracted mainly in four countries: Germany, France, Spain and the United Kingdom. Total potash consumption, including potash for agricultural and industrial purposes, is by far the highest in France, followed by Germany and the United Kingdom. While output in Germany (1992: approximately 3 500 kt of K_2O) amounts to more than four times domestic needs and in Spain to approximately twice domestic needs, production in France is not sufficient to cover domestic needs.

(a) Germany

(32) The Commission believes that Germany constitutes a distinct relevant market for potash products used for agricultural purposes. There have been, and there continue to be, no significant imports of potash into the German market. The supplies to Germany made by the Israeli company DSW and mentioned in the notification are supplies to the DSW subsidiary Amfert, which are intended for captive use, that is, the production of compound fertilizers. An insignificant volume of imports reaches the market from the United Kingdom company CPL, these consisting of occasional supplies to a few bulk blenders in northern Germany. The volume of such imports is well below [...](1) of K_2O. Besides that, only isolated imports from Belarus and Russia have been identified. According to the figures available, these supplies too totalled less than [...](2) of K_2O last year. It is doubtful whether they are continuing, following the adoption of the anti-dumping Council Regulation (EEC) No 3068/92 (3).

(33) This situation contrasts with that in other Member States. In appears that this is due primarily to the fact consumption in Germany has traditionally been concentrated on potash products containing magnesium, such as 'Korn-Kali', which are produced only in Germany. In addition, there are long-established links between German suppliers and their customers, the latter consisting primarily of a relatively small number of agricultural co-operatives (Raiffeisen). High transport costs within Germany give local producers an advantage due to the geographical proximity of their mines and distribution points to German customers. In addition, the possible threats to security of supply and maintained quality standards posed by imports mean that customers in Germany do not switch to foreign supplies. A final contributory factor is that, with output far exceeding domestic requirements and with imports thus made unnecessary, the German market is seen by foreign potash producers as largely unassailable.

(34) The view that Germany constitutes a distinct relevant geographic market is confirmed by the answers given by customers in Germany to request for information made by the Commission. The majority of customers stated that a switch to purchasing imported potash was only a very limited possibility for them. The prime reasons cited for this were as follows:

— potash products containing magnesium were available only from German production sources;

— where other products such as K_6O were required, imported products, in particular from outside the Community, lacked the necessary quality and security of supply;

— there were logistical advantages in the geographic proximity of suppliers in that supplies were rapid, reliable and inexpensive in terms of transport costs.

(b) Community apart from Germany

(35) The abovementioned market situation in Germany contrasts with that in other Member States. Those Member States which have no domestic potash reserves are naturally dependent on imports and are thus open to Community-wide competition. Three Member States, the United Kingdom, France and Spain, each have their own potash deposits (Italkali only produces SOP), but, unlike Germany, they import considerable amounts from other Community countries and in some instances from third countries.

(36) Unlike Germany, the British market is not a specialist market, since domestic demand is satisfied by potash products also available from sources outside the United Kingdom. The British potash producer CPL has a much lower share of its domestic market than the German producers [...](4). Considerable amounts of potash are imported from Germany, K + S and MdK having a combined share of the UK market of [...](5).

(37) Imports into France amount to [...](6) of domestic sales. Imports from other EC countries amount to [...](7) of domestic sales. These imports are largely channelled through the French company SCPA. In the case of direct imports from countries outside

(1) Insignificant.
(2) Insignificant.
(3) OJ No L 308, 24. 10. 1992, p. 41.
(4) Approximately 50 %.
(5) Approximately 40 %.
(6) Approximately 50 %.
(7) Approximately 30 %.

the Community, SCPA has a statutory monopoly on marketing in France. In the case of supplies from Germany, SCPA is the main middleman for domestic marketing. K + S specialty products, i.e. magnesium-containing potash fertilizers, are for instance channelled through SCPA.

(38) The Commission does not, however, consider that France should be regarded as a distinct relevant geographic market. France is dependent on potash imports, since domestic production is not sufficient to cover domestic demand. There are significant imports of potash into France from the United Kingdom and Spain which are not channelled through SCPA [...](1) of domestic sales. SCPA does not control domestic distribution to the same extent as K + S in Germany, imports taking place either in the form of direct sales to compound fertilizer producers or through distribution channels other than SCPA's domestic network (CPL for instance sells granular potash through the French company Timac). Finally, unlike the situation in Germany, the range of potash fertilizers that France mines are able to produce is also available from sources outside France, and to the extent that there is domestic demand for speciality products, these have to be imported from Germany. In this context, the channelling of imports from Germany through SCPA, appears to be due to a large extent to the existing links between K + S and SCPA. As is explained in more detail below, these links stem primarily from cooperation in the export cartel Kali Export GmbH and in the joint venture Potacan. In view of the abovementioned characteristics of the French market, it is not clear why, without these links, K + S should not enter the market independently.

(39) The Spanish producer, Coposa, has a very high share of domestic sales [....](2). However, unlike Germany, Spain imports significant amounts of potash from within the Community (CPL has a share of [....](3) of the Spanish market) and to a lesser extent from third-country prodcers such as Dead Sea Works. These imports have increased over the years and resulted in a corresponding decrease in Coposa's market shares. Moreover, unlike the situation in Germany, Spanish potash reserves yield a product range also available from sources outside Spain.

(40) More generally, the Community market outside Germany is characterized by significant trade flows between individual Member States. In particular, there are exports of potash products from the United Kingdom to France, Spain, Denmark, the Netherlands and Belgium/Luxembourg; from Spain to France, Italy, Portugal and Ireland; from Germany to France, the United Kingdom, Italy, Denmark, the Netherlands, Belgium/Luxembourg, Ireland and Portugal, and from France to Italy, the Netherlands, Belgium/Luxembourg and Ireland.

(41) This cross-border movement of potash products is, in the opinion of the Commission, the result of essentially homogeneous competitive conditions throughout the Community outside Germany. On the demand-side, consumers in the various Member States apart from Germany use potash products that are largely interchangeable. As explained under paragraph 14, there are two groups of customers for potash products: there is demand, on the one hand, from producers of compound fertilizers for the standard product, and, on the other hand, from farmers and bulk blenders for the granular product. In certain parts of the Community, the market for granular potash is mainly for straight application (e.g. in the Netherlands) while in others bulk blending is better established (e.g. in the United Kingdom and Ireland). Although product specifications may vary slightly from producer to producer, the different types of standard or granular potash are largely interchangeable as far as consumers are concerned. In no Member State other than Germany do consumers have a marked preference for speciality products that are only available from local producers.

As far as distribution in the various Member States outside Germany is concerned, potash is either transported direct from the mine (direct sales to customers, such as compound fertilizer producers) or is sold through local agents. Community suppliers selling in local markets use both of these distribution methods and no barriers to entry at the distribution level similar to those in Germany appear to exist.

(42) The analysis of transport costs within the Community as well as the comparison of potash prices in different Member States also indicate that the rest of the Community outside Germany should be considered as one relevant geographic market for potash. As far as transport costs are concerned, these tend to vary from case to case depending on the mode of transport used, the distance from the mine to the place of delivery and the quantities transported. In any case, they do not appear to be of a level capable of preventing significant trade flows within the Community outside Germany. For instance, in 1992 K + S's own costs for transportation within Germany, 75 % of which were attributable to rail transport costs, were not significantly higher than its costs for transportation to other Member States (about 14 % of sales revenue in Germany compared to e.g. 16 % for transport to the Netherlands, 17 % to France, 20 % to Denmark).

(1) Approximately 20 %.
(2) Approximately 80 %.
(3) Approximately 10 %.

(43) Finally, as far as intra-Community potash prices are concerned, it appears that there is no appreciable difference in the price level obtaining in different Member States with the exception of Germany, where prices appear to be significantly higher. In particular, according to data provided by FAO, on a three-year average (1987 to 1989) MOP prices per K_2O in individual Member States except Germany did not differ significantly. By contrast, German prices for MOP were more than 20 % higher than those in other Member States (for example, prices were about 20 % lower in France and Spain and 24 % lower in the United Kingdom). Moreover, according to information provided by the parties, 1992 prices charged by K + S for Korn-Kali and Kali granular 40/8 in Belgium and the Netherlands for example were roughly the same, but compared to the German prices for the same products they were respectively 15 % and 20 % lower.

(44) In the light of the above, the Commission has therefore come to the conclusion that the rest of the Community outside Germany constitutes a distinct relevant geographic market for potash.

The abovementioned high market shares enjoyed by each Community potash producer in its own domestic market or the fact that the market shares of Community suppliers differ in the various parts of the Community do not detract from this conclusion. In view of the abovementioned homogeneity of market conditions throughout the Community outside Germany and the absence of barriers to entry into the various Member States, the Commission considers that the extent to which individual Community suppliers are present in various regions does not point in the direction of separate national markets but can be attributed to historical or strategic commercial reasons.

2. *Magnesium products*

(45) There is no need for a decision as to whether the market for magnesium products is a Community-wide market or whether there are separate national markets. Even on a Community-wide basis, only K + S and MdK are really active on this special market.

C. Effects of the merger

1. *Potash*

(a) Germany

(46) It can be assumed that the merger will lead to a *de facto* monopoly on the German market for potash used for agricultural purposes. Leaving aside the amounts earmarked to meet own requirements, the overwhelming majority of which consist of intra-group supplies made by K + S to BASF, K + S has a market share of [...] (1) and Mdk one of [...] (2). This gives a combined market share of 98 %. CPL has a market share of [...] (3), and imports from Belarus and Russia together also amount to [...] (4). These market shares on the German market suggest that K + S already has a dominant position which will be strengthened by the merger.

(47) The parties point out in this connection that, despite the lack of imports, the two German potash producers would have no room for manoeuvre in pricing since they would have to align themselves on world market prices. While it can be accepted that the price-setting of the two German suppliers on the domestic market is not completely detached from world-market price trends, it is doubtful whether the room for manoeuvre in the product of the merger company would be constrained to that extent. Even the price examples for Kali 60 granular given by the parties show that, given identical freight terms, the K + S price was in each case some 10 % or more above that of foreign suppliers. It should be borne in mind here that these were rival offers which K + S matched in order to prevent foreign suppliers from gaining a foothold on the German market. The price examples do not correspond to the general domestic prices charged by K + S and, moreover, relate to a product which has no magnesium content and is thus untypical of the German market. A comparison of the general price data submitted by the parties (position at 24 March 1992) shows, for example, that the net selling price charged by K + S for 'Korn-Kali' in Germany was consistently about 20 % higher than that in other Member States.

(48) Again, where the parties argue that compound fertilizers exert competitive pressure on the supply of straight potash fertilizers, it would seem to be doubtful whether there is sufficient constraint on the room for manoeuvre of K + S/MdK. As pointed out, the movement of NPK fertilizer prices depends on a series of factors which are not connected with straigth potash. Furthermore, even if the parties' market definition described above

(1) Approximately 80 %.
(2) Approximately 20 %.
(3) Approximately 1 %.
(4) Approximately 1 %.

were adopted, potash contained in imported compound fertilizers would have a market share of only (1). This would still leave K + S/MdK with a market share of the order of 75 %. There is the further fact that importers of compound fertilizers, such as Norsk Hydro or Agrolinz, in turn buy a considerable proportion of the potash used for producing these products from K + S or MdK.

(49) Finally, the parties themselves have also stated that, even if, without the merger, MdK were to leave the market, other suppliers could not be expected to gain a foothold in the German market to any significant extent. Because of such factors as product quality, security of supply and customer service provided by the German potash producers, it would have to be assumed that any end to supplies from a German producer would be made good by supplies from another German producer.

(50) On the basis of the above, the Commission has therefore come to the conclusion that after the proposed concentration the dominant position enjoyed by K + S on the German potash market will be strengthened. However, for the reasons outlined under paragraphs 70 to 90, the proposed concentration is not the cause of this deterioration of the competitive structure.

(b) Community apart from Germany

(51) A look at the relevant market consisting of all Community countries other than Germany shows that there would be two major suppliers following the proposed merger, K + S/MdK and SCPA, the French potash distributor and subsidiary of the EMC Group which also owns the French potash producer Mines de Potasses d'Alsace. The merged company K + S/MdK and SCPA together account for 80 % of potash production in the Community as a whole (K + S 35 %, MdK 25 % and SCPA 20 %).

(52) On the Community market excluding Germany, the market shares of the merged company and SCPA, calculated on the basis of sales from own production (excluding own consumption), give a combined market share of about 50 % [...](2) for K + S, [...](3) for MdK and [...](4) for SCPA). However, this takes no account of the fact that SCPA markets a considerable amount of potash stemming form other producers, and in particular imports from third countries. A calculation based on the total sales controlled by K + S/MdK and SCPA in the Community apart from Germany gives a combined market share of about 60 % ([...](5) for K + S, [...](6) for MdK and [...](7) for SCPA).

(53) This market share is likely to increase further in future. The last independent Canadian potash producer, SPCA, was recently acquired by the Canadian company PCS which belongs to the Canadian export cartel Canpotex, whose supplies to France and Ireland are chancelled through SCPA. Moreover, in calculating the parties' market share the Commission took into account imports from the Community of Independent States (CIS) into the Community, which in 1992 accounted for a share of [...](8) of the Community market excluding Germany ([...](9), if the calculation does not include CIS imports channelled through SCPA). It appears, however, that at least some of these imports have declined following the adoption of the anti-dumping Regulation (EEC) No 3068/92. This was, for instance, the case with regard to the Community sales of Ferchimex, which is the official distributor of CIS potash in the Community, whose sales in the course of 1993 amounted to less than [...](10) of the sale in 1992.

(54) Supply outside the K + S/MdK and SCPA grouping is fragmented. Of the Community producers, the United Kingdom company CPL has the highest market share [...](11). However, CPL operates only one potash mine which is already being run at almost full capacity. As there are no signs of any future capacity expansion and as, according to details provided by the parties, such expansion is impossible in the short term, CPL would not be able to increase its sales to any significant extent in order to gain a market share from the K + S/MdK and SCPA group.

(55) The Spanish company Coposa has a low market share in the Community excluding Germany [...](12). Its main marketing territory is Spain and South America. Its capacity of production is much smaller than that of the leading group K + S/MdK and SCPA and will be further reduced, because one of its mines is expected to close next year. The Italian company Italkali produces only potassium sulphate (SOP) and it thus not active on the market for MOP. Furthermore, according to information provided by the parties, Italkali has recently suspended its production until further notice.

(1) Approximately 20 %.
(2) Approximately 15 %.
(3) Approximately 10 %.
(4) Approximately 25 %.
(5) Approximately 15 %.
(6) Approximately 10 %.
(7) Approximately 35 %.
(8) Approximately 10 %.
(9) A few percentage points less.
(10) Considerable decrease.
(11) Approximately 15 %.
(12) Approximately 10 %.

(56) Third-country potash producers have each a small market share of the Community market outside Germany. The Israeli potash producer DSW imports into the country having the biggest consumption, France, through SCPA. Its free market share in the Community excluding Germany is [...] (1). As indicated above, the Canadian producer PCA, whose market share is [...] (2), was taken over by a member of the export cartel Canpotex. The free market share of Canpotex is [...] (3). The same applies to the Jordanian potash producer ACP, there are no indications that these imports will increase in the future. In any event, in France, which is by far the largest potash-consuming country in the Community (more than 40 % of total Community sales) all direct third-country imports have to be channelled through SCPA. This gives SCPA control over future supplies from outside the Community. With regard to CIS imports in particular, as indicated above, it is doubtful whether they will continue at the same level, following the adoption of Community anti-dumping measures. In any event, it appears that the competitive pressure these imports will be able to exert on the K + S/MdK and SCPA group may be limited due to quality considerations and difficulties in guaranteeing a prompt and exact date of delivery.

(57) There are many indications to suggest that there will be no effective competition between K + S/MdK on the one hand and SCPA on the other. The potash market is a mature commodity market characterized by a largely homogeneous product and the lack of technological innovation. The market circumstances are very transparent, information on production, demand, trade and prices being generally available in the industry. In addition, the market shares of K + S and SCPA have been stable over the last four years (according to information provided by the parties). Finally, in the past there was an agreement between K + S and SCPA relating *inter alia* to the joint determination of the quantities and qualities of potash products exported by each party. That agreement was declared incompatible with Article 85 of the EEC Treaty by Commission Decision 73/212/EEC (SCPA/Kali und Salz) (4). In this context, it should, however, be noted that, subsequent to his decision and despite over-production in Germany, there is still little cross-border trade from Germany into France that is not channelled through SCPA. The abovementioned characteristics of the market and the record of the past behaviour of K + S and SCPA indicate that the merger, which would involve the addition of MdK's market share in the Community outside Germany, would lead to a situation of oligopolistic dominance by the K + S/MdK and SCPA group. However, the main reason for assuming an absence of real competition between K + S and SCPA is the existence of exceptionally close links between the two companies extending over a long period of time. These links are a particular feature of the present case.

(58) The two companies run a joint venture in Canada (Potacan), whose subsidiary, PMC, had an output of about 800 kilograms of K_2O in 1992, equivalent to a large part of SCPA's total production. On the basis of the joint venture agreement, each party has 50 % of the shares and joint control of Potacan which acts as the exclusive marketing agent and sales operator for all products of the joint venture mine, which is located in New Brunswick. Potacan holds 100 % of the shares of PMC, which is the owner of the mine.

(59) Although Potacan has so far not supplied the Community, the favourable location of its PMC-run mine in New Brunswick means that it is especially well suited, from a transport viewpoint, to exporting potash to the Community. It can be assumed that such exports will start up in the near future. According to information provided by the parties, SCPA will close a further mine as early as 1996 owing to depletion of the deposits there. Over the next 10 years, SCPA's potash reserves will be entirely exhausted. Against this background, it is clear that potash supplies from the joint venture Potocan will be of key importances to SCPA. The joint venture has been notified to the Commission pursuant to Council Regulation No 17 (5). The Commission has recently communicated to the parties a Statement of Objections pursuant to Article 85 of the Treaty regarding Potocan.

(60) K + S and SCPA cooperate in the export cartel Kali-Export GmbH in Vienna, which coordinates its members' sales of potash products in countries outside the Community K + S, EMC/SCPA, MdK and Coposa each have a 25 % interest in Kali-Export GmbH. It is impossible that this cooperation may also have an indirect impact on the competitive behaviour of the cartel members in the Community. The United Kingdom potash producer CPL thus started to sell independently on the French market only after it had left the export cartel in 1987, because it could not reconcile the planned direct competition with SCPA in France with continued membership of the cartel.

(61) Finally, K + S has maintained long-established supply links with SCPA, as a result of which K + S potash products sold in France have been marketed

(1) Approximately 5 %
(2) Approximately 5 %.
(3) Approximately 1 %.
(4) OJ No L 217, 6. 8. 1973, p. 3.

(5) OJ No L 13, 21. 2. 1962, p. 204/62.

through SCPA. According to information it has itself provided, K + S maintains a closely knit customer-oriented distribution network in the Community. The special situation in the sales region of France, which is reflected in the channelling of supplies through SCPA, also points to a restricted competitive relationship between K + S and SCPA.

(62) To sum up in light of the above it does not appear that effective competition between K + S and SCPA is likely to occur. On this basis, the Commission has come to the conclusion that K + S's takeover of MdK, the second-largest EC producer, will lead to the creation of a market-dominating duopoly. As pointed out K + S/MdK and SCPA would control almost two-thirds of potash sales on the Community market excluding Germany. The other suppliers are fragmented and do not have the sales base necessary to hold their own against a K + S/MdK and SCPA duopoly on that market.

(63) Following the Commission's Communication pursuant to Article 18 and in order to remove its concern that the merger would create a situation of oligopolistic dominance on the Community market excluding Germany, the parties have offered the following commitments:

'— *Kali-Export GmbH, Vienna*

K + S and the joint venture will withdraw without delay from Kali-Export GmbH in Vienna [...] (1).

In the same way K + S and the joint venture will terminate the existing agency contract with Kali-Export GmbH on [...] (2) in accordance with the termination arrangements provided for therein. After that date, the joint venture will enter into competition with Kali-Export GmbH via its own distribution organization [...] (3).

— *Distribution*

K + S and the joint venture will establish in the Community their own distribution organization — where not already in existence — and will distribute their products through this distribution network in accordance with normal commercial practice. A distribution organization will be established in France for potash products, including potash specialities.

This will cover the whole of the French market and its nature and size will be commensurate with the importance of the French market. Its establishment will conform to the principle of economic efficiency.

The current cooperation with SCPA as distribution partner in the French market will be terminated [...] (4). It will be possible on the one hand for SCPA to fulfil contracts already agreed with its own customers and on the other hand, for the joint venture to build up its own distribution organization. The sale to SCPA on normal market conditions is allowed'.

(64) The abovementioned commitment by K + S/MdK to withdraw from Kali-Export GmbH will ensure that cooperation between K + S and EMC/SCPA within the framework of the export cartel is discontinued. K + S's commitment to establish its own distribution organization will have the result that K + S becomes an independent competitor of SCPA. Obligations attached to this decision will ensure that the parties comply with these two commitments.

(65) Furthermore, in acknowledging the Commission's concerns about the negative effects of the merger on the conditions of competition within the Community, K + S has undertaken to adapt until 30 June 1994 the structure of Potacan in such a way as to enable each partner to market the potash obtained from Potascan independently of each other on the Community market.

(66) Within the structure of Potacan, it is particularly important for EMC/SCPA to be able to market potash from the PMC mine within the Community since its domestic potash reserves will be completey exhausted in the next 10 years. The guarantee must exist that EMC/SCPA is able to have access to its own sources of potash through PMC for the EC market and to market these in the Community, without being subject to approval by K + S. An appropriate arrangement in this respect can of course only be reached in agreement with EMC. In the abovementioned commitment regarding Potocan, K + S has proposed one of several possible arrangements that could meet the requirements of the Commission acknowledged by K + S. The arrangements to the negotiated by K + S and EMC/SCPA in this respect can also take other forms that would equally satisfy these requirements. K + S has therefore also committed itself to implementing any other appropriate solutions which could gain EMC's approval.

(1) Deleted business secrets regarding details of implementation.
(2) Deleted business secrets regarding details of implementation.
(3) Deleted business secrets regarding details of implementation.
(4) Deleted business secrets regarding details of implementation.

(67) The Commission has decided not to impose a formal obligation based on the commitment regarding Potacan. It has taken note of this commitment and it will proceed on the assumption that K + S will use its best efforts to reach, in agreement with EMC, an arrangement which will meet the abovementioned requirements. In this context, it must be noted that EMC/SCPA is not a party to the present merger proceedings. Moreover, K + S and EMC have notified the Potacan joint venture to the Commission under the provisions of Council Regulation 17/62. In the course of the latter proceedings, to which both undertakings are party, the Commission has recently communicated a Statement of Objections to K + S and EMC, in which it expresses its doubts as to the compatibility of the Potacan joint venture with Article 85 of the EC Treaty. These doubts also essentially relate to the coordination between K + S and EMC with regard to the use of PMC's production capacities for future supplies in the Community, which is considered to take place in the joint venture in its present form. In the event that K + S is not able to reach an agreement with EMC, despite K + S's best efforts, an appropriate solution of the competition problems arising from the current form of the Potacan joint venture is to be found in the proceedings under Regulation No 17/62.

(68) The implementation of the abovementioned commitments will have the result that the existing links between K + S and EMC/SCPA are severed. On the basis of these commitments, the Commission has come to the conclusion that the existing concerns regarding the effects of the merger on the Community market for potash outside Germany will be removed. In this respect, the merger can therefore be declared compatible with the common market. This decision is, to the extent described above, subject to conditions and obligations to ensure that the parties comply with the commitments they have entered into *vis-à-vis* the Commission.

2. *Magnesium products*

(69) Following the merger, K + S and MdK will be the only producers of magnesium sulphate and kieserite in the Community. If these products are combined with the products bitter salt and magnesium chloride (solution), the result will be a Community-wide market with a sales volume of [...](1). K + S and MdK hold respective market shares of [...](2) and [...](3) on this market. The combined market share of [...](4) shows that the merged company will have a dominant position on this special market.

(1) Approximately DM 100 million.
(2) Approximately 80 %.
(3) Approximately 10 %.
(4) Approximately 90 %.

D. **Rescue merger**

(70) The parties have argued that, without the merger, MdK would soon be forced out of the market and that the market shares then becoming available would essentially go to K + S. The requirements for the application of the 'failing company defence', according to which the creation or reinforcement of a dominant position has to be accepted under merger law in such circumstances, would then be satisfied.

(71) In this context, the Commission considers that this line of argument can be taken into account pursuant to Article 2 (2) of the merger Regulation, as far as the causality of a concentration for the creation or strengthening of a dominant position is concerned. A merger which should normally be considered to lead to the creation or reinforcement of a dominant position on the part of the acquiring firm can be regarded as not causing such a position on the market if, even in the event of the merger's being prohibited, the acquirer would inevitably achieve or reinforce a dominant position. Accordingly, a merger generally is not the cause of the deterioration of the competitive structure if it is clear that:

— the acquired undertaking would in the near future be forced out of the market if not taken over by another undertaking,

— the acquiring undertaking would take over the market share of the acquired undertaking if it were forced out of the market,

— there is no less anticompetitive alternative purchase.

In a situation where, as in this case, a merger leads to a *de facto* monopoly on the market, it is particularly important that the three conditions should be met.

(72) The lack of causality means that it is the disappearance of the failing company, which would be unavoidable even in the event of the concentration's being prohibited, and not the concentration itself, which creates or strengthens the dominant position. In those circumstances, the legal consequences provided in Article 2 (3) do not apply. Such a situation occurs, however, only in exceptional cases. Normally, there would be a presumption that a concentration which results in the creation or strengthening of a dominant position is the cause of this deterioration of the competitive structure. Consequently, the burden of proof for a missing link of causality lies with the merging undertakings.

1. *MdK's withdrawal from the market*

(73) The parties have submitted that MdK is in an extremely critical economic situation. Although capacity has been cut by one-third since 1990, utilization of the firm's potash capacity is currently only around 50 %. In MdK's first financial year from 1 July 1990 to 31 December 1991 losses reached [...](1) of the turnover. In 1992, this percentage increased to [...](2). However, the result in that year was influenced negatively by special measures, for example, reserves for mining-subsidence damage and the complete deduction for depreciation of mines closed down and mines that have to be closed down. But even after the restructuring completed by 1 January 1993 losses in the first half year of 1993 amount to [...](3) of the turnover. On 31 July 1993 the operating costs already exceeded sales revenue by [...](4). If interest is taken into consideration, this figure amounts to [...](5).

(74) Those immense losses are on the one hand due to the fact that most of the plants are too old and have accordingly high production costs. Furthermore, there is a high rate of employment and a lack of storage capacity. The losses are also due to a considerable decrease in sales. In 1992, sales were 28 % below the 1991 forecasts and in 1993, they are expected to be 46 % down on the forecasts. While overseas sales in 1992 were 8 % up on the forecasts, they will be 18 % down on them in 1993, and while sales in western Europe in 1993 will also be a comparatively slight 10 % down on the forecasts, sales in eastern Europe have slumped dramatically. Eastern European sales in 1992 were 76 % down on the forecast and will be 88 % down in 1993.

(75) MdK's current economic situation is accordingly mainly a result of the firm's operating structure and a crisis in sales attributable primarily to the collapse of markets in eastern Europe. In addition, MdK's sales on the German market have fallen quite substantially, since, following German unification, supplies to the old Länder have come to a virtual halt. Furthermore, MdK does not dispose of an efficient distribution system.

(76) In the actual economic situation, MdK would not seem to be able to survive. The undertaking could not continue to operate without the Treuhandanstalt which has covered the losses until now. A long-term covering of losses by the Treuhandanstalt using State aids for an undertaking that is not competitive cannot be expected. Furthermore it would not be compatible with the State aid rules of Articles 92 and 93 of the EC Treaty, and in particular the Commission decisions adopted in 1991 and 1992 pursuant to those Articles and relating to the measures taken by the Treuhandanstalt. It is also likely that MdK on a stand-alone basis would continue to make losses, even if it were given the same amount of financial aid for restructuring by the Treuhand that was made available for the proposed concentration. Without an acquisition by a private industrial partner with the necessary management expertise and in the absence of synergies, a rescue of MdK would appear to be impossible in the long term. In this case, it is at least to be expected that the costs of restructuring would be higher than the aid provided for the merger. The explanation of the Treuhandanstalt as to why it will close down MdK completely if it could not be sold to a private undertaking therefore seems to be convincing and is relevant as far as the lack of causality is concerned. An administration charged with privatization cannot be expected to rescue with extraordinary high aids one of its own undertakings that cannot be expected to survive and to hold it in the long term as a State-owned company.

(77) The Commission therefore is of the opinion that there is sufficient proof that MdK will withdraw from the market if it is not taken over by a private undertaking. Even if this does not happen immediately, for social, regional and general political reasons, a closure of MdK is to be expected in the near future with a sufficient degree of probability. In view of the special conditions of the case which concerns the privatization of a State-owned enterprise which cannot be considered as competitive by normal standards, the Commission is of the opinion that the first condition of the lack of causality as mentioned above has to be considered to be fulfilled.

2. *Accrual of MdK's market share to K + S*

(78) As convincingly argued by the parties and in accordance with the facts known to the Commission, it is reasonable to suppose that MdK's share of the German potash market would accrue to K + S if MdK had to withdraw from the market. As explained above, the German potash market is sealed off against competitors from other countries because of a number of structural factors. Since, as the parties have submitted, K + S could increase its potash production without any further expenditure and become the sole supplier of the German market, MdK's market share would in such circumstances go to K + S. The same conclusion has been reached in respect of the special market for magnesium products where basically only K + S and MdK are active.

(1) Between 25 and 50 %.
(2) More than 75 %.
(3) Between 25 and 50 %.
(4) Between 25 and 50 %.
(5) Between 50 and 75 %.

(79) As far as MdK's market position in the Community outside Germany is concerned, it is not sufficiently clear that, if MdK were no longer on the market, the competitive situation would essentially be identical to the situation that would exist if the proposed merger took place. The parties argue that the similarity of the products of MdK and K + S and the similarity of the commercial relations with at least one German supplier indicate that former MdK clients will buy from K + S. This argument does not take into consideration the fact that the major part of Kali exports made by MdK to the Community outside Germany concerns Kali 60 and not the magnesium-containing specialty products exclusively offered by German producers. In the light of the above, the Commission considers that the conditions for the lack of causality as described in paragraph 71 are not fulfilled with regard to the deterioration of the competitive structure in the Community market outside Germany.

3. *Alternative purchasers*

(80) In the opinion of the Commission, it is established with sufficient certainty that a purchase of all or a substantial part of MdK by companies other than K + S can be discounted. The existing offer of the Peine Group to take over the Bischofferode mine cannot in this context be considered as a possible alternative, because it does not relate to a substantial part of MdK.

(a) Alternative acquisition of all or a substantial part of MdK

(81) As the parties have demonstrated, as part of the privatization of MdK 48 firms worldwide were approached by Goldman Sachs International Limited, which was responsible for inviting tenders. Of these 48 firms, 19 expressed an interest and received a confidentiality declaration with a summary of the purchase options. This declaration was signed by the 19 firms who then received the offering memorandum. The parties have submitted that, subsequently, intensive talks were held with only three interested parties, namely K + S, Potash Corporation of Saskatchewan (PCS) and EMC. The negotiations with PSC and EMC did not, however, get beyond the intial stage.

(82) According to the detailed records of the privatization process passed on by the Treuhandanstalt, the Commission has come to the conclusion that Goldman Sachs made a great effort to interest as many firms as possible in purchasing MdK. Even those firms which clearly hesitated to express an interest were sent repeated reminders. On top of the offering memorandum, firms which expressed a corresponding interest were given detailed information on MdK. It also appears from the documents that Goldman Sachs and the Treuhandanstalt, despite a basic preference for the privatization of the whole of MdK emphasized the flexibility of the Treuhand and followed up every reasonable possibility, even if it only concerned a substantial part of MdK. Despite this, Goldman Sachs did not succeed in obtaining a firm offer from any firm other than K + S. Lastly, the firms which at the beginning of the privatization process showed a certain interest in MdK distanced themselves from further negotiations.

(83) Despite the intensive aforementioned efforts to interest other firms in an acquisition of MdK, the proof of the non-existence of an alterantive purchaser cannot be supported only by the procedure followed by the Treuhandanstalt and Goldman Sachs. In the context of the examination of a possible lack of causality, it had to be taken into account that the financial support for the K + S/MdK merger was not fully known to the other potential purchasers during the privatization process, because the financial aid given by the Treuhandanstalt was the result of the negotiations with K + S. To be sure, the Treuhandanstalt and Goldman Sachs indicated to all interested potential buyers that the Treuhandanstalt was prepared to provide substantial financial aid going beyond the legal mandatory investment aid. However, no potential buyer could have foreseen the financial magnitude of the aid which was finally agreed. The financial amount agreed in the final stages of negotiation was only communicated to EMC which, at that stage, was the only remaining interested party.

(84) As a result of the above, during the merger proceedings the Commission has therefore approached in particular EMC and PCS as well as other undertakings contacted by Goldman Sachs, which could be assumed to be interested in acquiring all or a substantial part of MdK. All these undertakings gave a clear negative answer to the question whether they would be interested, in the event that the proposed merger could not be implemented, in acquiring all or a substantial part of MdK now that they had been made aware of the financial support promised by the Treuhandanstalt. In the course of the merger proceedings an undertaking with worldwide mining activites, which as a result of a recent reorganization is now also active in the potash sector and which had not previously been contacted by Goldman Sachs, stated to the Commission that it could be interested in acquiring MdK, if it could be guaranteed financial aid comparable to that made available by the Treuhandanstalt for the joint venture. However, following a first examination of its intention to acquire MdK, even this undertaking stated to the Commission that it no longer intended to pursue the possible acquisition of MdK.

(85) Under these circumstances, the Commission is of the opinion that there is sufficient evidence to suggest that an acquisition of all or a substantial part of MdK by any undertaking other than K + S can be ruled out. In view of the results of the first privatization procedure and the Commission's findings in the course of the merger proceedings, the possibility that, in the event of a further call for offers, there might be a serious alternative buyer with a viable business plan appears to be practically excluded. In this respect, it must also be noted that no other undertaking could achieve the same synergies as K + S would be able to realize as purchaser of MdK, because of its geographical location and product range. In these circumstances, it would be unreasonable to prohibit the merger with the prospect of a later possible call for offers after considerable delay following a new but equally unsuccessful privatization procedure. The extremely small possibility that a new interested buyer might appear would be unreasonably disproportionate to the possible damage that would result from the continuing losses of MdK and the persisting uncertainty about the future of the company during the new procedure for receiving offers.

(b) Bischofferode potash mine

(86) Under the business plan agreed K + S and the Treuhandanstalt for the proposed joint venture, the Bischofferode mine, one of MdK's four currently operating potash mines, is to be closed by the end of 1993. After final agreement had been reached between the Treuhand and K + S on the merger, but before the Federal Minister for Finance had given his final authorization, the firm Peine made an offer to the Treuhand to take over the Bischofferode mine. On the basis of a report by the auditing company C&L Treuarbeit, the Treuhandanstalt turned down the offer. Irrespective of whether this appears to be objectively justified, Peine's offer cannot be regarded as an alternative acquisition in the context of a lack of causality.

(87) Bearing in mind the causality considerations outlined above, a merger leading to the creation or reinforcement of a dominant position must take place in such a way as to cause the least possible damage to competition. This means that any alternative partial disposal of the target company which will reduce the deterioration of the competitive structure must as a rule be carried out if the rest of the merger is to be accepted under merger law.

(88) The particular characteristic of this case, however, is that the offer of the Peine group involves that part of MdK which is not included in the activites to be transferred to the joint venture. Peine's proposal is also based on the assumption that the Treuhandanstalt will provide substantial financial support. The implementation of this offer would therefore involve an additional privatization as well as claims for additional State aids, and would not be a partial acquisition of those MdK activities which are to be transferred to K + S and for which the necessary financial resources have been set aside.

(89) Considering a possible lack of causality, the fact that it would be theoretically possible to accept the offer of the firm Peine in the place of the proposed merger between K + S and MdK could not be held against the Treuhandanstalt. According to the Commission, in the context of a lack of causality the Treuhandanstalt must examine an alternative acquisition proposal, even if it is not in all respects identical with the proposed merger. An alternative proposal would therefore have to be considered, even if, compared to the concentration plan, it involved different or even smaller mines of MdK. However, this will only be required if the proposal involves at least a substantial part of MdK.

(90) According to the Commission, a line must be drawn if there is a gross discrepancy between the scope of the privatization proposals. A comparison of the two existing proposals, that is, either to implement the merger plan or to accept Peine's offer, reveals such a discrepancy. While the merger plan concerns 3 000 jobs in total, after the necessary restructuring has taken place, Peine's offer relates to a part of MdK, which, following necessary restructuring, would involve 536 jobs. This amounts to about 18 % of the jobs involved in the merger proposal. If the turnover figures are considered, Peine's proposal is also clearly below 20 % of the K + S/MdK proposal. If, therefore, Peine's proposal were carried out, it would not lead to a comparable alternative acquisition, but to a completely different and much more limited privatization.

VI. NON-COMPETITION CLAUSE

(91) Pursuant to Article 20 of the Framework Agreement dated 13 May 1993 concerning the present concentration, the Treuhandansalt and K + S have entered into a non-competition agreement with the future joint venture. Pursuant to Article 20 (1) of the Framework Agreement the parties bind themselves not to compete, either directly or indirectly, with the joint venture for a period of 10 years. Pursuant to Article 20 (2) the Treuhandanstalt and K + S bind themselves to transfer this non-competition agreement to the purchaser upon the disposal of assets, plant or shareholdings, to the extent that the acquired activities can be used to compete against the joint venture. This non-competition agreement cannot be considered an ancillary restraint within the meaning of the second subparagraph of Article 8 (2) of the merger Regulation and cannot therefore be covered by the present decision on the compatibility of the concentration with the common market, since the non-competition agreement goes far beyond the restrictions directly linked to, and necessary for, the implementation of the concentration.

(92) This is particularly true with regard to the obligation contained in Article 20 (2) to transfer the

non-competition restriction to third undertakings, which acquire activities from the parties that could extend into the field of operation of the joint venture. This makes it impossible for the Treuhandanstalt to carry out the privatization of companies that would be the competitors of K + S/MdK in the potash market. The non-competition restriction further secures and cements the dominant position of the merging companies K + S/MdK. This dominant market position must be accepted, as far as the German market is concerned, on the basis of the abovementioned reasons for lack of causality: however, that agreement cannot justify additional measures that reinforce the limitation of competition brought about by the concentration.

(93) The 10-year duration of the non-competition agreement also goes *ratione temporis* beyond the scope of a restriction of competition which can be regarded as an ancillary restraint within the meaning of the second subparagraph of Article 8 (2) of the merger Regulation. A period of five years is the maximum which as a rule is considered appropriate.

(94) The Commission therefore considers that the decision as to the compatibility of the concentration with the common market does not cover Article 20 of the Framework Agreement.

VII. CONCLUSION

(95) For the abovementioned reasons, the Commission has come to the conclusion that after the proposed merger a dominant position on the German market for agricultural potash will be strengthened. However, it has also concluded that K + S's dominant position would be reinforced even in the absence of the merger, because MdK would withdraw from the market in the foreseeable future if it was not acquired by another undertaking and its market share would then accrue to K + S; it can be practically ruled out that an undertaking other than K + S would acquire all or a substantial part of MdK. The merger is not therefore the cause of the reinforcement of a dominant position on the German market.

Given the severe structural weakness of the regions in East Germany which are effected by the proposed concentration, and the likelihood of serious consequences for them of the closure of MdK, this conclusion is also in line with the fundamental objective of strengthening the Community's economic and social cohesion referred to in recital 13 of the merger Regulation.

(96) If the existing links between K + S and EMC/SCPA were preserved, the merger would lead to the creation of a joint dominant position by K + S/MdK and SCPA on the Community market for agricultural potash outside Germany. The commitments given by the parties will, however, ensure that the existing links between K + S and EMC/SCPA will be severed. The merger can therefore be declared compatible with the common market subject to conditions and obligations ensuring that the parties comply with these commitments.

(97) This declaration cannot cover the non-competition clause contained in Article 20 of the Framework Agreement relating to the concentration,

HAS ADOPTED THIS DECISION:

Article 1

Subject to full compliance with the conditions and obligations contained in the parties' commitments *vis-à-vis* the Commission, set out in paragraph 63 of this Decision, the proposed concentration between Kali und Salz AG, Mitteldeutsche Kali AG und Treuhandanstalt is declared compatible with the common market.

Article 2

This declaration does not cover the non-competition clause contained in Article 20 of the Framework Agreement relating to the concentration.

Article 3

This Decision is addressed to:

— Kali und Salz AG
Friedrich-Ebert-Straße 160
D-34119 Kassel,

— Mitteldeutsche Kali AG
Schachtstraße 62-65
D-99701 Sondershausen,

— Treuhandanstalt
Leipziger Straße 5-7
D-10117 Berlin.

Done at Brussels, 14 December 1993.

For the Commission

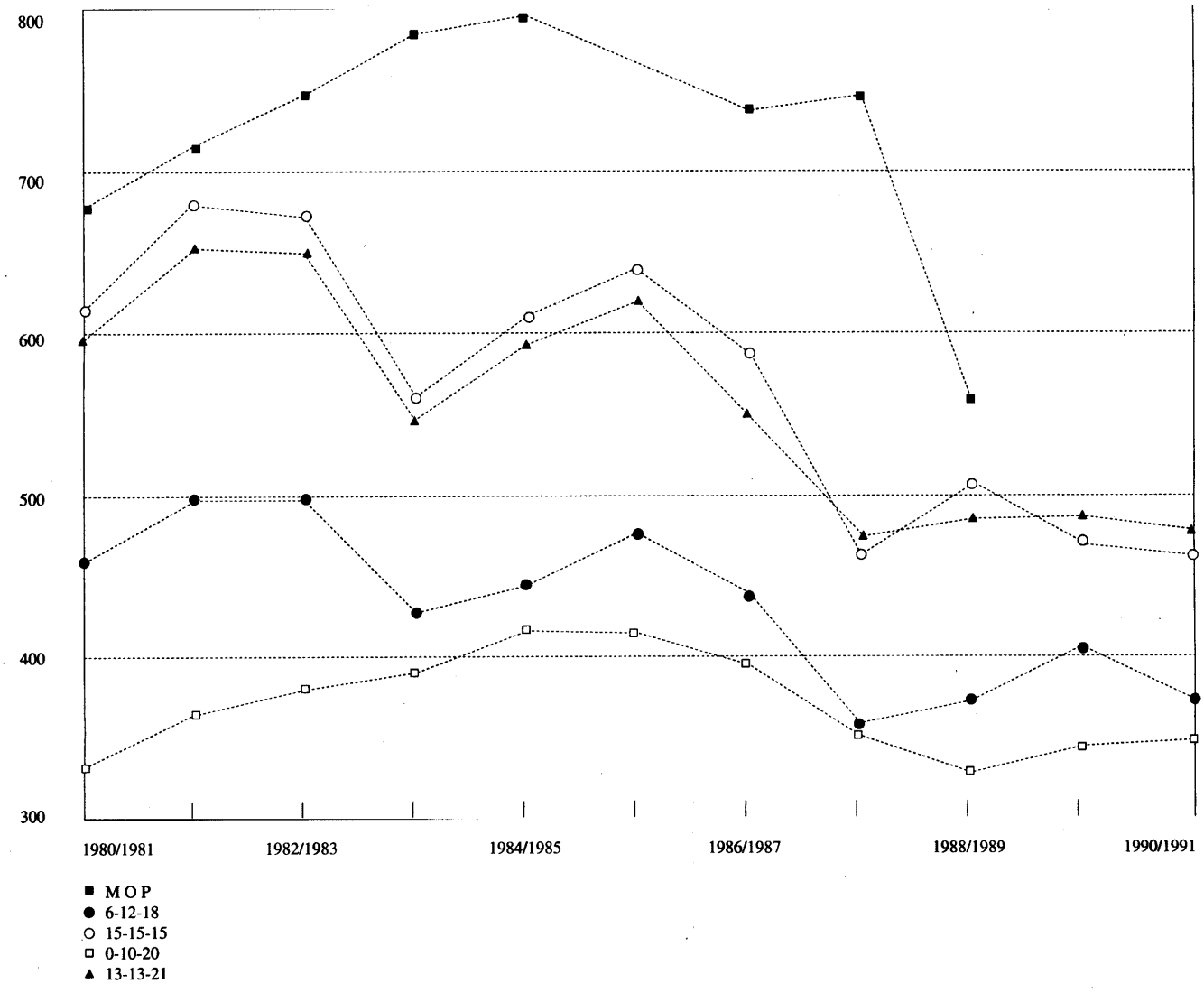
Karel VAN MIERT

Member of the Commission

ANNEX I

Prices in Germany for MOP and fertilizers

(DM)

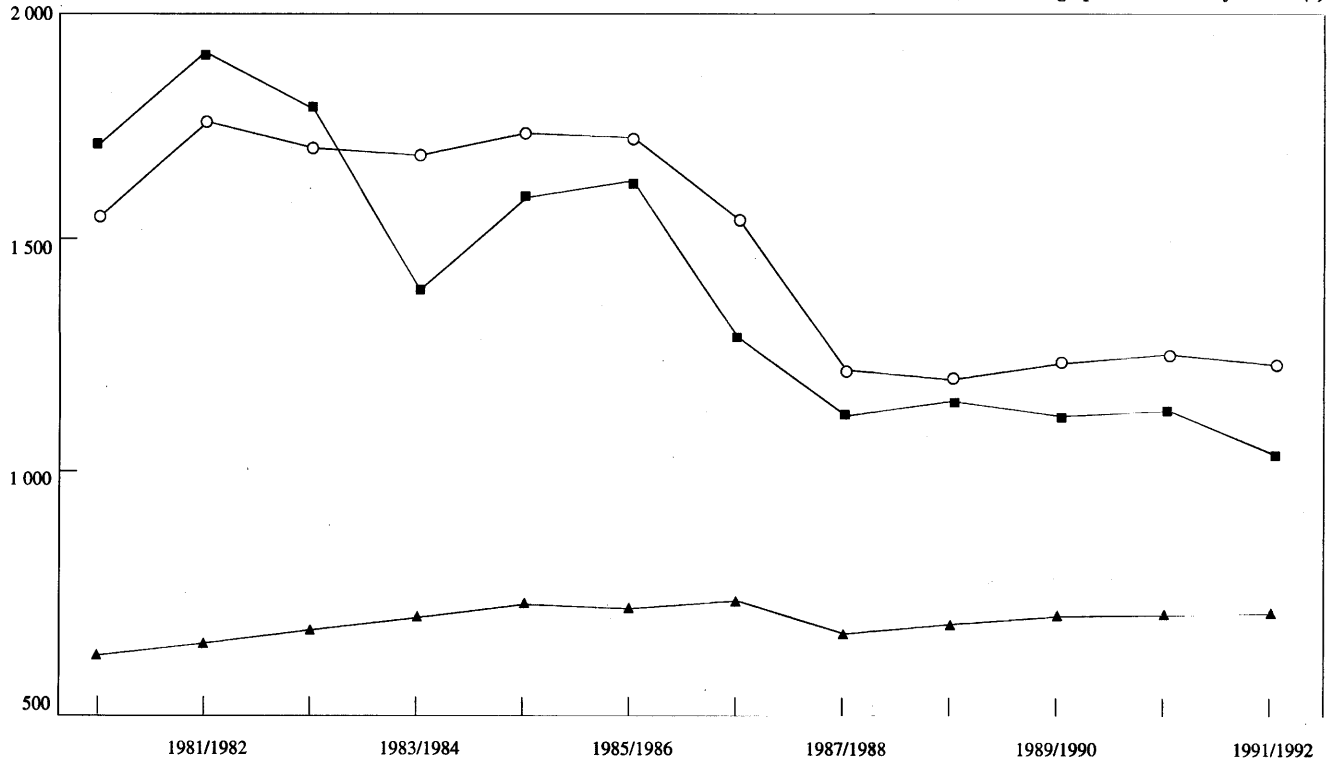


Source: FAO-Rome.

ANNEX II

Fertilizer prices in Germany

N, P, K: Average prices in DM/t fertilizer (*)



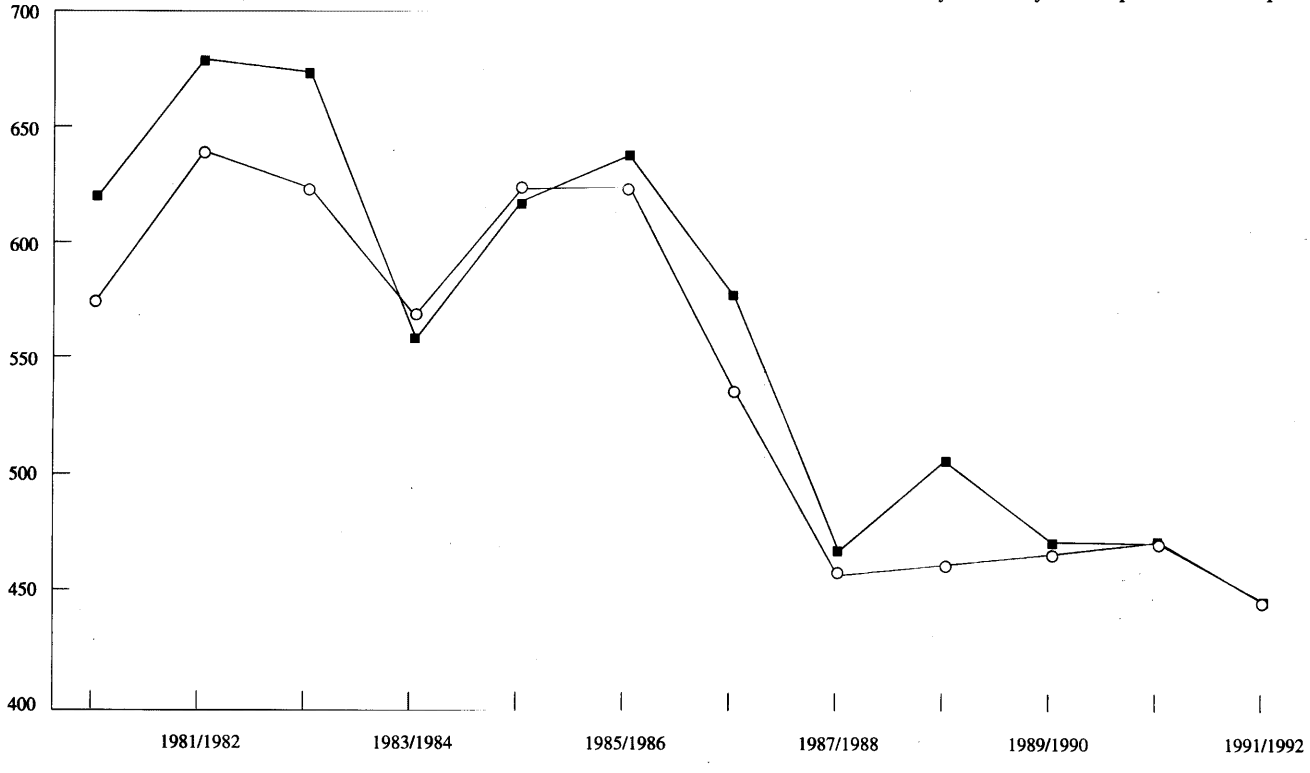
Source: Statistisches Bundesamt, Wiesbaden.

(*) Average trade prices for fertilizers.

ANNEX III

Comparison of fertilizer type

Prices calculated on the basis of German fertilizer prices and FAO prices



○ Calculated price 15-15-15
■ FAO statistics

Source: Statistisches Bundesamt - Wiesbaden, FAO-Rome.