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I

(Acts whose publication is obligatory)

COMMISSION REGULATION (EC) No 1778/94**of 20 July 1994****altering the export refunds on white sugar and raw sugar exported in the natural state**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organization of the markets in the sugar sector ⁽¹⁾, as last amended by Regulation (EC) No 133/94 ⁽²⁾, and in particular the second subparagraph of Article 19 (4) thereof,

Whereas the refunds on white sugar and raw sugar exported in the natural state were fixed by Commission Regulation (EC) No 1700/94 ⁽³⁾;

Whereas it follows from applying the detailed rules contained in Regulation (EC) No 1700/94 to the information known to the Commission that the export refunds at present in force should be altered to the amounts set out in the Annex hereto;

Whereas the representative market rates defined in Article 1 of Council Regulation (EEC) No 3813/92 ⁽⁴⁾, as amended by Regulation (EC) No 3528/93 ⁽⁵⁾, are used to convert amounts expressed in third country currencies

and are used as the basis for determining the agricultural conversion rates of the Member States' currencies; whereas detailed rules on the application and determination of these conversions were set by Commission Regulation (EEC) No 1068/93 ⁽⁶⁾, as amended by Regulation (EC) No 547/94 ⁽⁷⁾,

HAS ADOPTED THIS REGULATION:

Article 1

The export refunds on the products listed in Article 1 (1) (a) of Regulation (EEC) No 1785/81, undenatured and exported in the natural state, as fixed in the Annex to Regulation (EC) No 1700/94 are hereby altered to the amounts shown in the Annex hereto.

Article 2

This Regulation shall enter into force on 21 July 1994.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 July 1994.

For the Commission

René STEICHEN

Member of the Commission

⁽¹⁾ OJ No L 177, 1. 7. 1981, p. 4.

⁽²⁾ OJ No L 22, 27. 1. 1994, p. 7.

⁽³⁾ OJ No L 180, 14. 7. 1994, p. 3.

⁽⁴⁾ OJ No L 387, 31. 12. 1992, p. 1.

⁽⁵⁾ OJ No L 320, 22. 12. 1993, p. 32.

⁽⁶⁾ OJ No L 108, 1. 5. 1993, p. 106.

⁽⁷⁾ OJ No L 69, 12. 3. 1994, p. 1.

ANNEX

to the Commission Regulation of 20 July 1994 altering the export refunds on white sugar and raw sugar exported in the natural state

Product code	Amount of refund ⁽¹⁾
	— ECU/100 kg —
1701 11 90 100	32,36 ⁽¹⁾
1701 11 90 910	30,36 ⁽¹⁾
1701 11 90 950	⁽²⁾
1701 12 90 100	32,36 ⁽¹⁾
1701 12 90 910	30,36 ⁽¹⁾
1701 12 90 950	⁽²⁾
	— ECU/1 % of sucrose × 100 kg —
1701 91 00 000	0,3517
	— ECU/100 kg —
1701 99 10 100	35,17
1701 99 10 910	35,57
1701 99 10 950	34,07
	— ECU/1 % of sucrose × 100 kg —
1701 99 90 100	0,3517

⁽¹⁾ Applicable to raw sugar with a yield of 92 % ; if the yield is other than 92 %, the refund applicable is calculated in accordance with the provisions of Article 5 (3) of amended Regulation (EEC) No 766/68.

⁽²⁾ Fixing suspended by Commission Regulation (EEC) No 2689/85 (OJ No L 255, 26. 9. 1985, p. 12), as amended by Regulation (EEC) No 3251/85 (OJ No L 309, 21. 11. 1985, p. 14).

⁽³⁾ Refunds on exports to the Federal Republic of Yugoslavia (Serbia and Montenegro) may be granted only where the conditions laid down in Regulation (EEC) No 990/93 are observed.

COMMISSION REGULATION (EC) No 1779/94

of 20 July 1994

determining the extent to which applications lodged in July 1994 licences for certain eggs and poultrymeat products under the regime provided for by the Interim Agreements concluded by the Community with the Republic of Poland, the Republic of Hungary, the Czech Republic and the Slovak Republic can be accepted

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EEC) No 2699/93 of 30 September 1993 laying down detailed rules for the application in the eggs and poultrymeat sector of the regime provided for by the Interim Agreements concluded by the Community with the Republic of Poland, the Republic of Hungary, the former Czech and Slovak Federal Republic⁽¹⁾, as amended by Regulation (EC) No 3549/93⁽²⁾, and in particular Article 4 (5),

Whereas the applications for import licences lodged for the third quarter of 1994 are, in the case of some products, for quantities less than or equal to the quantities available and can therefore be met in full, but in the case of other products the said applications are for quantities greater than the quantities available and must therefore be reduced by a fixed percentage to ensure a fair distribution;

Whereas, in the case of the first-mentioned category of products, the surplus to be added to the quantity available for the following period should be determined,

HAS ADOPTED THIS REGULATION:

Article 1

1. Applications for import licences for the period 1 July to 30 September 1994 submitted under Regulation (EEC) No 2699/93 shall be met as referred to in Annex I.
2. During the first 10 days of the period 1 October to 31 December 1994 applications may be lodged pursuant to Regulation (EEC) No 2699/93 for import licences for a total quantity as referred to in Annex II.

Article 2

This Regulation shall enter into force on 21 July 1994.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 July 1994.

For the Commission

René STEICHEN

Member of the Commission

⁽¹⁾ OJ No L 245, 1. 10. 1993, p. 88.

⁽²⁾ OJ No L 324, 24. 12. 1993, p. 8.

ANNEX I

Group No	Percentage of acceptance of import licences submitted for the period 1 July to 30 September 1994
1	6,94
2	17,26
4	100,00
5	100,00
6	41,59
7	7,89
8	100,00
9	20,76
10	100,00
11	100,00
12	11,44
14	100,00
15	100,00
16	100,00
17	100,00
18	100,00
19	14,81
21	100,00
22	100,00
23	100,00
24	100,00
25	100,00
26	100,00
27	100,00
28	100,00
30	100,00
31	100,00
32	100,00
33	100,00
34	100,00
35	100,00
36	100,00

ANNEX II

(tonnes)

Group No	Total quantity available for the period 1 October to 31 December 1994
1	318,50
2	227,50
4	6 645,00
5	1 698,25
6	1 362,50
7	1 075,00
8	671,25
9	475,00
10	675,00
11	135,00
12	420,00
14	1 625,00
15	2 275,00
16	650,00
17	700,00
18	100,00
19	70,00
21	673,75
22	445,00
23	1 030,00
24	86,50
25	1 981,88
26	120,00
27	920,00
28	105,00
30	580,00
31	255,00
32	320,00
33	210,00
34	1 135,00
35	65,00
36	455,00

COMMISSION REGULATION (EC) No 1780/94

of 20 July 1994

on import licences for poultrymeat products originating in the African, Caribbean, and Pacific states or in the overseas countries and territories

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard Council Regulation (EEC) No 715/90 of 5 March 1990 on the arrangements applicable to agricultural products and certain goods resulting from the processing of agricultural products originating in the African, Caribbean and Pacific States or in the overseas countries and territories ⁽¹⁾, as last amended by Regulation (EC) No 235/94 ⁽²⁾, and in particular Article 27 thereof,

Whereas Article 4 (5) of Commission Regulation (EEC) No 903/90 ⁽³⁾, as amended by Regulation (EEC) No 1741/90 ⁽⁴⁾, provides that the Commission is to decide to what extent quantities may be awarded in respect of applications for import licences; whereas, however, imports must not exceed the quotas;

Whereas licence applications have been lodged from 1 to 10 July 1994;

Whereas Article 4 (5) of Regulation (EEC) No 903/90 stipulates that if the total quantity for which applications have been submitted is less than that available, the

Commission is to determine the quantity remaining, which is to be added to that available for the following quarter; whereas the quantity available for the second six months of 1994 of the products referred to in Article 6 of Regulation (EEC) No 715/90 should therefore be determined;

Whereas Council Regulation (EEC) No 444/92 ⁽⁵⁾ extends until 29 February 2000 the application of Regulation (EEC) No 715/90,

HAS ADOPTED THIS REGULATION:

Article 1

Applications for import licences lodged in accordance with Regulation (EEC) No 903/90 for the period 1 July to 30 December 1994 shall be accepted in full.

Article 2

This Regulation shall enter into force on the 21 July 1994.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 July 1994.

For the Commission

René STEICHEN

Member of the Commission

⁽¹⁾ OJ No L 84, 30. 3. 1990, p. 85.

⁽²⁾ OJ No L 30, 3. 2. 1994, p. 12.

⁽³⁾ OJ No L 93, 10. 4. 1990, p. 20.

⁽⁴⁾ OJ No L 161, 27. 6. 1990, p. 32.

⁽⁵⁾ OJ No L 52, 27. 2. 1992, p. 7.

COMMISSION REGULATION (EC) No 1781/94

of 20 July 1994

determining the extent to which applications lodged in July 1994 for import
licences for certain poultrymeat products can be accepted

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European
Community,

Having regard to Council Regulation (EEC) No 3834/90
of 20 December 1990 reducing for 1991 the levies on
certain agricultural products originating in developing
countries⁽¹⁾, as last amended by Regulation (EC) No
3668/93⁽²⁾,

Whereas the fixed amounts are those mentioned in the
Annex to Regulation (EEC) No 3834/90; whereas, since
on 15 June 1994 the Council did not adopt the new
scheme of generalized tariff preferences, the application
of Council Regulation (EC) No 3668/93 is automatically
extended until 31 December 1994;

Whereas Commission Regulation (EC) No 1558/94⁽³⁾ set
the quantity of poultrymeat that can be imported at a
reduced levy for the period 1 July to 30 September 1994;

Whereas Article 4 (5) of Commission Regulation (EEC)
No 3809/91⁽⁴⁾, as amended by Regulation (EEC) No
581/92⁽⁵⁾, stipulates that the quantities applied for can be
reduced; whereas applications for import licences for
duckmeat lodged pursuant to that Regulation are for total

quantities in excess of those available pursuant to Regula-
tion (EC) No 1558/94; whereas in order to ensure a fair
allocation of those quantities those applied for should be
reduced proportionately,

HAS ADOPTED THIS REGULATION:

Article 1

Applications for import licences for the period 1 July to
30 September 1994 submitted pursuant to Regulation
(EC) No 1558/94 shall be granted:

- (a) for 15,3846 % of the quantity applied for, in the case
of products covered by order No 59.0020 in Regula-
tion (EEC) No 3834/90;
- (b) for 16,0122 % of the quantity applied for, in the case
of products covered by order No 59.0025 in Regula-
tion (EEC) No 3834/90.

Article 2

This Regulation shall enter into force on 21 July 1994.

This Regulation shall be binding in its entirety and directly applicable in all Member
States.

Done at Brussels, 20 July 1994.

For the Commission

René STEICHEN

Member of the Commission

⁽¹⁾ OJ No L 370, 31. 12. 1990, p. 121.

⁽²⁾ OJ No L 338, 31. 12. 1993, p. 22.

⁽³⁾ OJ No L 166, 1. 7. 1994, p. 57.

⁽⁴⁾ OJ No L 357, 28. 12. 1991, p. 48.

⁽⁵⁾ OJ No L 62, 7. 3. 1992, p. 28.

COMMISSION REGULATION (EC) No 1782/94
of 20 July 1994

**fixing the minimum levies on the importation of olive oil and levies on the
importation of other olive oil sector products**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 136/66/EEC of 22 September 1966 on the establishment of a common organization of the market in oils and fats⁽¹⁾, as last amended by Regulation (EC) No 3179/93⁽²⁾, and in particular Article 16 (2) thereof,

Having regard to Council Regulation (EEC) No 1514/76 of 24 June 1976 on imports of olive oil originating in Algeria⁽³⁾, as last amended by Regulation (EEC) No 1900/92⁽⁴⁾, and in particular Article 5 thereof,

Having regard to Council Regulation (EEC) No 1521/76 of 24 June 1976 on imports of olive oil originating in Morocco⁽⁵⁾, as last amended by Regulation (EEC) No 1901/92⁽⁶⁾, and in particular Article 5 thereof,

Having regard to Council Regulation (EEC) No 1508/76 of 24 June 1976 on imports of olive oil originating in Tunisia⁽⁷⁾, as last amended by Regulation (EEC) No 413/86⁽⁸⁾, and in particular Article 5 thereof,

Having regard to Council Regulation (EEC) No 1180/77 of 17 May 1977 on imports into the Community of certain agricultural products originating in Turkey⁽⁹⁾, as last amended by Regulation (EEC) No 1902/92⁽¹⁰⁾, and in particular Article 10 (2) thereof,

Having regard to Council Regulation (EEC) No 1620/77 of 18 July 1977 laying down detailed rules for the importation of olive oil from Lebanon⁽¹¹⁾,

Whereas by Regulation (EEC) No 3131/78⁽¹²⁾, as amended by the Act of Accession of Greece, the Commission decided to use the tendering procedure to fix levies on olive oil;

Whereas Article 3 of Council Regulation (EEC) No 2751/78 of 23 November 1978 laying down general rules for fixing the import levy on olive oil by tender⁽¹³⁾ specifies that the minimum levy rate shall be fixed for each of the products concerned on the basis of the situation on the world market and the Community market and of the levy rates indicated by tenderers;

Whereas, in the collection of the levy, account should be taken of the provisions in the Agreements between the Community and certain third countries; whereas in particular the levy applicable for those countries must be fixed, taking as a basis for calculation the levy to be collected on imports from the other third countries;

Whereas, pursuant to Article 101 (1) of Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community⁽¹⁴⁾, no levies shall apply on imports of products originating in the overseas countries and territories;

Whereas application of the rules recalled above to the levy rates indicated by tenderers on 18 and 19 July 1994 leads to the minimum levies being fixed as indicated in Annex I to this Regulation;

Whereas the import levy on olives falling within CN codes 0709 90 39 and 0711 20 90 and on products falling within CN codes 1522 00 31, 1522 00 39 and 2306 90 19 must be calculated from the minimum levy applicable on the olive oil contained in these products; whereas, however, the levy charged for olive oil may not be less than an amount equal to 8 % of the value of the

⁽¹⁾ OJ No 172, 30. 9. 1966, p. 3025/66.

⁽²⁾ OJ No L 285, 20. 11. 1993, p. 9.

⁽³⁾ OJ No L 169, 28. 6. 1976, p. 24.

⁽⁴⁾ OJ No L 192, 11. 7. 1992, p. 1.

⁽⁵⁾ OJ No L 169, 28. 6. 1976, p. 43.

⁽⁶⁾ OJ No L 192, 11. 7. 1992, p. 2.

⁽⁷⁾ OJ No L 169, 28. 6. 1976, p. 9.

⁽⁸⁾ OJ No L 48, 26. 2. 1986, p. 1.

⁽⁹⁾ OJ No L 142, 9. 6. 1977, p. 10.

⁽¹⁰⁾ OJ No L 192, 11. 7. 1992, p. 3.

⁽¹¹⁾ OJ No L 181, 21. 7. 1977, p. 4.

⁽¹²⁾ OJ No L 370, 30. 12. 1978, p. 60.

⁽¹³⁾ OJ No L 331, 28. 11. 1978, p. 6.

⁽¹⁴⁾ OJ No L 263, 19. 9. 1991, p. 1.

imported product, such amount to be fixed at a standard rate ; whereas application of these provisions leads to the levies being fixed as indicated in Annex II to this Regulation,

Article 2

The levies applicable on imports of other olive oil sector products are fixed in Annex II.

HAS ADOPTED THIS REGULATION :

Article 1

The minimum levies on olive oil imports are fixed in Annex I.

Article 3

This Regulation shall enter into force on 22 July 1994.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 July 1994.

For the Commission

René STEICHEN

Member of the Commission

ANNEX I

Minimum import levies on olive oil⁽¹⁾

(ECU/100 kg)

CN code	Non-member countries
1509 10 10	79,00 (?)
1509 10 90	79,00 (?)
1509 90 00	92,00 (?)
1510 00 10	77,00 (?)
1510 00 90	122,00 (*)

(¹) No levy applies to OCT originating products according to Article 101 (1) of Decision 91/482/EEC.

(²) For imports of oil falling within this CN code and produced entirely in one of the countries listed below and transported directly from any of those countries to the Community, the levy to be collected is reduced by :

(a) Lebanon : ECU 0,60 per 100 kg ;

(b) Tunisia : ECU 12,69 per 100 kg provided that the operator furnishes proof of having paid the export tax applied by that country ; however, the repayment may not exceed the amount of the tax in force ;

(c) Turkey : ECU 22,36 per 100 kg provided that the operator furnishes proof of having paid the export tax applied by that country ; however, the repayment may not exceed the amount of the tax in force ;

(d) Algeria and Morocco : ECU 24,78 per 100 kg provided that the operator furnishes proof of having paid the export tax applied by that country ; however, the repayment may not exceed the amount of the tax in force.

(³) For imports of oil falling within this CN code :

(a) produced entirely in Algeria, Morocco or Tunisia and transported directly from any of those countries to the Community, the levy to be collected is reduced by ECU 3,86 per 100 kg ;

(b) produced entirely in Turkey and transported directly from that country to the Community, the levy to be collected is reduced by ECU 3,09 per 100 kg.

(⁴) For imports of oil falling within this CN code :

(a) produced entirely in Algeria, Morocco or Tunisia and transported directly from any of those countries to the Community, the levy to be collected is reduced by ECU 7,25 per 100 kg ;

(b) produced entirely in Turkey and transported directly from that country to the Community, the levy to be collected is reduced by ECU 5,80 per 100 kg.

ANNEX II

Import levies on other olive oil sector products⁽¹⁾

(ECU/100 kg)

CN code	Non-member countries
0709 90 39	17,38
0711 20 90	17,38
1522 00 31	39,50
1522 00 39	63,20
2306 90 19	6,16

(¹) No levy applies to OCT originating products according to Article 101 (1) of Decision 91/482/EEC.

COMMISSION REGULATION (EC) No 1783/94

of 18 July 1994

imposing a provisional anti-dumping duty on imports of furfuraldehyde
originating in the People's Republic of China

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community⁽¹⁾, as last amended by Regulation (EC) No 522/94⁽²⁾, and in particular Article 11 thereof,

After consultations within the Advisory Committee,

Whereas :

A. PROCEDURE

- (1) In January 1993, the Commission received a complaint lodged by Furfural Español, S.A., the only producer of furfuraldehyde in the Community.

The complaint contained evidence of dumping of the said product originating in the People's Republic of China and of material injury resulting therefrom which was considered sufficient to justify the initiation of a proceeding.

- (2) The Commission accordingly announced, by a notice published in the *Official Journal of the European Communities*⁽³⁾, the initiation of an anti-dumping proceeding concerning imports of furfuraldehyde originating in the People's Republic of China, falling within the CN code 2932 12 00, and it commenced an investigation.
- (3) The Commission officially notified the exporters and importers known to be concerned and the representatives of the exporting country of the initiation of the proceeding and gave the parties concerned the opportunity to make their views known in writing and to request a hearing.
- (4) Representatives of the main Chinese exporter, China National Chemical Import & Export Corpo-

ration Sinochem, Beijing, were granted a hearing and made their views known in writing.

- (5) The Commission sought and verified all the information it deemed to be necessary for the purpose of a preliminary determination and carried out investigations at the premises of the following :

(a) Community producer :

— Furfural Español S.A., Alcantarilla, Spain,

(b) Importers in the Community :

— Quaker Oats Chemicals Inc., Antwerp, Belgium (unrelated importer).

Otto Aldag GmbH & Co., Germany, an unrelated importer, made its views known in writing and requested a hearing, which the Commission granted. Limited information has been supplied by two other importers : I. C. Chemikalien GmbH, Germany, and COPCI, France.

- (6) Sinochem, which was, until the end of 1992, the sole and is still the main Chinese trading organization exporting furfuraldehyde to the Community, replied to the Commission's questionnaire.

The Commission has received information that from 1 January 1993 a number of other Chinese producers or exporters began selling the product concerned to the Community. The Commission has received no cooperation from any of these companies.

- (7) As Argentina has been used as an analogue country for the purpose of calculating normal value, (see recitals 14 and 15) the Commission conducted an investigation at the premises of two Argentinian producers of furfuraldehyde.
- (8) The investigation of dumping covered the period from 1 July 1992 to 30 June 1993 the 'investigation period'.

B. PRODUCT UNDER INVESTIGATION

1. Description of the product concerned

- (9) The product concerned is furfuraldehyde, a light yellow liquid with a characteristic pungent odour, which is obtained by processing different kinds of agricultural waste. Its two main applications are as a

⁽¹⁾ OJ No L 209, 2. 8. 1988, p. 1.

⁽²⁾ OJ No L 66, 10. 3. 1994, p. 10.

⁽³⁾ OJ No C 208, 31. 7. 1993, p. 8.

selective solvent in petroleum refining for the production of lubricating oils and as raw material for processing into furfural alcohol, which is used to make synthetic resin for foundry moulds.

- (10) According to the information available to the Commission, the product exported from China is made principally from rice husks or maize loaf and can be used for both the abovementioned applications.

2. Like product

- (11) The Commission found that the furfuraldehyde produced by the Community producer, by the Argentinian producers and in the People's Republic of China have the same specifications. In spite of being made from different kinds of agricultural waste, they have been found to be interchangeable as far as their application is concerned. The Commission considered therefore that the furfuraldehyde imported from People's Republic of China is alike to the product made and sold by both the Community and the Argentina producers, within the meaning of Article 2 (12) of Regulation (EEC) No 2423/88 (hereinafter referred to as 'the Basic Regulation').

C. COMMUNITY INDUSTRY

- (12) The complainant company was the only producer of furfuraldehyde in the Community during the investigation period. Therefore, as it represents the totality of Community production, it is considered to be the 'Community industry' for the purposes of Article 4 (5) of the Basic Regulation.

D. DUMPING

1. Normal value

- (13) In order to establish normal value of furfuraldehyde produced in People's Republic of China, the Commission took account of the fact that the People's Republic of China is a non-market economy country. Therefore, in accordance with Article 2 (5) of the Basic Regulation, the determination of normal value was based on a market-economy country (analogue country). The complainant suggested Argentina, while the Chinese exporter considered Argentina inappropriate and submitted that South Africa or the Dominican Republic should be selected as the analogue country. As these three countries are the major producers of furfuraldehyde throughout the world,

the Commission contacted the known producers in all of them in order to assess which was the most reasonable and appropriate to serve as an analogue country.

The Dominican Republic producer did not reply to the request for information made by the Commission.

From the information supplied by the South African producer which was contacted, it appears that this is the only producer in that country and the only supplier of its domestic market. However, while the production volume of the South African producer is relatively high, most is made for captive use and less than 3 % of total production is sold on the domestic market. In spite of the fact that no import duties are in force for this product, no imports of furfuraldehyde are recorded in South Africa. The absence of imports can be explained both by the embargo which affected South Africa until the end of 1992 and by the limited dimension of the domestic market. The Commission concluded therefore, that the South African market was not sufficiently competitive to meet the requirements of an analogue market. Finally, given the indications that the South African industry is largely subsidized, there was also the risk that domestic prices of furfuraldehyde were influenced by the subsidy policy.

- (14) As far as the Argentinian market is concerned, it was found that duties of 10 % and 17,5 % were imposed on imports respectively from Aladi (Latin American Integration Association) countries and from the rest of the world and that no imports of the product concerned had been recorded during the investigation period in that country. There were two Argentinian producers whose size appeared similar to that of the Chinese producers and whose domestic prices were in reasonable proportion to production costs. Their domestic sales can be considered representative, as their volume corresponds to more than 10 % of the Chinese exports to the Community. Furthermore, the access to raw materials in Argentina is favourable since the industrial plants of those producers are situated in a tropical forest area from which is taken the variety of wood used for the production of furfuraldehyde. The Commission, after considering all these aspects, finally selected Argentina as the most appropriate and reasonable analogue country.

Sinochem argued that the production process in Argentina was entirely different from that in China, because in Argentina furfuraldehyde was a 'by-product of the production of tannin extract', while in China furfuraldehyde was produced as a by-product of agricultural waste. This statement

concerning the Argentinian production process proved incorrect. In fact, in Argentina furfuraldehyde is obtained from the agricultural waste left after the extraction of tanning from wood. This is a process similar to the one used in China, as well as in South Africa, where other kinds of agricultural waste are used, namely bagasse, maize loaf or rice husks.

Furthermore, Sinochem argued that the Argentinian production process would be highly inefficient since it used the machinery of an Italian producer which had stopped its production in the Community in 1990 as a result of high costs which had made it uncompetitive. However, according to the information supplied to the Commission, the production cost of the producer in question became uncompetitive because of the cost of compliance with increasingly strict standards of environmental protection laid down by national laws.

Normal value calculations have therefore been based on the information provided by the two Argentinian producers, whose submissions have been verified by means of an on-the-spot investigation. The domestic sales of those two companies represent the totality of the sales of furfuraldehyde on the Argentinian market.

- (15) In accordance with Article 2 (5) (a) (i) of the Basic Regulation, normal value was established on the basis of the average ex-factory price of furfuraldehyde sold on the Argentinian market during the investigation period.

2. Export price

- (16) The export price was determined on the basis of the price actually paid for the product sold for export to the Community. Export sales taken into consideration were all made to unrelated importers and represented more than 80 % of total exports from China.
- (17) Sinochem, which represented 100 % of exports from China into the Community until 1 January 1993, cooperated in this proceeding.
- (18) After 1 January 1993, the sales of Sinochem on the Community market dropped to less than 50 % of total Chinese exports to the Community, since other Chinese exporters had begun to operate in this field at that time.
- (19) None of the companies which started exporting furfuraldehyde into the Community after 1 January

1993 cooperated in this proceeding. The Commission considered, therefore, that in accordance with Article 7 (7) of the Basic Regulation, it was reasonable to determine their export prices on the basis of the most reasonable facts available for the period from 1 January to 30 June 1993, which corresponds to the part of the investigation period during which they carried out their furfuraldehyde operations. It was found that Sinochem's export prices went down considerably once those other exporters had begun selling to the Community. This indicates that this price reduction was due to the pricing policy of these non-cooperators. It was therefore considered appropriate to base the export prices of those exporters on those applied by Sinochem during the period 1 January to 30 June 1993. This approach is also supported by the statistical information available to the Commission, which shows that Sinochem's average price was in line with the average import price of the product concerned originating in the People's Republic of China during the same period.

3. Comparison

- (20) Normal value has been compared to the net Chinese border prices FOB for furfuraldehyde imported during the investigation period. For the purpose of ensuring a fair comparison, normal value and export price have been adjusted with respect to selling expenses according to Article 2 (9) and (10) of the Basic Regulation. In particular, normal value was reduced to take account of indirect taxes, transport, insurance and credit costs, whilst from the export price, ocean freight, insurance, packing, handling, salesmen's salaries, and where appropriate commission costs have been deducted.

The comparison of normal value and export prices, after all adjustments, was made at the same level of trade.

4. Dumping margin

- (21) As the People's Republic of China is a non-market economy, the application to exporters of individual measures would be inappropriate given that exports could be channelled through exporters with low or no duty. Thus, a single dumping margin of 62,6 %, corresponding to the weighted average of the dumping margins of both cooperating and non-cooperating exporters has been determined.

E. INJURY**1. Preliminary remarks**

- (22) Statistical information relating to imports of furfuraldehyde into Belgium are covered by confidentiality. The Commission had access to this information subject to the proviso that import figures and origin were to be treated in confidence.
- (23) A major portion of these imports are effected by a single user company through a US company, which belongs to the same group as the user. The US company buys from the producer on the basis of a long-term contract. The sales transactions between the US company and the Community user company have to be considered as occurring in a captive market, as they take place between companies of the same group at transfer prices which have remained constant since at least 1988.
- (24) The Commission has therefore examined whether the findings could be limited to the free market, on the basis of the criteria laid down by the Court of Justice in its judgment of 27 November 1981 in Case C-315/90. The Court⁽¹⁾ had held that only the free market should be considered for the purpose of establishing the injury if the sales on the captive market do not enter into direct competition with the sales on the free market and cannot therefore be affected by the dumping. Given the conditions established in the long-term contract mentioned in recital 23, import volumes and prices from the third country in question are independent of normal market conditions for furfuraldehyde in the Community, and there is no competition between the sales made on each of the two markets. The Commission has therefore based its assessment of injury only on the free market.

2. Volume and market share of the dumped imports

- (25) The apparent consumption of furfuraldehyde in the Community determined on the basis of the criteria mentioned in recital (24) declined by 37,4 % between 1988 and the investigation period. The decrease of consumption took place almost entirely between 1988 and 1991, and the consumption has since stabilized.
- (26) The volume of imports from China, adjusted to take account of re-exports, went down by 35,6 % between 1988 and the investigation period; these

imports fell therefore at a slightly lower rate than consumption.

- (27) As a consequence, the movement in the market share of Chinese imports shows an increase from 44,2 % in 1988 to 45,8 % in the investigation period. However, this market share has fluctuated over the years: in particular, it declined to 41,4 % in 1991, before reaching the abovementioned level in the investigation period.

3. Price of dumped imports

- (28) It was found that during the investigation period the furfuraldehyde from China was imported at prices which undercut those of the Community producer by 24,4 %. This price undercutting has been calculated as a percentage difference between the average cif import price of the Chinese product and the average ex-factory price of the Community producer. It must be noted that the undercutting margin would be much higher if the import prices of the second half of the investigation period were taken separately. In fact, the import price of furfuraldehyde from China dropped by more than 30 % during the investigation period alone.

4. Situation of Community industry*Total production*

- (29) The production of furfuraldehyde by Furfural Español S.A. dropped by 17,7 % between 1989 and the investigation period.

Production capacity and its utilization

- (30) Production capacity remained stable over the period under consideration, with the exception of 1991, due to the relocation of one plant. However, the utilization of production capacity dropped considerably, from 85 % to 70 %.

Sales and market share

- (31) Sales of Furfural Español S.A. on the Community market a drop of 28,5 % from 1989 to the investigation period.

Besides the Spanish producer, two Italian companies produced furfuraldehyde in the Community until 1990. The total market share of all the Community producers, which was 40,2 % in 1989, decreased in 1991 by 50 %, due to the decision of the Italian producers to cease production because

⁽¹⁾ Gimelec and others v. Commission [1991] ECR I-5589.

of the rising costs of compliance with the standards of environmental protection. The complainant, which had a market share of 17,7 % in 1989 did not in practice gain from this situation, as, indeed, its market share reached 20,8 % in 1991 but fell to 17,8 % during the investigation period. This fall would have been even greater without adjustment by the producer of its prices, as is explained below.

Prices

- (32) Sales prices of the Community producer increased by 23,7 % between 1989 and 1991, but decreased by 36,4 % between 1991 and the investigation period, this price drop being 22,4 % between 1992 and the investigation period. Furfuraldehyde is a product with homogeneous characteristics and, in a very competitive market, prices are the decisive factor as regards each operator's position.

Stock

- (33) Stocks held by the Community producer of furfural increased both in volume by (31,6 %) and as a percentage of production volume (from 12 % to 20 %) during the period under consideration.

Investments

- (34) Investments grew considerably as a consequence of the relocation of one plant in 1991 and of environmental legislation. During the investigation period the level of investment was more than double that of 1989.

Profitability

- (35) The sharp drop in sales prices, together with the decline of sales volume, badly affected the profitability of the Community producer. Its financial results, which were still positive in 1991, became increasingly negative in the following years: losses had appeared by 1992 and during the investigation period the highest loss on turnover (between 10 and 20 %) was recorded.

Conclusion on injury

- (36) On the basis of the abovementioned factors, particularly increasing losses resulting from significantly reduced sales, declining prices and increasing stocks in 1992 and during the investigation period, the Commission concluded, for the purpose of its preliminary findings, that the Community industry

had suffered material injury within the meaning of Article 4 (1) of the Basic Regulation.

F. CAUSE OF INJURY

1. Effect of dumped imports

- (37) In examining the volume and price trends of the dumped imports in relation to the evolution of the factors affecting the state of the Community industry, the Commission found that the deterioration of the economic situation of that industry from 1992 to the end of the investigation period had coincided with the significant decrease in the prices of Chinese imports described above in recital (28). In fact, between 1988 and 1991 the export prices of furfuraldehyde from China were consistently below those of the Community production and those of the imports from other third countries, but they remained relatively stable. During this period the level of prices on the Community market was such that the Community producer was able to sell furfuraldehyde at profitable prices. From 1992 to the end of the investigation period, the Chinese export prices dropped abruptly, especially during the second half of the investigation period. Obviously, under the pressure of the low-priced dumped imports, the average sales prices of the Community producer went down by 22,4 % during that period, with serious repercussions on the profitability of the company. Under these circumstances it must be concluded that its precarious financial situation was caused by the dumped Chinese imports.

2. Other factors

- (38) The Commission also considered the effect of other factors on the situation of the Community industry. In this respect, the contraction of Community consumption by 37,4 % between 1988 and the investigation period has affected the industry negatively, especially as far as its volume of sales is concerned. However, the reduction of Community consumption took place almost entirely between 1988 and 1991, a period during which the Community producer did not suffer financial losses. From 1991 to the investigation period the Community market had virtually stabilized, but the situation of the Community producer deteriorated. There is therefore no apparent link between the decrease in Community consumption and the injury to the Community production.

- (39) As far as imports from countries other than China are concerned, only those originating in Austria and South Africa show a significant volume. Imports from Austria increased until 1991 and since then have held a stable market share of about 15 %. Imports from South Africa seemed to have benefited most from the disappearance of Italian production, their market share having risen from 2,6 % in 1990 to 12,3 % in 1992, but this market share dropped abruptly to 4,5 % during the investigation period. Consequently, the Commission concludes that Austrian and South African imports of furfuraldehyde did not cause or contribute to the injury to the Community industry, which became a material injury especially during the investigation period.
- (40) The market share of the other exporting countries taken as whole fluctuated considerably between 1988 and the investigation period. This erratic evolution was due both to the continuously changing composition of this group of countries and to the important fluctuations in the exports of the individual countries, which have, in some cases, actually ceased in certain years. In those circumstances, it was not possible to establish any trend to the exports from this group of countries. In addition, it should be noted that the prices of these exports are, on average, higher than those for the Chinese exports. Furthermore, the volume of exports per country was low, their market share seldom approaching 5 %.
- (41) That being so, it must be concluded that the imports from the People's Republic of China into a shrinking market have, through their low dumped price, resulted in price depression of furfuraldehyde which has led to a serious deterioration in the profitability of the Community producer and which are therefore, taken in isolation, to be considered to have caused the material injury suffered by the Community industry.

G. COMMUNITY INTEREST

1. General considerations

- (42) The purpose of anti-dumping duties is to eliminate the dumping which is causing injury to the Community industry and thus to re-establish a situation of open and fair competition on the Community market which is fundamentally in the general Community interest. Against this background, the

Commission has considered the effect of anti-dumping duties on furfuraldehyde imported from the People's Republic of China in relation to the specific interests of Community industry and of the users.

2. Interest of the Community industry

- (43) The Community producer has made considerable investments in recent years to move one of its plants to a more isolated location in order to comply with the environmental protection laws. If this producer is forced out of the market, all these investments will be wasted. Chinese producers, not being bound by such strict anti-pollution obligations, which inevitably have a considerable impact on production costs, can further benefit from unfair competitive behaviour.
- (44) Furthermore, as furfuraldehyde represents about 90 % of the turnover of the Community producer the company will have to shut down if no measure is taken, and at least 80 employees will become redundant in an area which already counts among those with the highest unemployment rate of the whole Community.

3. Interest of users

- (45) The production capacity of the complainant company corresponds to one-third of the yearly consumption of the Community market. It cannot be expected, however, that there will be shortage of supply should anti-dumping measures be taken. First, the purpose of trade defence measures is not to exclude from the Community market, exporters found to have dumped injuriously, but simply to restore fair competitive conditions. Second, the high number of exporters from other third countries ensure that supply will be maintained at a level sufficient to meet the demand for furfuraldehyde in the Community in all circumstances. In this respect, however, it should be noted that the closure of the Community producer's plant, with the loss of one-third of the required supply in the Community, would cause considerable disruption of supply to Community users.
- (46) The consequences of a possible price increase of furfuraldehyde following the imposition of anti-dumping measures are to be seen separately for the two main uses of furfuraldehyde, as namely selective solvent in oil refineries and as raw material for the production of synthetic resins.

- (47) In the first case furfuraldehyde is used as a catalyst and as such its consumption in relation to the volume of lubricating oil is minimal. Its incidence on production costs are immaterial.
- (48) As regards the use of furfuraldehyde in the production process of synthetic resin, the sole producer in the Community of the first intermediate product, furfural alcohol, obtains a considerable proportion of furfuraldehyde from a third country. In recitals (22) and (23) it was explained why these imports are a separate market and not influenced by the prices of furfuraldehyde on the Community's free market. As regards the free market, imports from the People's Republic of China correspond to only 10 % of the consumption of furfuraldehyde by the company in question. A price increase for those imports therefore cannot be expected to have a significant impact on the cost of production of furfural alcohol as a whole.

4. Conclusion

- (49) In view of the heavy losses suffered by the sole producer of furfuraldehyde still operating in the Community, there is a material risk that in the absence of intervention this producer will shut down as all other Community producers have already done in recent years. In that event the Community market will become entirely dependent on imports. In view of the strategic importance of this product in the oil-refining sector, such a development would not be in the Community interest. In this context, it should be noted that the People's Republic of China, as a single supplier to the Community, already represents more than 60 % of the imported product.

The Commission therefore concludes that it is in the Community interest to eliminate the injurious effects of the dumping and to restore fair competitive conditions by the imposition of provisional anti-dumping measures.

H. PROVISIONAL DUTY

- (50) The level of the injury has been calculated on the basis of the difference between the weighted average cif import price and the cost of production of the Community producer, plus a profit margin of 5 %. This rate seems justified in consideration of the facts available to the Commission concerning the market conditions and the investment requirement in the industry. On this basis, the average cif price of Chinese exports would have to be

increased by about a half, in order to allow the Community producer to sell at profitable prices.

- (51) As the dumping margin exceeds this injury threshold, the anti-dumping duty should be based on the lower figure in accordance with Article 13 (3) of the Basic Regulation.
- (52) The exporters concerned sell furfuraldehyde besides a variety of other products to the importers in the Community. In order to minimize the risk of the duties being evaded by price manipulation it is considered appropriate to impose the duty in form of a specific amount of ECU per metric tonne. The calculation of the injury threshold related to cif import price results in a duty of ECU 352 per tonne.
- (53) In the interests of sound administration, a period should be fixed within which the parties concerned may make their views known in writing and request a hearing. Furthermore, it should be stated that all findings made for the purpose of this Regulation are provisional and may have to be reconsidered for the purpose of any definitive duty which the Commission may propose,

HAS ADOPTED THIS REGULATION :

Article 1

1. A provisional anti-dumping duty of ECU 352 per tonne is hereby imposed on imports of furfuraldehyde falling within CN code 2932 12 00, originating in the People's Republic of China.
2. Unless otherwise specified, the provisions in force concerning customs duties shall apply.
3. The release for free circulation in the Community of the product referred to in paragraph 1 shall be subject to the provision of a security equivalent to the amount of the provisional duty.

Article 2

Without prejudice to Article 7 (4) (b) and (c) of Regulation (EEC) No 2423/88, the parties concerned may make known their views in writing and apply to be heard orally by the Commission within one month of the date of entry into force of this Regulation.

Article 3

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 18 July 1994.

For the Commission

Leon BRITTAN

Member of the Commission

COMMISSION REGULATION (EC) No 1784/94

of 19 July 1994

concerning the stopping of fishing for Greenland halibut by vessels flying the flag of the United Kingdom

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy⁽¹⁾, and in particular Article 21 (3) thereof,

Whereas Council Regulation (EC) No 3693/93 of 21 December 1993 allocating, for 1994, Community catch quotas in Greenland waters⁽²⁾ provides for Greenland halibut quotas for 1994;

Whereas, in order to ensure compliance with the provisions relating to the quantitative limitations on catches of stocks subject to quotas, it is necessary for the Commission to fix the date by which catches made by vessels flying the flag of a Member State are deemed to have exhausted the quota allocated;

Whereas, according to the information communicated to the Commission, catches of Greenland halibut in the waters of ICES divisions V and XIV (Greenland waters) by vessels flying the flag of the United Kingdom or registered in the United Kingdom have reached the quota

allocated for 1994; whereas the United Kingdom has prohibited fishing for this stock as from 5 July 1994; whereas it is therefore necessary to abide by that date,

HAS ADOPTED THIS REGULATION:

Article 1

Catches of Greenland halibut in the waters of ICES divisions V and XIV (Greenland waters) by vessels flying the flag of the United Kingdom or registered in the United Kingdom are deemed to have exhausted the quota allocated to the United Kingdom for 1994.

Fishing for Greenland halibut in the waters of ICES divisions V and XIV (Greenland waters) by vessels flying the flag of the United Kingdom or registered in the United Kingdom is prohibited, as well as the retention on board, the transshipment and the landing of such stock captured by the abovementioned vessels after the date of application of this Regulation.

Article 2

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 19 July 1994.

For the Commission

Yannis PALEOKRASSAS

Member of the Commission

⁽¹⁾ OJ No L 261, 20. 10. 1993, p. 1.

⁽²⁾ OJ No L 341, 31. 12. 1993, p. 106.

COMMISSION REGULATION (EC) No 1785/94
of 19 July 1994
concerning the classification of certain goods in the combined nomenclature

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff⁽¹⁾, as last amended by Commission Regulation (EC) No 1706/94⁽²⁾, and in particular Article 9 thereof,

Whereas in order to ensure uniform application of the combined nomenclature annexed to the said Regulation, it is necessary to adopt measures concerning the classification of the goods referred to in the Annex to this Regulation;

Whereas Regulation (EEC) No 2658/87 has set down the general rules for the interpretation of the combined nomenclature and those rules also apply to any other nomenclature which is wholly or partly based on it or which adds any additional subdivision to it and which is established by specific Community provisions, with a view to the application of tariff and other measures relating to trade in goods;

Whereas, pursuant to the said general rules, the goods described in column 1 of the table annexed to the present

Regulation must be classified under the appropriate CN codes indicated in column 2, by virtue of the reasons set out in column 3;

Whereas the measures provided for in this Regulation are in accordance with the opinion of the Tariff and Statistical Nomenclature Section of the Customs Code Committee,

HAS ADOPTED THIS REGULATION:

Article 1

The goods described in column 1 of the annexed table are now classified within the combined nomenclature under the appropriate CN codes indicated in column 2 of the said table.

Article 2

This Regulation shall enter into force on the third day following its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 19 July 1994.

For the Commission

Christiane SCRIVENER

Member of the Commission

⁽¹⁾ OJ No L 256, 7. 9. 1987, p. 1.

⁽²⁾ OJ No L 180, 14. 7. 1994, p. 17.

ANNEX

Description of the goods	Classification CN code	Reasons
(1)	(2)	(3)
1. 'Synthetic rutile', obtained from ilmenite by roasting, treatment with hydrochloric acid, and calcination, and containing by weight approximately 95 % of titanium dioxide, approximately 2 % of diiron trioxide and approximately 1 % of silicon dioxide. It is presented in the form of a beige-coloured powder	2614 00 10	Classification is determined by the provisions of general rules 1 and 6 for the interpretation of the combined nomenclature, by Note 2 to Chapter 26, and by the wording of CN codes 2614 and 2614 00 10. The change in crystalline structure is due only to the processes of roasting and calcination mentioned in the General Explanatory Notes to the Harmonized System, Chapter 26.
2. Emulsifying agent, consisting of a mixture of mono- and diacetyl-tartaric-acid esters of mono- and diglycerides of fatty acids (E 472 (e))	3823 90 87	Classification is determined by the provisions of general rules 1 and 6 for the interpretation of the combined nomenclature, by Note 1 (b) to Chapter 38 and by the wording of CN codes 3823, 3823 90 and 3823 90 87.

COMMISSION REGULATION (EC) No 1786/94

of 20 July 1994

fixing for the 1994/95 marketing year the minimum price to be paid to producers for dried plums and the amount of production aid for prunes

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 426/86 of 24 February 1986 on the common organization of the market in products processed from fruit and vegetables ⁽¹⁾, as last amended by Commission Regulation (EC) No 549/94 ⁽²⁾, and in particular Articles 4 (4) and 5 (5) thereof,

Whereas Council Regulation (EEC) No 1206/90 ⁽³⁾, as amended by Regulation (EEC) No 2202/90 ⁽⁴⁾, lays down general rules for the system of production aid for processed fruit and vegetables;

Whereas, pursuant to Article 4 (1) of Regulation (EEC) No 426/86, the minimum price to be paid to producers is to be determined on the basis of, firstly, the minimum price applying during the previous marketing year, secondly, the movement of basic prices in the fruit and vegetable sector, and thirdly, the need to ensure the normal marketing of fresh products for the various uses, including supply of the processing industry;

Whereas Article 5 of Regulation (EEC) No 426/86 lays down the criteria for fixing the amount of production aid; whereas account must, in particular, be taken of the aid fixed for the previous marketing year adjusted to take account of changes in the minimum price to be paid to products and the difference between the cost of the raw material in the Community and in the major competing third countries;

Whereas the measures provided for in this Regulation are in accordance with the opinion of the Management

Committee for Products Processed from Fruit and Vegetables,

HAS ADOPTED THIS REGULATION:

Article 1

For the 1994/95 marketing year:

- (a) the minimum price referred to in Article 4 of Regulation (EEC) No 426/86 to be paid to producers for dried plums derived from prunes d'Ente;
and
- (b) the production aid referred to in Article 5 of the same Regulation for prunes ready to be offered for human consumption,

shall be as set out in the Annex.

Article 2

Where processing takes place outside the Member State in which the produce was grown, such Member State shall furnish proof to the Member State paying the production aid that the minimum price payable to the producer has been paid.

Article 3

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 July 1994.

For the Commission

René STEICHEN

Member of the Commission

⁽¹⁾ OJ No L 49, 27. 2. 1986, p. 1.

⁽²⁾ OJ No L 69, 12. 3. 1994, p. 5.

⁽³⁾ OJ No L 119, 11. 5. 1990, p. 74.

⁽⁴⁾ OJ No L 201, 31. 7. 1990, p. 4.

*ANNEX***Minimum price to be paid to producers**

Product	ECU/100 kg net, ex producer
Prunes d'Ente of the size category corresponding to 66 fruit per 500 grams	160,266

Production aid

Product	ECU/100 kg net, for products obtained from raw materials
Dried plums derived from prunes d'Ente of the size category corresponding to 66 fruit per 500 grams	61,094

**COMMISSION REGULATION (EC) No 1787/94
of 20 July 1994**

determining the extent to which applications lodged in July 1994 for import licences for certain poultrymeat products under the regime provided for in Council Regulation (EC) No 774/94 opening and providing for the administration of certain Community tariff quotas for poultrymeat and certain other agricultural products can be accepted

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 1431/94 of 22 June 1994, laying down detailed rules for the application in the poultrymeat sector of the import arrangements provided for in Council Regulation (EC) No 774/94 opening and providing for the administration of certain Community tariff quotas for poultrymeat and certain other agricultural products⁽¹⁾, and in particular Article 4 (5) thereof,

Whereas the applications for import licences lodged for the period 1 January to 30 September 1994 are, either for quantities less than or equal to the quantities available and can therefore be met in full, or the said applications are for quantities greater than the quantities available and must therefore be reduced by a fixed percentage to ensure a fair distribution ;

Whereas, in the case of the applications less than or equal to the quantities available, the surplus to be added to the

quantity available for the following period should be determined,

HAS ADOPTED THIS REGULATION :

Article 1

1. Applications for import licences for the period 1 January to 30 September 1994 submitted under Regulation (EC) No 1431/94 shall be met as referred to in Annex I.

2. During the first 10 days of the period 1 October to 31 December 1994 applications may be lodged pursuant to Regulation (EC) No 1431/94 for import licences for a total quantity as referred to in Annex II.

Article 2

This Regulation shall enter into force on 21 July 1994.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 July 1994.

For the Commission

René STEICHEN

Member of the Commission

⁽¹⁾ OJ No L 156, 23. 6. 1994, p. 9.

ANNEX I

	Percentage of acceptance of import licences submitted for the period 1 January to 30 September 1994
1	8,34
2	8,06
3	7,75
4	77,79
5	11,90

ANNEX II

	Total quantity available for the period 1 October to 31 December 1994
1	3 550
2	2 550
3	1 650
4	900
5	350

(tonnes)

COMMISSION REGULATION (EC) No 1788/94

of 20 July 1994

fixing the maximum export refund for white sugar for the eighth partial invitation to tender issued within the framework of the standing invitation to tender provided for in Regulation (EC) No 1021/94

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organization of the markets in the sugar sector ⁽¹⁾, as last amended by Regulation (EC) No 133/94 ⁽²⁾, and in particular the first subparagraph of Article 19 (4) (b) thereof,

Whereas Commission Regulation (EC) No 1021/94 of 29 April 1994 on a standing invitation to tender to determine levies and/or refunds on exports of white sugar ⁽³⁾ requires partial invitations to tender to be issued for the export of this sugar;

Whereas, pursuant to Article 9 (1) of Regulation (EC) No 1021/94, a maximum export refund shall be fixed, as the case may be, account being taken in particular of the state and foreseeable development of the Community and world markets in sugar, for the partial invitation to tender in question;

Whereas, following an examination of the tenders submitted in response to the eighth partial invitation to tender, the provisions set out in Article 1 should be adopted;

Whereas Council Regulation (EEC) No 990/93 ⁽⁴⁾ prohibits trade between the European Community and the

Federal Republic of Yugoslavia (Serbia and Montenegro); whereas this prohibition does not apply in certain situations as comprehensively listed in Articles 2, 4, 5 and 7 thereof; whereas account should be taken of this fact when fixing the refunds;

Whereas the measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Sugar,

HAS ADOPTED THIS REGULATION:

Article 1

1. For the eighth partial invitation to tender for white sugar issued pursuant to Regulation (EC) No 1021/94 the maximum amount of the export refund is fixed at ECU 38,107 per 100 kilograms.

2. Refunds on exports to the Federal Republic of Yugoslavia (Serbia and Montenegro) may be granted only where the conditions laid down in Regulation (EEC) No 990/93 are observed.

Article 2

This Regulation shall enter into force on 21 July 1994.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 July 1994.

For the Commission

René STEICHEN

Member of the Commission

⁽¹⁾ OJ No L 177, 1. 7. 1981, p. 4.

⁽²⁾ OJ No L 22, 27. 1. 1994, p. 7.

⁽³⁾ OJ No L 112, 3. 5. 1994, p. 13.

⁽⁴⁾ OJ No L 102, 28. 4. 1993, p. 14.

COMMISSION REGULATION (EC) No 1789/94

of 20 July 1994

determining the extent to which applications lodged in July 1994 for import licences for fresh, chilled or frozen beef under the import arrangements provided for in the European Agreements between by the Community and the Republic of Poland, the Republic of Hungary and the Interim Agreements with the former Czech and Slovak Federal Republic (CSFR) can be accepted

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 1390/94 of 17 June 1994 laying down detailed rules for the period 1 July 1994 to 30 June 1995 for the application of the import arrangements for fresh, chilled or frozen beef provided for in the European Agreements between the Community and the Republic of Poland, the Republic of Hungary and the Interim Agreements with the former Czech and Slovak Federal Republic⁽¹⁾, and in particular Article 3 (4) thereof,

Whereas Article 1 (1) and (2) of Regulation (EC) No 1390/94 fixes the quantity of fresh, chilled and frozen beef originating in Poland, Hungary, the Czech Republic and the Slovak Republic which may be imported under special conditions in respect of the period 1 July to 30 September 1994; whereas the quantities covered by import licence applications are such that import licences may be granted for the full quantities applied for;

Whereas Article 1 (3) of Regulation (EC) No 1390/94 states that if for the year 4 (1 July 1994 to 30 June 1995) the quantities for which applications for import licences have been submitted for the first, second or third period specified in paragraph 2 of the Article are less than the quantities available, the remaining quantities are to be

added to the quantities in respect of the first period, the quantities available for the four countries concerned for the second period running from 1 October to 31 December 1994 should accordingly be determined,

HAS ADOPTED THIS REGULATION:

Article 1

1. Import licences shall be granted for the full quantities covered by applications submitted for the period 1 July to 30 September 1994 under the import arrangements referred to the Regulation (EC) No 1390/94.

2. The quantities available for the period referred to in Article 1 (2) of Regulation (EC) No 1390/94 running from 1 October to 31 December 1994 amount to:

- 2 398,0 tonnes for meat originating in Poland,
- 2 809,0 tonnes for meat originating in Hungary,
- 1 120,0 tonnes for meat originating in the Czech Republic,
- 495,0 tonnes for meat originating in the Slovak Republic.

Article 2

This Regulation shall enter into force on 26 July 1994.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 July 1994.

For the Commission

René STEICHEN

Member of the Commission

⁽¹⁾ OJ No L 152, 18. 6. 1994, p. 20.

COMMISSION REGULATION (EC) No 1790/94
of 20 July 1994

determining the extent to which applications lodged in July 1994 for import licences for fresh, chilled or preserved beef and veal under the import arrangements provided for in the Bilateral Agreement between the Community and Sweden can be accepted

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 266/94 of 4 February 1994 laying down detailed rules for the application in 1994 of the import arrangements for beef and veal provided for in the Bilateral Agreement between the Community and Sweden ⁽¹⁾, as amended by Regulation (EC) No 394/94 ⁽²⁾, and in particular Article 4 (4) thereof,

Whereas Articles 1 (1) and 2 (1) of Regulation (EC) No 266/94 fix the quantity of fresh or chilled beef and veal falling within CN code 0201 and products falling within CN code 1602 50 31, 1602 50 39 or 1602 50 80 originating in Sweden which may be imported under special conditions during the period 1 July to 30 September 1994; whereas import licences for meat falling within CN code 0201 have not been requested; whereas, however, applications for preserved meat may be granted for the full quantities applied for;

Whereas Article 2 (2) of Regulation (EC) No 266/94 states that if during 1994 the quantities for which applications for import licences have been submitted for the first, second or third period specified in paragraph 1 of that Article are less than the quantities available, the remaining quantities are to be added to the quantities available

in respect of the following period; whereas, given the quantities remaining in respect of the third period, the quantities available for Sweden for the fourth period, from 1 October to 31 December 1994, should therefore be determined,

HAS ADOPTED THIS REGULATION:

Article 1

1. The applications for import licences submitted according to Article 4 (1) of Regulation (EC) No 266/94 shall be granted for the full quantities applied for.

2. The quantities available for the period referred to in Article 2 (1) of Regulation (EC) No 266/94 from 1 October to 31 December 1994 amount to:

- 4 000 tonnes, expressed as carcase weight, of beef falling within CN code 0201,
- 794,30 tonnes, expressed as carcase weight, of beef falling within CN code 1602 50 31, 1602 50 39 or 1602 50 80.

Article 2

This Regulation shall enter into force on 25 July 1994.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 July 1994.

For the Commission

René STEICHEN

Member of the Commission

⁽¹⁾ OJ No L 32, 5. 2. 1994, p. 9.

⁽²⁾ OJ No L 53, 24. 2. 1994, p. 13.

COMMISSION REGULATION (EC) No 1791/94

of 20 July 1994

fixing the import levies on cereals and on wheat or rye flour, groats and meal

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1766/92 of 30 June 1992 on the common organization of the market in cereals ⁽¹⁾, as amended by Commission Regulation (EEC) No 2193/93 ⁽²⁾, and in particular Article 10 (5) and Article 11 (3) thereof,Having regard to Council Regulation (EEC) No 3813/92 of 28 December 1992 on the unit of account and the conversion rates to be applied for the purposes of the common agricultural policy ⁽³⁾, as amended by Regulation (EC) No 3528/93 ⁽⁴⁾,Whereas the import levies on cereals, wheat and rye flour, and wheat groats and meal were fixed by Commission Regulation (EC) No 1561/94 ⁽⁵⁾ and subsequent amending Regulations;

Whereas, in order to make it possible for the levy arrangements to function normally, the representative market

rate established during the reference period from 19 July 1994, as regards floating currencies, should be used to calculate the levies;

Whereas it follows from applying the detailed rules contained in Regulation (EC) No 1561/94 to today's offer prices and quotations known to the Commission that the levies at present in force should be altered to the amounts set out in the Annex hereto,

HAS ADOPTED THIS REGULATION:

Article 1

The import levies to be charged on products listed in Article 1 (1) (a), (b) and (c) of Regulation (EEC) No 1766/92 shall be as set out in the Annex hereto.

Article 2

This Regulation shall enter into force on 21 July 1994.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 July 1994.

For the Commission

René STEICHEN

Member of the Commission⁽¹⁾ OJ No L 181, 1. 7. 1992, p. 21.⁽²⁾ OJ No L 196, 5. 8. 1993, p. 22.⁽³⁾ OJ No L 387, 31. 12. 1992, p. 1.⁽⁴⁾ OJ No L 320, 22. 12. 1993, p. 32.⁽⁵⁾ OJ No L 166, 1. 7. 1994, p. 74.

ANNEX

to the Commission Regulation of 20 July 1994 fixing the import levies on cereals and on wheat or rye flour, groats and meal

(ECU/tonne)

CN code	Third countries ^(*)
0709 90 60	111,72 ^(*) ⁽³⁾
0712 90 19	111,72 ^(*) ⁽³⁾
1001 10 00	49,40 ⁽¹⁾ ⁽³⁾
1001 90 91	76,54
1001 90 99	76,54 ^(*)
1002 00 00	103,32 ^(*)
1003 00 10	105,65
1003 00 90	105,65 ^(*)
1004 00 00	93,93
1005 10 90	111,72 ^(*) ⁽³⁾
1005 90 00	111,72 ^(*) ⁽³⁾
1007 00 90	117,12 ^(*)
1008 10 00	28,57 ^(*)
1008 20 00	34,22 ^(*) ^(*)
1008 30 00	0 ^(*)
1008 90 10	⁽⁷⁾
1008 90 90	0
1101 00 00	146,57 ^(*)
1102 10 00	182,76
1103 11 10	113,18
1103 11 90	167,86
1107 10 11	147,12
1107 10 19	112,68
1107 10 91	198,94 ⁽¹⁰⁾
1107 10 99	151,39 ^(*)
1107 20 00	174,64 ⁽¹⁰⁾

⁽¹⁾ Where durum wheat originating in Morocco is transported directly from that country to the Community, the levy is reduced by ECU 0,60/tonne.

⁽²⁾ In accordance with Regulation (EEC) No 715/90 the levies are not applied to products imported directly into the French overseas departments, originating in the African, Caribbean and Pacific States.

⁽³⁾ Where maize originating in the ACP is imported into the Community the levy is reduced by ECU 1,81/tonne.

⁽⁴⁾ Where millet and sorghum originating in the ACP is imported into the Community the levy is applied in accordance with Regulation (EEC) No 715/90.

⁽⁵⁾ Where durum wheat and canary seed produced in Turkey are transported directly from that country to the Community, the levy is reduced by ECU 0,60/tonne.

⁽⁶⁾ The import levy charged on rye produced in Turkey and transported directly from that country to the Community is laid down in Council Regulation (EEC) No 1180/77 (OJ No L 142, 9. 6. 1977, p. 10), as last amended by Regulation (EEC) No 1902/92 (OJ No L 192, 11. 7. 1992, p. 3), and Commission Regulation (EEC) No 2622/71 (OJ No L 271, 10. 12. 1971, p. 22), as amended by Regulation (EEC) No 560/91 (OJ No L 62, 8. 3. 1991, p. 26).

⁽⁷⁾ The levy applicable to rye shall be charged on imports of the product falling within CN code 1008 90 10 (triticale).

⁽⁸⁾ No levy applies to OCT originating products according to Article 101 (1) of Decision 91/482/EEC.

⁽⁹⁾ Products falling within this code, imported from Poland or Hungary under the Agreements concluded between those countries and the Community and under the Interim Agreement between the Czech Republic, the Slovak Republic, Bulgaria and Romania and the Community and in respect of which EUR.1 certificates issued in accordance with Regulation (EC) No 121/94 or (EC) No 335/94 have been presented, are subject to the levies set out in the Annex to that Regulation.

⁽¹⁰⁾ In accordance with Council Regulation (EEC) No 1180/77 this levy is reduced by ECU 5,44 per tonne for products originating in Turkey.

COMMISSION REGULATION (EC) No 1792/94

of 20 July 1994

fixing the premiums to be added to the import levies on cereals, flour and malt

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1766/92 of 30 June 1992 on the common organization of the market in cereals ⁽¹⁾, as amended by Commission Regulation (EEC) No 2193/93 ⁽²⁾, and in particular Article 12 (4) thereof,

Having regard to Council Regulation (EEC) No 3813/92 of 28 December 1992 on the unit of account and the conversion rates to be applied for the purposes of the common agricultural policy ⁽³⁾, as amended by Regulation (EC) No 3528/93 ⁽⁴⁾,

Whereas the premiums to be added to the levies on cereals and malt were fixed by Commission Regulation (EC) No 1562/94 ⁽⁵⁾ and subsequent amending Regulations;

Whereas, in order to make it possible for the levy arrangements to function normally, the representative market

rate established during the reference period from 19 July 1994, as regards floating currencies, should be used to calculate the levies;

Whereas, on the basis of today's cif prices and cif forward delivery prices, the premiums at present in force, which are to be added to the levies, should be altered to the amounts set out in the Annex hereto,

HAS ADOPTED THIS REGULATION:

Article 1

The premiums to be added to the levies fixed in advance for the import in respect of the products listed in Article 1 (1) (a), (b) and (c) of Regulation (EEC) No 1766/92 shall be as set out in the Annex hereto.

Article 2

This Regulation shall enter into force on 21 July 1994.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 July 1994.

For the Commission

René STEICHEN

Member of the Commission

⁽¹⁾ OJ No L 181, 1. 7. 1992, p. 21.

⁽²⁾ OJ No L 196, 5. 8. 1993, p. 22.

⁽³⁾ OJ No L 387, 31. 12. 1992, p. 1.

⁽⁴⁾ OJ No L 320, 22. 12. 1993, p. 32.

⁽⁵⁾ OJ No L 166, 1. 7. 1994, p. 77.

ANNEX

to the Commission Regulation of 20 July 1994 fixing the premiums to be added to the import levies on cereals, flour and malt

A. Cereals and flour

(ECU/tonne)

CN code	Current 7	1st period 8	2nd period 9	3rd period 10
0709 90 60	0	1,01	1,02	1,48
0712 90 19	0	1,01	1,02	1,48
1001 10 00	0	0	0	0
1001 90 91	0	0	0	0
1001 90 99	0	0	0	0
1002 00 00	0	0	0	0
1003 00 10	0	0	0	0
1003 00 90	0	0	0	0
1004 00 00	0	0	0	0
1005 10 90	0	1,01	1,02	1,48
1005 90 00	0	1,01	1,02	1,48
1007 00 90	0	0	0	0
1008 10 00	0	0	0	0
1008 20 00	0	0	0	0
1008 30 00	0	0	0	0
1008 90 90	0	0	0	0
1101 00 00	0	0	0	0
1102 10 00	0	0	0	0
1103 11 10	0	0	0	0
1103 11 90	0	0	0	0

B. Malt

(ECU/tonne)

CN code	Current 7	1st period 8	2nd period 9	3rd period 10	4th period 11
1107 10 11	0	0	0	0	0
1107 10 19	0	0	0	0	0
1107 10 91	0	0	0	0	0
1107 10 99	0	0	0	0	0
1107 20 00	0	0	0	0	0

COMMISSION REGULATION (EC) No 1793/94
of 20 July 1994
amending for the 10th time Regulation (EC) No 3337/93 adopting exceptional
support measures for the market in pigmeat in Belgium

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2759/75 of 29 October 1975 on the common organization of the market in pigmeat ⁽¹⁾, as last amended by Commission Regulation (EEC) No 1249/89 ⁽²⁾, and in particular Article 20 thereof,

Whereas because of the outbreak of classical swine fever in one production region in Belgium, exceptional support measures for the market in pigmeat were adopted for that Member State in Commission Regulation (EC) No 3337/93 ⁽³⁾, as last amended by Regulation (EC) No 1481/94 ⁽⁴⁾;

Whereas it is necessary to adjust the buying-in price for pigs to the present market situation taking into account the decrease in market prices;

Whereas in view of a new outbreak of classical swine fever, the veterinary and commercial restrictions have been extended by the Belgian authorities to a new region in the middle of June 1994; whereas it is appropriate to include, as from 12 July 1994, the animals coming from this region in the buying-in scheme provided for by Regulation (EC) No 3337/93;

Whereas Commission Regulation (EC) No 1391/94 ⁽⁵⁾ has introduced as from 6 June 1994 a new quantity of pigs eligibles under the support measures provided for in Regulation (EC) No 3337/94; whereas it is appropriate to amend this date in order to allow the inclusion of pigs bought in in the first days of the month of June 1994;

Whereas the measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Pigmeat,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 3337/93 is hereby amended as follows:

1. Article 4 is amended as follows:

- (a) in paragraph 1, 'ECU 109' is replaced by 'ECU 102' and 'ECU 93' is replaced by 'ECU 87';
- (b) in paragraph 2, 'ECU 39' is replaced by 'ECU 32' and 'ECU 33' is replaced by 'ECU 27';
- (c) in paragraph 3, 'ECU 31' is replaced by 'ECU 26' and 'ECU 26' is replaced by 'ECU 22';

2. Annex I is replaced by the Annex to this Regulation.

Article 2

In Article 2 of Regulation (EC) No 1391/94, '6 June 1994' is replaced by '31 May 1994'.

Article 3

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

It shall apply as from 21 July 1994. However, the provisions of Article 1 point 2 shall apply with effect from 12 July 1994.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 July 1994.

For the Commission

René STEICHEN

Member of the Commission

⁽¹⁾ OJ No L 282, 1. 11. 1975, p. 1.
⁽²⁾ OJ No L 129, 11. 5. 1989, p. 12.
⁽³⁾ OJ No L 299, 4. 12. 1993, p. 23.
⁽⁴⁾ OJ No L 159, 28. 6. 1994, p. 50.
⁽⁵⁾ OJ No L 152, 18. 6. 1994, p. 24.

*ANNEX**ANNEX I*

- (a) The part of the municipality of Beernem located north of the following roads : Bruggestraat, Knesselaresstraat to the crossing with Hoogstraat, the Hoogstraat to the border of the Province.
 - (b) The part of the municipality of Brugge located :
 - 1. north of the roads : Astridlaan and Generaal Lemanlaan ;
 - 2. east of the roads : Buiten Boninvest, Buiten Kazernevest, Buiten Kruisvest, Fort Lapin, Havenstraat, Krommestraat, Dudzeelse Steenweg, Westkapeise Steenweg.
 - (c) The part of the municipality of Knokke-Heist located south of the roads : Dudzelestraat to the crossing with Sluisstraat, and Sluisstraat.
 - (d) The part of the municipality of Zelzate located west of the Ghent-Terneuzen canal.
 - (e) The part of the town of Ghent located :
 - 1. west of the Ghent-Terneuzen canal, Voorhaven, Tolhuisdok, Verbindungskanaal ;
 - 2. west of the roads : Elyzeese Velden and Bargiekaai ;
 - 3. north of the roads : Phoenixstraat, Weverstraat, Drongensesteenweg, Diensesteenweg and the E40.
 - (f) The part of the municipality of Nevele, located north of the E40.
 - (g) The part of the municipality of Aalter located :
 - 1. north of the E40 between the border with the municipality of Nevele and the crossing with the N44 ;
 - 2. east of the N44 from the E40 to the border with the municipality of Knesselare.
 - (h) The part of the municipality of Knesselare located :
 - 1. east of the N44 from the border with the municipality of Aalter to the crossing with Urseleweg ;
 - 2. north of the roads : Urseleweg from the crossing with the N44, Veldstraat and Kloosterstraat.
 - (i) The municipalities of Eeklo, Kaprijke, Waarschoot, Zomergem, Sint-Laureins, Assenede, Evergem, Lovendegem, Maldegem and Damme.'
-

COMMISSION REGULATION (EC) No 1794/94

of 20 July 1994

amending for the second time Regulation (EC) No 1393/94 adopting exceptional support measures for the market in pigmeat in the Netherlands

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2759/75 of 29 October 1975 on the common organization of the market in pigmeat⁽¹⁾, as last amended by Regulation (EEC) No 1249/89⁽²⁾, and in particular Article 20 thereof,Whereas, because of the outbreak of classical swine fever in certain regions in Belgium, which are located in the border area to the Netherlands, exceptional support measures for the market in pigmeat were adopted for the Netherlands in Commission Regulation (EC) No 1393/94⁽³⁾, as amended by Regulation (EC) No 1482/94⁽⁴⁾;

Whereas it is necessary to adjust the buying-in price for pigs to the present market situation taking into account the decrease in market prices;

Whereas in view of new outbreaks of classical swine fever in Belgium, the veterinary and commercial restrictions were extended by the Dutch authorities to a new region at the end of June 1994; whereas it is appropriate to include, as from 12 July 1994, animals coming from this region in the buying-in scheme provided for by Regulation (EC) No 1393/94;

Whereas the measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Pigmeat,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 1393/94 is hereby amended as follows:

1. Article 4 is amended as follows:

- (a) in paragraph 1, 'ECU 105' is replaced by 'ECU 95' and 'ECU 89' is replaced by 'ECU 81';
- (b) in paragraph 2, 'ECU 36' is replaced by 'ECU 31' and 'ECU 31' is replaced by 'ECU 26';

2. the Annex is replaced by the Annex to this Regulation.

*Article 2*This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

It shall apply from 21 July 1994. However, the provisions of Article 1 point 2 shall apply with effect from 12 July 1994.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 July 1994.

For the Commission

René STEICHEN

Member of the Commission⁽¹⁾ OJ No L 282, 1. 11. 1975, p. 1.⁽²⁾ OJ No L 129, 11. 5. 1989, p. 12.⁽³⁾ OJ No L 152, 18. 6. 1994, p. 27.⁽⁴⁾ OJ No L 159, 26. 6. 1994, p. 51.

*ANNEX**ANNEX*

The area located in the province of Zeeland is delimited as follows :

From the border post 359 follow road N58 towards the east to the crossroads with "Sint Annastraat", follow this towards the south-east to the crossroads with "De Kaai" in the municipality of Sluis, follow "De Kaai" towards the east to the crossroads with the "Hoogstraat", follow this towards the north to the crossroads with the provincial road from Sluis to Breskens, follow this towards the north-east to the crossroads with the "Barendijk" in the municipality of Nieuwvliet, follow the "Barendijk" towards the east and continue into "Schoondijkse Weg", follow this towards the east to the crossroads with road N58, follow this towards the south to the crossroads with road N61 in the commune of Schoondijk, follow road N61 towards the south-east to the crossroads with "Statendijk 1", follow this to the crossroads with the "Molentje", follow this to the crossroads with the "Oranjedijk", follow this to the crossroads with the "Mauritsweg", follow this to the crossroads with the "Zachariasweg", follow this to the crossroads with the "Driewegenweg", follow this and continue into "Schorerweg", follow this to the crossroads with the "Hoofdplaatseweg" and the "Driewegenweg", follow this towards the south-east to the crossroads with road N61, follow this towards the east to the crossroads with the "Isabella" canal, follow this canal to the State border, follow the border towards the south-east to border post 359.'

COMMISSION REGULATION (EC) No 1795/94
of 20 July 1994
amending for the eighth time Regulation (EC) No 3088/93 adopting exceptional
support measures for the market in pigmeat in Germany

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2759/75 of 29 October 1975 on the common organization of the market in pigmeat⁽¹⁾, as last amended by Regulation (EEC) No 1249/89⁽²⁾, and in particular Article 20 thereof,

Whereas, because of the outbreak of classical swine fever in certain production regions in Germany, exceptional support measures for the market in pigmeat were adopted for that Member State in Commission Regulation (EC) No 3088/93⁽³⁾, as last amended by Regulation (EC) No 1392/94⁽⁴⁾;

Whereas Commission Decision 94/178/EC⁽⁵⁾ laying down veterinary restrictions is amended by Decision 94/365/EC⁽⁶⁾; whereas this amendment applies on 24 June 1994; whereas it is appropriate to provide this amendment in Regulation (EC) No 3088/93;

Whereas the aid granted on the delivery of heavy pigs should be adjusted in line with the situation on the markets, taking account of the decrease in market prices;

Whereas the measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Pigmeat,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 3088/93 is hereby amended as follows:

1. Article 2 (1) is replaced by the following:

‘1. Only pigs, piglets and young piglets raised in the zone listed in Annex I to Decision 94/178/EC can be delivered, provided the veterinary provisions laid down in Article 1 (2) of that Decision are applicable in the zone on the day of delivery of the animals.’;

2. in Article 4 (1), ‘ECU 115’ is replaced by ‘ECU 107’.

Article 2

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

It shall apply from 21 July 1994. However, the provisions of Article 1 point 1 shall apply with effect from 24 June 1994.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 July 1994.

For the Commission

René STEICHEN

Member of the Commission

⁽¹⁾ OJ No L 282, 1. 11. 1975, p. 1.

⁽²⁾ OJ No L 129, 11. 5. 1989, p. 12.

⁽³⁾ OJ No L 277, 10. 11. 1993, p. 30.

⁽⁴⁾ OJ No L 152, 18. 6. 1994, p. 25.

⁽⁵⁾ OJ No L 83, 26. 3. 1994, p. 54.

⁽⁶⁾ OJ No L 162, 30. 6. 1994, p. 70.

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 granulation 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 nutrient content. The danger of segregation during transport and storage is 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 Commis-

sion 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 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 subject to completely 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 from 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 subject 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, magnesium 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. It 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.

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.

- (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 producers 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
- (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 straight 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 from 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 channelled 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 K₂O 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 Potacan 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 Potacan.

(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 channeling 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 specialties.

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 [...] ^(*). 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 Potacan 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 completely 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 Potacan, K + S has proposed one of several possible arrangements that could meet the requirements of the Commission acknowledged by K + S. The arrangements to be 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.

^(*) 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 above-mentioned 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.

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⁾ Approximately DM 100 million.

⁽²⁾ Approximately 80 %.

⁽³⁾ Approximately 10 %.

⁽⁴⁾ Approximately 90 %.

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 initial 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 alternative 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 activities, 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 activities 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 Treuhandanstalt 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.

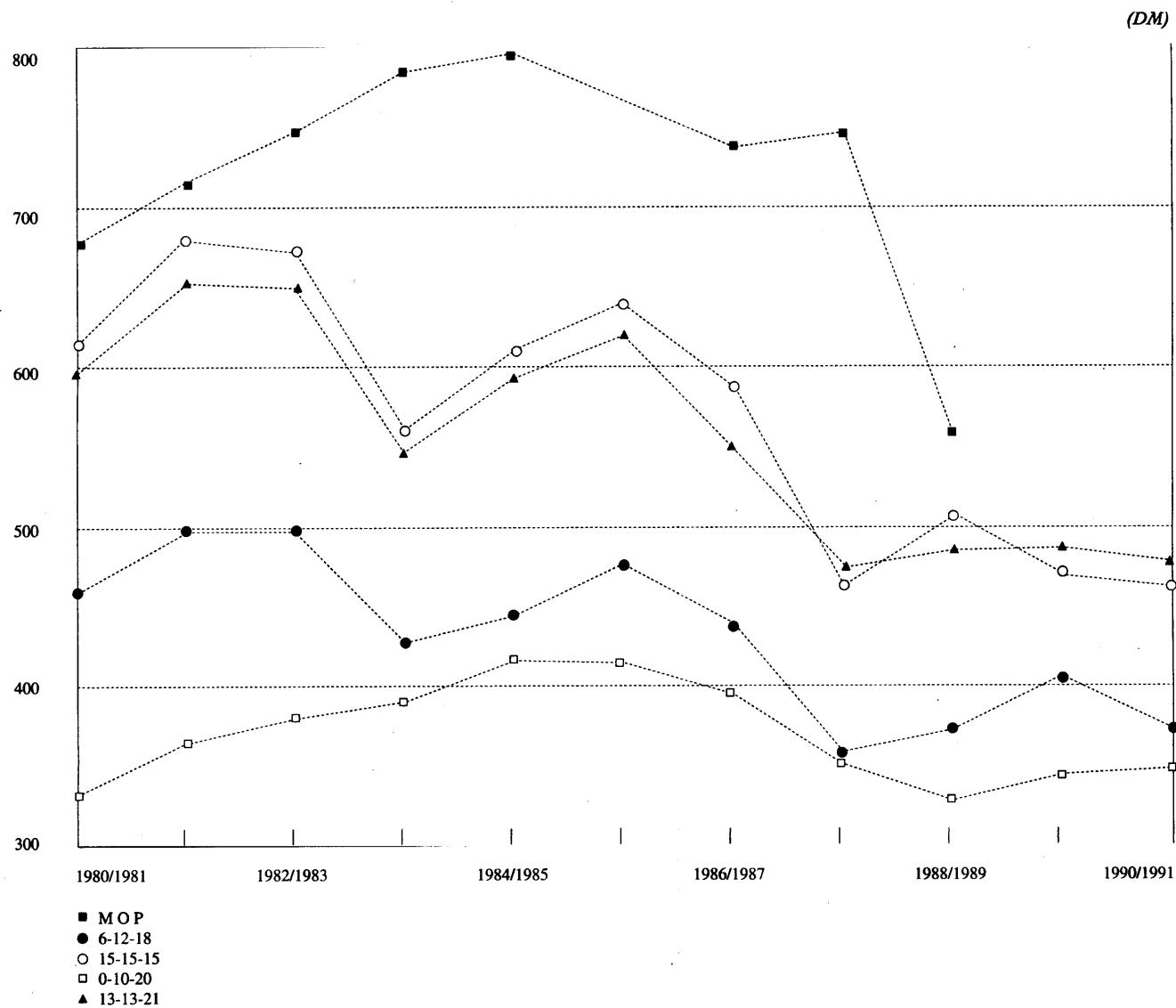
For the Commission

Karel VAN MIERT

Member of the Commission

ANNEX I

Prices in Germany for MOP and fertilizers

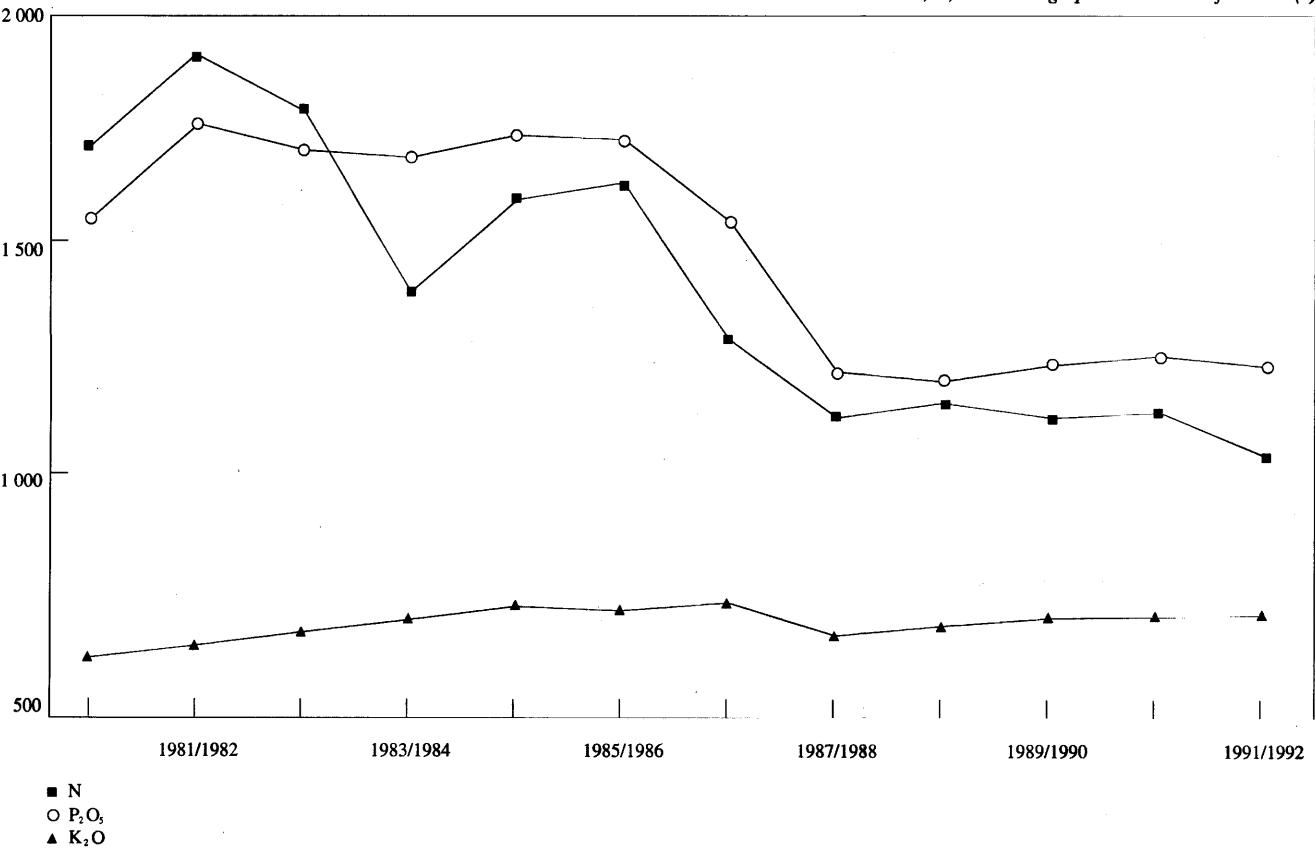


Source: FAO-Rome.

ANNEX II

Fertilizer prices in Germany

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

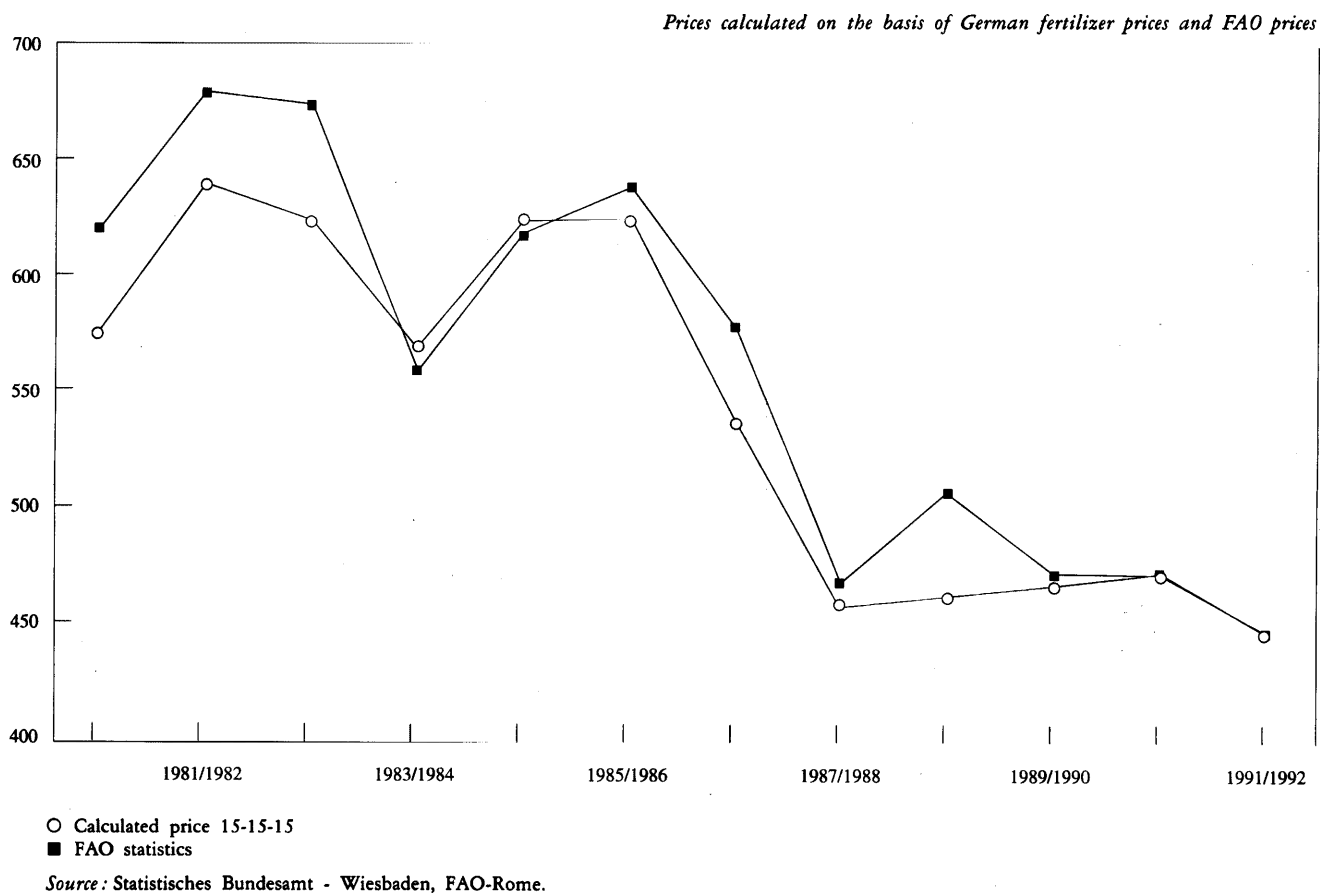


Source : Statistisches Bundesamt, Wiesbaden.

(*) Average trade prices for fertilizers.

ANNEX III

Comparison of fertilizer type



EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY

DECISION OF THE EFTA SURVEILLANCE AUTHORITY

No 21/94/COL

of 6 April 1994

on the issuing of three notices in the field of competition

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area ⁽¹⁾,

Having regard to Articles 5 (2) (b) and 25 (1) of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ⁽²⁾,

Whereas the EC Commission has adopted three notices which are of relevance also for the European Economic Area ;

Whereas it is necessary to provide guidance for undertakings by indicating the principles and rules which will guide the EFTA Surveillance Authority when applying Articles 53 to 60 of the EEA Agreement to a particular case in order to ensure a uniform application of the EEA competition rules throughout the European Economic Area,

— Notice of the EFTA Surveillance Authority modifying the notice concerning the acts referred to in points 2 and 3 of Annex XIV to the EEA Agreement on the application of Article 53 (3) of the EEA Agreement to categories of exclusive distribution and exclusive purchasing agreements.

— Notice of the EFTA Surveillance Authority clarifying the activities of motor vehicle intermediaries.

2. These notices shall be authentic in the English language and shall be published in the EEA Section of and the EEA Supplement to the *Official Journal of the European Communities*.

HAS ADOPTED THIS DECISION :

Done at Brussels, 6 April 1994.

1. The EFTA Surveillance Authority issues the following notices which are annexed to this Decision as Annexes 1 to 3 ;

— Notice of the EFTA Surveillance Authority concerning the assessment of cooperative joint ventures pursuant to Article 53 of the EEA Agreement.

For the EFTA Surveillance Authority

Nic GRÖNVALL

Acting President

⁽¹⁾ Hereinafter referred to as the EEA Agreement.

⁽²⁾ Hereinafter referred to as the Surveillance and Court Agreement.

ANNEX 1

NOTICE OF THE EFTA SURVEILLANCE AUTHORITY CONCERNING THE ASSESSMENT OF COOPERATIVE JOINT VENTURES PURSUANT TO ARTICLE 53 OF THE EEA AGREEMENT

- A. The present notice is issued pursuant to the rules of the Agreement on the European Economic Area (EEA Agreement) and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement).
- B. The Commission issued a notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EEC Treaty (OJ No C 43, 16. 2. 1993, p. 2). This non-binding act contains principles and rules which the Commission follows in the field of competition.
- C. The EFTA Surveillance Authority considers the abovementioned act to be EEA relevant. In order to maintain equal conditions of competition and to ensure a uniform application of the EEA competition rules throughout the European Economic Area, the EFTA Surveillance Authority adopts the present notice exercising the power conferred to it in Article 5 (2) (b) of the Surveillance and Court Agreement. It intends to follow the principles and rules laid down in this notice when applying the relevant EEA competition rules to a particular case.

I. Introduction

1. Joint ventures (JVs), as referred to in this notice, embody a special, institutionally fixed form of cooperation between undertakings. They are versatile instruments at the disposal of the parents, with the help of which different goals can be pursued and attained.

2. JVs can form the basis and the framework for cooperation in all fields of business activity. Their potential area of application includes, *inter alia*, the procuring and processing of data, the organization of working systems and procedures, taxation and business consultancy, the planning and financing of investment, the implementation of research and development plans, the acquisition and granting of licences for the use of intellectual property rights, the supply of raw materials or semi-finished products, the manufacture of goods, the provision of services, advertising, distribution and customer service.

3. JVs can fulfil one or more of the aforementioned tasks. Their activity can be limited in time or be of an unlimited duration. The broader the concrete and temporal framework of the cooperation, the stronger it will influence the business policy of the parents in relation to each other and to third parties. If the JV concerns market-oriented matters such as purchasing, manufacturing, sales or the provision of services, it will normally lead to coordination, if not even to a uniformity of the competitive behaviour of the parents at that particular economic level. This is all the more true where a JV fulfils all the functions of a normal undertaking and consequently behaves on the market as an independent supplier or purchaser. The creation of a JV which combines wholly or in part the existing activities of the parents in a particular economic area or takes over new activities for the parents, brings, over and above that, a change in the structure of the participating enterprises.

4. The assessment of cooperative JVs pursuant to Article 53 (1) and (3) of the EEA Agreement does not depend on the legal form which the parents choose for their cooperation. The applicability of the prohibition of restrictive practices depends, on the

contrary, on whether the creation or the activities of the JV may affect trade between Contracting Parties and have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement. The question whether an exemption can be granted to a JV will depend on the one hand on its overall economic benefits and on the other hand on the nature and scopes of the restrictions of competition it entails.

5. In view of the variety of situations which come into consideration it is impossible to make general comments on the compliance of JVs with competition law. For a large proportion of JVs, whether or not they fall within the scope of application of Article 53 of the EEA Agreement depends on their particular activity⁽¹⁾. For other JVs, prohibition will occur only if particular legal and factual circumstances coincide, the existence of which must be determined on a case-by-case basis⁽²⁾. Exemptions from the prohibition are based on the analysis of the overall economic balance, the results of which can turn out differently⁽³⁾. Cooperative joint ventures can however be divided into different categories, which are each open to the same competition law analysis.

6. In the notice of the EFTA Surveillance Authority concerning agreements, decisions and concerted practices in the field of cooperation between enterprises⁽⁴⁾, the EFTA Surveillance Authority listed a series of types of cooperation which by their nature are not prohibited because they do not have as their object or effect the restriction of competition within the meaning of Article 53 (1) of the EEA Agreement. The notice of the EFTA Surveillance Authority on agreements of minor importance⁽⁵⁾ sets out quantitative criteria for those arrangements which are not prohibited because they have no appreciable impact on competition or inter-State trade. Both notices apply to JVs. The acts referred to in Annex XIV to the EEA Agreement on the applica-

⁽¹⁾ See (EEC) III.1, point 15.

⁽²⁾ See (EEC) III.2 and 3, points 17 *et seq.* and 32 *et seq.*

⁽³⁾ See (EEC) IV.1 and 2, points 43 *et seq.* and 52 *et seq.*

⁽⁴⁾ OJ No L 153, 18. 6. 1994, p. 25.

⁽⁵⁾ OJ No L 153, 18. 6. 1994, p. 32.

tion of Article 53 (3) of the EEA Agreement to specialization agreements⁽⁶⁾, research and development agreements⁽⁷⁾, patent licensing agreements⁽⁸⁾ and know-how licensing agreements⁽⁹⁾, include JVs amongst the beneficiaries of these group exemptions⁽¹⁰⁾. Further general indications on the assessment of co-operative JVs for competition purposes can be found in the Commission decisions which have been issued in individual cases. The EFTA Surveillance Authority will take due account of the principles applied by the EC Commission in the decisions which are cited in this notice.

7. With this notice the EFTA Surveillance Authority informs undertakings about both the legal and economic criteria which will guide it in the future application of Article 53 (1) and (3) of the EEA Agreement to cooperative JVs. This notice applies to all JVs which do not fall within the scope of application of Article 3 of the act on the control of concentrations between undertakings referred to in Annex XIV to the EEA Agreement⁽¹¹⁾. It forms the counterpart of the notice regarding concentrative and cooperative operations⁽¹²⁾ and the notice on restrictions ancillary to concentrations⁽¹³⁾ which clarify the abovementioned act. Links between undertakings other than JVs will not be dealt with in this notice, even though they often have similar effects on competition in the territory covered by the EEA Agreement and on trade between Contracting Parties.

8. This notice is without prejudice to the power of national courts in the EFTA States to apply Article 53 (1) and group exemptions pursuant to Article 53 (3) of the EEA Agreement on the basis of their own jurisdiction. Nevertheless it constitutes a factor which the national courts can take into account when deciding a dispute before them. It is also without prejudice to any interpretation which may be given by the EFTA Court.

II. The concept of cooperative joint ventures

9. The concept of cooperative JVs can be derived from the act on the control of concentrations between undertakings referred to in Annex XIV to the EEA Agreement⁽¹⁴⁾. According to Article 3 (1), a JV is an undertaking under the joint control of several other undertakings, the parents. Control, according to Article 3 (3), consists of the possibility of exercising a decisive influence on the activities of the undertaking. Whether joint control, the prerequisite of every JV, exists, is determined by the legal and factual circumstances of the individual case. For details refer to the notice of the EFTA Surveillance Authority regarding concentrative and cooperative operations⁽¹⁵⁾.

10. According to Article 3 (2) of the abovementioned act any JV which does not fulfil the criteria of a concentration, is cooperative in nature. Under the second subparagraph, this applies to:

- all JVs, the activities of which are not to be performed on a lasting basis, especially those limited in advance by the parents to a short time period,
- JVs which do not perform all the functions of an autonomous economic entity, especially those charged by their parents simply with the operation of particular functions of an undertaking (partial-function JVs),
- JVs which perform all the functions of an autonomous economic entity (full-function JVs) where they give rise to coordination of competitive behaviour by the parents in relation to each other or to the JV.

The delimitation of cooperative and concentrative operations can be difficult in individual cases. The abovementioned notice contains detailed instructions⁽¹⁶⁾ for the solution of this problem⁽¹⁷⁾.

11. Cooperative JVs are outside the scope of the provisions on merger control. The determination of the cooperative character of the JV has however no substantive legal effects. It simply means that the JV is subject to the procedures set out in Chapters II, VI, IX and XI of Protocol 4 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice when determining its compliance with Article 53 (1) and (3).

⁽¹⁶⁾ See points 15 to 16.

⁽¹⁷⁾ Additional indications can also be gained from the past practice of the Commission of the European Communities under Regulation (EEC) No 4064/89 (Act referred to in point 1 of Annex XIV of the EEA Agreement).

See on the one hand Decisions (pursuant to Article 6 (1) (a) of Regulation (EEC) No 4064/89): Renault/Volvo, OJ No C 281, 7. 11. 1990, p. 2; Baxter/Nestlé/Slavia, OJ No C 37, 6. 2. 1991, p. 11; Apollinaris/Schweppes, OJ No C 203, 24. 6. 1991, p. 14; Elf/Enterprise, OJ No C 203, 24. 7. 1991, p. 24; Sunrise, OJ No C 18, 31. 1. 1992, p. 15; BSN/Nestlé/Cokoladovny, OJ No C 47, 17. 2. 1992, p. 23; Flachglas/Vegla OJ No C 120, 12. 5. 1992, p. 30; Eureko, OJ No C 113, 1. 5. 1992, p. 12; Herba/IRR, OJ No C 120, 28. 4. 1992, p. 13; Koipe-Tabacalera/Elosua, OJ No C 227, 3. 9. 1992, p. 10; on the other hand Decisions (pursuant to Article 6 (1) (b) of Regulation (EEC) No 4064/89): Sanofi/Sterling Drugs, OJ No C 156, 10. 6. 1991, p. 10; Elf/BC/Cepsa, OJ No C 172, 18. 6. 1991, p. 8; Dräger/IBM/HMP, OJ No C 236, 28. 6. 1991, p. 6; Thomson/Pilkington, OJ No C 279, 23. 10. 1991, p. 19; UAP/Transatlantic/Sun Life, OJ No C 296, 11. 11. 1991, p. 12; TNT/GD Net; Lucas/Eaton, OJ No C 328, 9. 12. 1991, p. 15; Courtaulds/SNIA, OJ No C 333, 19. 12. 1991, p. 16; Volvo/Atlas, OJ No C 17, 14. 1. 1992, p. 10; Ericsson/Kolbe, OJ No C 27, 22. 1. 1992, p. 14; Spar/Dansk Supermarket, OJ No C 29, 3. 2. 1992, p. 18; Generali/BCHA OJ No C 107, 28. 4. 1992, p. 24; Mondri/Frantschach OJ No C 124, 16. 5. 1992, p. 19; Eucom/Digital, OJ No C 140, 18. 5. 1992, p. 12; Ericsson/Ascom OJ No C 201, 8. 8. 1992, p. 26; Thomas Cook/LTU/West LB OJ No C 199, 6. 8. 1992, p. 12; Elf-Atochem/Rohm & Haas, OJ No C 201, 8. 8. 1992, p. 27; Rhône-Poulenc/SNIA OJ No C 212, 18. 8. 1992, p. 23; Northern Telecom/Matra Telecommunications OJ No C 240, 19. 9. 1992, p. 15; Avesta/British Steel, NCC/AGA/Axel Johnson OJ No C 258, 7. 10. 1992, p. 9.

⁽⁶⁾ Point 6 of Annex XIV to the EEA Agreement (Regulation (EEC) No 417/85 as amended by Regulation (EEC) No 151/93).

⁽⁷⁾ Point 7 of Annex XIV to the EEA Agreement (Regulation (EEC) No 418/85 as amended by Regulation (EEC) No 151/93).

⁽⁸⁾ Point 5 of Annex XIV to the EEA Agreement (Regulation (EEC) No 2349/84 as amended by Regulation (EEC) No 151/93).

⁽⁹⁾ Point 9 of Annex XIV to the EEA Agreement (Regulation (EEC) No 556/89 as amended by Regulation (EEC) No 151/93).

⁽¹⁰⁾ See below IV.1, points 43 *et seq.*

⁽¹¹⁾ Point 1 of Annex XIV to the EEA Agreement (Regulation (EEC) No 4064/89).

⁽¹²⁾ OJ No L 153, 18. 6. 1994, p. 7.

⁽¹³⁾ OJ No L 153, 18. 6. 1994, p. 3.

⁽¹⁴⁾ Cited in footnote 11.

⁽¹⁵⁾ Cited in footnote 12; see points 6 to 14.

III. Assessment pursuant to Article 53 of the EEA Agreement

1. General comments

12. JVs can be caught by the prohibition of cartels only where they fulfil all the requisite elements pursuant to Article 53 (1) of the EEA Agreement.

13. The creation of a JV is usually based on an agreement between undertakings and sometimes on a decision of an association of undertakings. The exercise of control as well as the management of the business is likewise usually governed by contract. Where there is no agreement, which is the case for instance in the acquisition of a joint controlling interest in an existing company by the purchase of shares on the stock exchange, the continued existence of the JV depends on the parent companies coordinating their policy towards the JV and their manner of controlling it.

14. Whether the aforementioned agreements, decisions or concerted practices are likely to affect trade between Contracting Parties, can be decided only on a case-by-case basis. Where the JV's actual or foreseeable effects on competition are limited to the territory of one Contracting Party or to territories not covered by the EEA Agreement, Article 53 (1) of the EEA Agreement will not apply.

15. Article 53 (1) therefore does not apply to certain categories of JV because they do not have as their objective or effect the prevention, restriction or distortion of competition. This is particularly true for:

- JVs formed by parents which all belong to the same group and which are not in a position freely to determine their market behaviour: in such a case its creation is merely a matter of internal organization and allocation of tasks within the group,
- JVs of minor economic importance within the meaning of the notice of the EFTA Surveillance Authority on agreements of minor importance⁽¹⁸⁾; there is no appreciable restriction of competition where the combined turnover of the participating undertakings does not exceed ECU 200 million and their market share is not more than 5 %,
- JVs with activities neutral to competition within the meaning of the EFTA Surveillance Authority on cooperation between enterprises⁽¹⁹⁾: the types of cooperation referred to therein do not restrict competition because:
 - they have as their sole object the procurement of non-confidential information and therefore serve in the preparation of autonomous decisions of the participating enterprises⁽²⁰⁾;
 - they have as their sole object management cooperation⁽²¹⁾;
 - they have as their sole object cooperation in fields removed from the market⁽²²⁾,
 - they are concerned solely with technical and organizational arrangements⁽²³⁾,

— they concern solely arrangements between non-competitors⁽²⁴⁾,

— even though they concern arrangements between competitors, they neither limit the parties competitive behaviour nor affect the market position of third parties⁽²⁵⁾.

The aforementioned characteristics for distinguishing between conduct restrictive of competition and conduct which is neutral from a competition point of view are not fixed, but form part of the general development of EEA rules. They must therefore be construed and applied in the light of the case-law of the Court of Justice of the European Communities, the EFTA Court as well as in the light of the EFTA Surveillance Authority's decisions. In addition, notices of the EFTA Surveillance Authority may be modified from time to time in order to adapt them to the evolution of the law.

16. JVs which do not fall into any of the abovementioned categories must be individually examined to see whether they have the object or effect of restricting competition. The basic principles of the notice on cooperation can be useful in such examination. The EFTA Surveillance Authority will explain below on what criteria it assesses the restrictive character of a JV.

2. Criteria for the establishment of restrictions of competition

17. The appraisal of a cooperative JV in the light of the competition rules will focus on the relationship between the enterprises concerned and on the effects of their cooperation on third parties. In this respect the first task is to check whether the creation or operation of the JV is likely to prevent, restrict or distort competition between parents. Secondly, it is necessary to examine whether the operation in question is likely to affect appreciably the competitive position of third parties, especially with regard to supply and sales possibilities. The relationship of the parents to the JV requires a separate legal assessment only if the JV is a full-function undertaking. However, even here the assessment must always take into account the relationship of the parents to each other and to third parties. Prevention, restriction or distortion of competition will be brought about by a JV only if its creation or activity affects the conditions of competition on the relevant market. The evaluation of a JV pursuant to Article 53 (1) of the EEA Agreement therefore always implies defining the relevant geographic and product market. The criteria to apply in that process are to be drawn from the notice on agreements of minor importance⁽²⁶⁾. Special attention must be paid to networks of JVs which are set up by the same parents, by one parent with different partners, or by different parents in parallel. They form an important element of the market structure and may therefore be of decisive influence in determining whether the creation of a JV leads to restrictions of competition.

(a) Competition between parent companies

18. Competition between parent companies can be prevented, restricted or distorted through cooperation in a JV only to the extent that companies are already actual or potential competitors. The assumption of potential competitive circumstances presup-

⁽¹⁸⁾ Cited in footnote 5.

⁽¹⁹⁾ See footnote 4.

⁽²⁰⁾ See II, point 1 of the abovementioned notice.

⁽²¹⁾ See II, point 2 of the abovementioned notice.

⁽²²⁾ See II, point 3 of the abovementioned notice.

⁽²³⁾ See II, point 4 of the abovementioned notice.

⁽²⁴⁾ See II, points 5 and 6 of the abovementioned notice.

⁽²⁵⁾ See II, points 7 and 8 of the abovementioned notice.

⁽²⁶⁾ Cited in footnote 5.

poses that each parent alone is in a position to fulfil the tasks assigned to the JV and that it does not forfeit its capabilities to do so by the creation of the JV. An economically realistic approach is necessary in the assessment of any particular case.

19. A set of questions has been drawn up which aims to clarify the existing theoretical and practical possibilities for the parents to perform the tasks individually instead of together. Although these questions are designed to apply in particular to the case of the manufacturing of goods, they are also relevant to the provision of services. They are as follows:

— *Contribution to the JV*

Does each parent company have sufficient financial resources to carry out the planned investment? Does each parent company have sufficient managerial qualifications to run the JV? Does each parent company have access to the necessary input products?

— *Production of the JV*

Does each parent know the production technique? Does each parent make the upstream or downstream products itself and does it have access to the necessary production facilities?

— *Sales by the JV*

Is the actual or potential demand such as to enable each parent company to manufacture the product on its own? Does each parent company have access to the distribution channels needed to sell the product manufactured by the JV?

— *Risk factors*

Can each parent company on its own bear the technical and financial risks associated with the production operations of the JV?

— *Access to the relevant market*

What is the relevant geographic and product market? What are the barriers to entry into that market? Is each parent company capable of entering the market on its own? Can each parent overcome existing barriers within a reasonable time and without undue effort or cost?

20. The parents of a JV are potential competitors, in so far as in the light of the above factors, which may be given different weight from case-to-case, they could reasonably be expected to act autonomously. In that connection, analysis must focus on the various stages of the activity of an undertaking. The economic pressure towards cooperation at the R&D stage does not normally eliminate the possibility of competition between the participating undertakings at the production and distribution stages. The pooling of the production capacity of several undertakings, when it is economically unavoidable and thus unobjectionable as regards competition law, does not necessarily imply that these undertakings should also cooperate in the distribution of the products concerned.

(b) Competition between the parent companies and the JV

21. The relationship between the parents and the JV takes a specific significance when the JV is a full-function JV and is in

competition with, or is a supplier or a customer of, at least one of the parents. The applicability of the prohibition on cartels depends on the circumstances of the individual case. Since anti-competitive behaviour between the parents will as a rule also influence business relationships between the parents and the JV and conversely, anti-competitive behaviour by the JV and one of the parents will always affect relationships between the parents, a global analysis of all the different relationships is necessary.

22. The restriction of competition, within the meaning of Article 53 (1) of the EEA Agreement, between parents and JVs typically manifests itself in the division of geographical markets, product markets (especially through specialization) or customers. In such cases the participating undertakings reduce their activity to the role of potential competitors. If they remain active competitors, they will usually be tempted to reduce the intensity of competition by coordinating their business policy, especially as to prices and volume of production or sales or by voluntarily restraining their efforts.

(c) Effects of the JV on the position of third parties

23. The restrictive effect on third parties depends on the JV's activities in relation to those of its parents and on the combined market power of the undertakings concerned.

24. Where the parent companies leave it to the JV to handle their purchases or sales, the choice available to suppliers or customers may be appreciably restricted. The same is true when the parents arrange for the JV to manufacture primary or intermediate products or to process products which they themselves have produced. The creation of a JV may even exclude from the market the parents' traditional suppliers and customers. That risk increases in step with the degree of oligopolization of the market and the existence of exclusive or preferential links between the JV and its parents.

25. The existence of a JV in which economically significant undertakings pool their respective market power may even be a barrier to market entry by potential competitors and/or impede the growth of the parents' competitors.

(d) Assessment of the appreciable effect of restrictions of competition

26. The scale of a JV's effects on competition depends on a number of factors, the most important of which are:

- the market shares of the parent companies and the JV, the structure of the relevant market and the degree of concentration in the sector concerned,
- the economic and financial strength of the parent companies, and any commercial or technical edge which they may have in comparison to their competitors,
- the market proximity of the activities carried out by the JV,
- whether the fields of activity of the parent companies and the JV are identical or interdependent,

- the scale and significance of the JV's activities in relation to those of its parents,
- the extent to which the arrangement between the firms concerned are restrictive,
- the extent to which market access by third parties is restricted.

(e) JV networks

27. JV networks can particularly restrict competition because they increase the influence of the individual JV on the business policy of the parents and on the market position of third parties. The assessment under competition law must take into account the different ways of arranging JV networks just as much as the cumulative effects of parallel existing networks.

28. Often competing parent companies set up several JVs which are active in the same product market but in different geographical markets. On the top of the restrictions of competition which can already be attributed to each JV, there will then be those which arise in the relationships between the individual JVs. The ties between the parents are strengthened by the creation of every further JV so that any competition which still exists between them will be further reduced.

29. The same is true in the case where competing parents set up several JVs for complementary products which they themselves intend to process or for non-complementary products which they themselves distribute. The extent and intensity of the restrictive effects on competition are also increased in such cases. Competition is most severely restricted where undertakings competing within the same oligopolistic economic sector set up a multitude of JVs for related products or for a great variety of intermediate products. These considerations are also valid for the service sector.

30. Even where a JV is created by non-competing undertakings and does not, on its own, cause any restriction of competition, it can be anti-competitive if it belongs to a network of JVs set up by one of the parents for the same product market with different partners, because competition between the JVs may then be prevented, restricted or distorted⁽²⁷⁾. If the different partners are actual or potential competitors, there will additionally be restrictive effects in the relationships between them.

31. Parallel networks of JVs, involving different parent companies, simply reveal the degree of personal and financial connection between the undertakings of an economic sector or between several economic sectors. They form, in so far as they are comparable to the degree of concentration on the relevant market, an important aspect of the economic environment which has to be taken into account in the assessment from a competition point of view of both the individual networks and the participating JVs.

3. Assessment of the most important types of JV

(a) Joint ventures between non-competitors

32. This group rarely causes problems for competition, whether the JV fulfils merely partial or the full functions of an undertaking. In the first case one must simply examine whether market access of third parties is significantly affected by the cooperation between the parents⁽²⁸⁾. In the second case the emphasis of the examination is on the same question and the problem of competition restrictions between one of the parents and the JV⁽²⁹⁾ is usually only of secondary significance.

33. JVs between non-competitors created for research and development, for production or for distribution of goods including customer service do not in principle fall within Article 53 (1) of the EEA Agreement. The non-application of the prohibition is justified by the combination of complementary knowledge, products and services in the JV. That is, however, subject to the reservation that there remains room for a sufficient number of R&D centres, production units and sales channels in the respective area of economic activity of the JV⁽³⁰⁾. The same reasoning also applies to the assessment of purchasing JVs for customers from different business sectors. Such JVs are unobjectionable from a competition point of view as long as they leave suppliers with sufficient possibilities of customer choice.

34. JVs which manufacture exclusively for their parents' primary or intermediate products or undertake processing for one or more of their parents do not, as a rule, restrict competition. A significant restriction of the supply and sales possibilities of third parties, a prerequisite for the application of the prohibition, can occur only if the parents have a strong market position in the supply or demand of the relevant products.

35. In the assessment of a full-function JV it is essential whether the activities the JV pursues are closely linked to those of the parents. In addition, the relationship of the activities of the parents to each other is of importance. If the JV trades in a product market which is upstream or downstream of the market of a parent, restrictions of competition can occur in relation to third parties, if the participants are undertakings with market power⁽³¹⁾. If the market of the JV is upstream of the market of one of the parents and at the same time downstream of the market of another parent, the JV functions as a connection between the two parents and also possibly as a vertical multi-level integration instrument. In such a situation the exclusive effects with regard to third parties are reinforced. Whether it fulfils the requisite minimum degree for the application of

⁽²⁸⁾ See III.2 (c) points 23, 24 and 25.

⁽²⁹⁾ See III.2 (b) points 21 and 22.

⁽³⁰⁾ See Section II of the notice on cooperation (cited in footnote 4), points 3 and 6, and the act on the application of Article 53 (3) of the EEA Agreement to categories of research and development agreements (cited in footnote 7).

⁽³¹⁾ See Commission decisions where no negative effect was found: Decision 86/405/EEC (Optical Fibres), OJ No L 236, 22. 8. 1986, p. 30, and in Decision 90/410/EEC (Elopak/Metal Box-Odin), OJ No L 209, 8. 8. 1990, p. 15).

⁽²⁷⁾ Commission Decision Optical Fibre, OJ No L 236, 22. 8. 1986, p. 30.

Article 53 (1) of the EEA Agreement can be decided only on an individual basis. If the JV and one of the parents trade in the same product market, then coordination of their market behaviour is probable if not inevitable⁽³²⁾.

(b) Joint ventures by competitors

36. In this situation the effects of the JV on competition between the parents and on the market position of third parties must be analysed. The relationship between the activities of the JV and those of the parents is of decisive importance. In the absence of any interplay, Article 53 (1) of the EEA Agreement will usually not be applicable. The competition law assessment of the different types of JV leads to the following results.

37. A research and development JV may, in exceptional cases, restrict competition if it excludes individual activity in this area by the parents or if competition by the parents on the market for the resulting products will be restricted. This will normally be the case where the JV also assumes the exploitation of the newly developed or improved products or processes⁽³³⁾. Whether the restriction of competition between the parents and the ensuing possible secondary effects on third parties are appreciable can be decided only on a case-by-case basis.

38. Sales JVs, selling the products of competing manufacturers, restrict competition between the parents on the supply side and limit the choice of purchasers. They belong to the category of traditional horizontal cartels which are subject to the prohibition of Article 53 (1) of the EEA Agreement⁽³⁴⁾, when they have an appreciable effect on the market.

39. Purchasing JVs set up by competitors can give the participants an advantageous position on the demand and reduce the choice of suppliers. Depending on the importance of the jointly-sold products to the production and sales activities of the parents, the cooperation can also lead to a considerable weakening of price competition between the participating undertakings. This applies even more so when the purchase price makes up a significant part of the total cost of the products distributed by the parents. The application of Article 53 (1) of the EEA Agreement depends on the circumstances of the individual case⁽³⁵⁾.

40. JVs which manufacture primary or intermediate products for competing parent companies, which are further processed by them into the final product must be assessed on the same principles. On the other hand, if the JV undertakes the processing of basic materials supplied by the parents, or the processing of half-finished into fully-finished products, with the aim of resupplying the parents, then competition between the participating undertakings, taking into consideration the market proximity of their cooperation and the inherent tendency to align prices, will usually exist only in a weaker form⁽³⁶⁾. This is particularly so when the entire production activities of the parents are concentrated in the JV and the parents withdraw to the role of pure distributors. This leads to the standardization of manufacturing

costs and the quality of the products so that essentially the only competition between the parents is on trade margins. This is a considerable restriction of competition which cannot be remedied by the parents marketing the products under different brand names⁽³⁷⁾.

41. Different situations must be distinguished when assessing full-function JVs between competing undertakings⁽³⁸⁾.

— Where the JV operates on the same market as its parents, the normal consequence is that competition between all participating undertakings will be restricted.

— Where the JV operates on a market upstream or downstream of that of the parents with which it has supply or delivery links, the effects on competition will be the same as in the case of a production JV.

— Where the JV operates on a market adjacent to that of its parents, competition can only be restricted when there is a high degree of interdependence between the two markets. This is especially the case when the JV manufactures products which are complementary to those of its parents.

Combinations of various types of JV are often found in economic life so that an overall assessment of the resultant restrictions of competition between participating undertakings and the consequences of the cooperation on third parties must be carried out. In addition the economic circumstances must be taken into account, especially the association of a JV to a network with other JVs and the existence of several parallel JV networks within the same economic sector⁽³⁹⁾.

⁽³²⁾ See Commission Decision 91/38/EEC (KSB/Goulds/Lowara/ITT), OJ No L 19, 25. 1. 1991, p. 25; the anti-competitive character of joint economic production is acknowledged in principle in the act referred to in point 6 of Annex XIV to the EEA Agreement (Regulation (EEC) No 417/85).

⁽³⁸⁾ See in particular the following Commission decisions: Bayer/Gist-Brocades, OJ No L 30, 5. 2. 1976, p. 13; United Reprocessors and KEWA, OJ No L 51, 26. 2. 1976, pp. 7 and 15; Vacuum Interrupters I, OJ No L 48, 19. 2. 1977, p. 32, and II, OJ No L 383, 31. 12. 1980, p. 1; De Laval/Stork I, OJ No L 215, 23. 8. 1977, p. 11, and II, OJ No L 59, 4. 3. 1988, p. 32; GEC/Weir, OJ No L 327, 20. 12. 1977, p. 26; WANO/Schwarzpulver, OJ No L 322, 16. 11. 1978, p. 26; Langenscheidt/Hachette, OJ No L 39, 11. 2. 1982, p. 25; Amersham/Buchler, OJ No L 314, 10. 11. 1982, p. 34; Rockwell/Iveco, OJ No L 224, 17. 8. 1983, p. 19; Carbon Gas Technologie, OJ No L 376, 31. 12. 1983, p. 17; Enichem/ICI, OJ No L 50, 24. 2. 1988, p. 18; Bayer/BP Chemicals, OJ No L 150, 16. 6. 1988, p. 35; Iveco/Ford, OJ No L 230, 19. 8. 1988, p. 39; Alcatel Espace/ANT, OJ No L 32, 3. 2. 1990, p. 19; Konsortium ECR 900, OJ No L 228, 22. 8. 1990, p. 31; Screensport/EBU — Eurosport, OJ No L 63, 9. 3. 1991, p. 32; Eirpage, OJ No L 306, 7. 11. 1991, p. 22; Procter and Gamble/Finaf, OJ No C 3, 7. 1. 1992, p. 2 and Infonet, OJ No C 7, 11. 1. 1992, p. 3.

⁽³⁹⁾ See III.2 (e), points 27 to 31.

⁽³³⁾ See III.2 (b) point 22, and Decision 87/100/EEC (Mitchell Cotts/Sofitra), OJ No L 41, 11. 2. 1987, p. 31.

⁽³⁴⁾ See Section II of the notice on cooperation (cited in footnote 4), point 3 and the act on the application of Article 53 (3) of the EEA Agreement to categories of research and development agreements (cited in footnote 7).

⁽³⁵⁾ See the following decisions: NCH, OJ No L 22, 26. 1. 1972, p. 16; Cementregeling voor Nederland, OJ No L 303, 31. 12. 1972, p. 7; Cimbel, OJ No L 303, 31. 12. 1972, p. 24; CSV, OJ No L 242, 4. 9. 1978, p. 15; UIP, OJ No L 226, 3. 8. 1989, p. 25 and Astra, OJ No L 20, 28. 1. 1993, p. 23.

⁽³⁶⁾ See the following Commission decisions: Socemas, OJ No L 201, 12. 8. 1968, p. 4; Intergroup, OJ No L 212, 9. 8. 1975, p. 23; National Sulphuric Acid Association I, OJ No L 260, 3. 10. 1980, p. 24 and (II) OJ No L 190, 5. 7. 1989, p. 25; Filmeinkauf Deutscher Fernsehanstalten, OJ No L 284, 3. 10. 1989, p. 36; and Ijselcentrale, OJ No L 28, 2. 2. 1991, p. 32.

⁽³⁷⁾ See notice in Exxon/Shell, OJ No C 92, 2. 4. 1993, p. 2.

42. Even JVs between competitors, which are usually caught by the prohibition in Article 53 (1) of the EEA Agreement, must be examined to see whether in the actual circumstances of the individual case they have as their object or effect the restriction, prevention or distortion of competition. This will not be the case where cooperation in the form of a JV can objectively be seen as the only possibility for the parents to enter a new market or to remain in their existing market, provided that their presence will strengthen competition or prevent it from being weakened. Under these conditions the JV will neither reduce existing competition nor prevent potential competition from being realized. The prohibition in Article 53 (1) of the EEA Agreement will therefore not apply⁽⁴⁰⁾.

IV. Assessment pursuant to Article 53 (3) of the EEA Agreement

1. Group exemptions

43. JVs falling within the scope of Article 53 (1) of the EEA Agreement are exempted from the prohibition if they fulfil the conditions of a group exemption. Two acts referred to in Annex XIV to the EEA Agreement legalize cooperation between undertakings in the form of JVs (see (a) and (b)). Two other acts referred to in Annex XIV to the EEA Agreement authorize certain restrictive agreements on the transfer of technology to a JV by its parents (see (c)). The field of application of these group exemptions will be considerably expanded, notably for JVs, by the act amending the acts referred to in points 5, 6, 7 and 9 of Annex XIV to the EEA Agreement⁽⁴¹⁾.

(a) Specialization regulation

44. The act on the application of Article 53 (3) of the EEA Agreement to categories of specialization agreements⁽⁴²⁾ includes, *inter alia*, agreements whereby several undertakings leave the manufacture of certain products to a JV set up by them. This transfer can be for existing or future production. The creation and use of production JVs are exempted only if the aggregate market share of the participating undertakings does not exceed 20 % and the cumulated turnover does not exceed ECU 1 000 million. Agreements between more sizeable undertakings, the turnover of which exceeds ECU 1 000 million, also benefit from the group exemption if they are properly notified and the EFTA Surveillance Authority does not object to the agreement within six months. This procedure is not applicable when the market share threshold is exceeded.

45. The abovementioned rules apply exclusively to cooperation at the production level. The JV must supply all its produc-

tion — which can include primary, intermediate or finished products — to its parents. The latter are not permitted to be active as manufacturers in the JV's area of production, but they may manufacture other products belonging to that product market. Products made by the JV are then sold by the parents, each of which can deal as exclusive distributor for a given territory.

46. Agreements in which the parents entrust JVs with the distribution of the contract products are also covered by the group exemption, though only under more rigorous conditions. The aggregate market share of the participating undertakings must not exceed 10 %. In this case also, there is a turnover threshold of ECU 1 000 million, the effect of which undertakings can avoid by resorting to the opposition procedure. The abovementioned act leaves the undertakings concerned free to organize their cooperation at the production and distribution stages. It allows for separate production followed by joint distribution of the contract products through a sales JV, as well as for the merging of production and distribution in a full-function JV, or the separation of both functions through the creation of a production JV and a sales JV. The production and/or distribution of the contract products can be entrusted to several JVs instead of one, which may, as the case may be, fulfil their function on the basis of exclusive contracts in various territories.

(b) Research and development regulation

47. The act on the application of Article 53 (3) of the EEA Agreement to categories of research and development agreements⁽⁴³⁾ provides for the exemption of JVs whose activities can range from R&D to the joint exploitation of results. The term exploitation covers the manufacture of new or improved products as well as the use of new or improved production processes, the marketing of products derived from R&D activities and the granting of manufacturing, use or distribution licences to third parties. The exemption is subject to the requirement that the joint R&D contributes substantially to technical or economic progress and is essential to the manufacture of new or improved products.

48. The abovementioned act also links exemption from the prohibition to quantitative conditions in the form of a two-fold market share limit. Cooperation in the form of a JV dealing with R&D, production and licensing policy will be permitted for parents who have an aggregate market share of up to 20 %. In the area of R&D as well as manufacture, the regulation allows all forms of coordination of behaviour because it does not require specialization. The parents can themselves remain or become active within the field of activity of the JV. They are also allowed to determine in what way they wish to use the possibilities of production by themselves or the licensing of third parties. By the allocation of contract territories the parents can protect themselves for the duration of the contract from the manufacture and use of the contract products by other partners in the reserved territories; furthermore, they can prevent other partners from pursuing an active marketing policy in those territories for five

⁽⁴⁰⁾ See the following Commission decisions: Alliance des constructeurs français de machines-outils, OJ No L 201, 12. 8. 1968, p. 1; SAFCO, OJ No L 13, 17. 1. 1972, p. 44; Metaleurop, OJ No L 179, 12. 7. 1990, p. 41; Elopak/Metal Box — Odin, OJ No L 209, 8. 8. 1990, p. 15; Konsortium ECR 900, OJ No L 228, 22. 8. 1990, p. 31.

⁽⁴¹⁾ Points 5, 6, 7 and 9 of Annex XIV to the EEA Agreement (Regulation No 151/93).

⁽⁴²⁾ Cited in footnote 6.

⁽⁴³⁾ Cited in footnote 7.

years after the introduction of the new or improved product into the territory covered by the EEA Agreement. If, on the contrary, the partners entrust one or more JVs with the distribution of the contract products, a market share threshold of 10 % is applicable to the whole of their cooperation. Since the abovementioned act does not provide for a turnover threshold, all undertakings regardless of their size can benefit from the group exemption.

(c) Patent-licensing and know-how licensing regulations

49. The act on the application of Article 53 (3) of the EEA Agreement to categories of patent licensing agreements⁽⁴⁾ applies also to such agreements between any one of the parents and the JV affecting the activities of the JV. If the parents are competitors on the market of the contract products, the group exemption applies only up to a certain market share limit. This is 20 % if the JV simply carries on manufacturing or 10 % if it carries on the manufacture and marketing of the licensed products.

50. The abovementioned act also permits the granting of exclusive territorial manufacture and distribution licences to the JV, the protection of the licence territories of the JV and of the parents against active and passive competition by other participants for the duration of the contract and the protection of the licence territory of the JV against other licensees. The parents can protect the JV from an active distribution policy by other licensees for the full duration of the contract. During an initial five-year period from the introduction of a product into the territory covered by the EEA Agreement, it is possible to forbid direct imports of contract products by other licensees into the JV's licensed territory.

51. The act on the application of Article 53 (3) of the EEA Agreement to certain categories of know-how licensing agreements⁽⁵⁾ contains similar provisions, except that the territorial protection between the JV and the parents is limited to 10 years, beginning from the signature of the first know-how agreement concluded for a territory inside the EEA. This point in time also marks the beginning of the period for which the JV can be protected against active competition (10 years) and passive competition (five years) by other licensees.

2. Individual exemptions

(a) General comments

52. JVs which fall within Article 53 (1) of the EEA Agreement without fulfilling the conditions for the application of a group exemption regulation are not inevitably unlawful. They can be exempted by an individual decision of the EFTA Surveillance Authority in so far as they fulfil the four conditions of Article 53 (3) of the EEA Agreement. According to Articles 4, 5 and 15 of Chapter II of Protocol 4 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as 'Chapter II') an individual exemption can be issued only if the participating undertakings have notified the agreement, decision or concerted prac-

tice on which cooperation is based, to the EFTA Surveillance Authority. Certain arrangements which are less harmful to the development of the territory covered by the EEA Agreement are dispensed from the requirement to notify by Article 4 (2) of Chapter II. They can therefore be exempted without prior notification. The same applies to transport cartels within the meaning of the acts referred to in points 10 and 11 of Annex XIV to, points 7 and 11 of Protocol 21 and point 13 of Protocol 21 of the EEA Agreement.

53. The EFTA Surveillance Authority must, pursuant to Article 53 (3) of the EEA Agreement, examine :

- whether the JV contributes to improving the production or distribution of goods or to promoting technical or economic progress,
- whether consumers are allowed a fair share of the resulting benefit,
- whether the parents or the JV are subject to restrictions which are not indispensable for the attainment of these objectives,
- and
- whether the cooperation in the JV affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

An exemption from the prohibition in Article 53 (1) of the EEA Agreement can be issued only if the answer to the first two questions is in the affirmative and the answer to the second two questions is negative.

(b) Principles of assessment

54. In order to fulfil the first two conditions of Article 53 (3) of the EEA Agreement the JV must bring appreciable objective advantages for third parties, especially consumers, which at least equal the consequent detriment to competition.

55. Advantages in the abovementioned sense, which can be pursued and attained with the aid of a JV, include, in the EFTA Surveillance Authority's opinion, in particular, the development of new or improved products and processes which are marketed by the originator or by third parties under licence. In addition, measures opening up new markets, leading to the sales expansion of the undertaking in new territories or the enlargement of its supply range by new products, will in principle be assessed favourably. In all these cases the undertakings in question contribute to dynamic competition, consolidating the territory covered by the EEA Agreement and strengthening the competitiveness of the relevant economic sector. Production and sales increases can also be a pro-competitive stimulant. On the other hand, the rationalization of production activities and distribution networks are rather a means of adapting supply to a shrinking or stagnant demand. It leads, however, to cost savings which, under effective competition, are usually passed on to customers as lower prices. Plans for the reduction of production capacity however lead mostly to price rises. Agreements of this latter type will be judged favourably only if they serve to overcome a structural crisis, to accelerate the removal of unprofitable production capacity from the market and thereby to re-establish competition in the medium term.

⁽⁴⁾ Cited in footnote 8.

⁽⁵⁾ Cited in footnote 9.

56. The EFTA Surveillance Authority will give a negative assessment to agreements which have as their main purpose the coordination of actual or potential competition between the participating undertakings. This is especially so for joint price-fixing, the reduction of production and sales by establishing quotas, the division of markets and contractual prohibitions or restrictions on investment. JVs which are created or operated essentially to achieve such aims are nothing but classic cartels the anti-competitive effects of which are well known.

57. The pros and cons of a JV will be weighted against each other on an overall economic balance, by means of which the type and the extent of the respective advantages and risks can be assessed. If the parents are economically and financially powerful and have, over and above that a high market-share, their exemption applications will need a rigorous examination. The same applies to JVs which reinforce an existing narrow oligopoly or belong to a network of JVs.

58. The acceptance pursuant to Article 53 (3) (a) of the EEA Agreement of restrictions on the parents or the JV depends above all on the type and aims of the cooperation. In this context, the decisive factor is usually whether the contractual restriction on the parties' economic freedom is directly connected with the creation of the JV and can be considered indispensable for its existence⁽⁴⁶⁾. It is only for the restriction of global competition that Article 53 (3) (b) of the EEA Agreement sets an absolute limit. Competition must be fully functioning at all times. Agreements which endanger its effectiveness cannot benefit from individual exemption. This category includes JVs which, through the combination of activities of the parents, achieve, consolidate or strengthen a dominant position.

(c) Assessment of the most important types of JV

59. Pure research and development JVs which do not fulfil the conditions for group exemption under the act on the application of Article 53 (3) of the EEA Agreement to categories of research and development agreements⁽⁴⁷⁾ can still in general be viewed positively. This type of cooperation normally offers important economic benefits without adversely affecting competition. That is also the case where the parents entrust the JV with the further task of granting licences to third parties. If the JV also takes on the manufacture of the jointly researched and developed product, the assessment for the purpose of exemption must include the principles which apply to production JVs⁽⁴⁸⁾. JVs which are responsible for R&D, licensing, production and distribution are full-function JVs and must be analysed accordingly⁽⁴⁹⁾.

60. Sales JVs belong to the category of classic horizontal cartels. They have as a rule the object and effect of coordinating

the sales policy of competing manufacturers. In this way they not only close off price competition between the parents but also restrict the volume of goods to be delivered by the participants within the framework of the system for allocating orders. The EFTA Surveillance Authority will therefore in principle assess sales JVs negatively⁽⁵⁰⁾. The EFTA Surveillance Authority takes a positive view however of those cases where joint distribution of the contract products is part of a global cooperation project which merits favourable treatment pursuant to Article 53 (3) of the EEA Agreement and for the success of which it is indispensable. The most important examples are sales JVs between manufacturers who have concluded a reciprocal specialization agreement, but wish to continue to offer the whole range of products concerned, or sales JVs set up for the joint exploitation of the results of joint R&D, even at the distribution stage. In other cases, an exemption can be envisaged only in certain specific circumstances⁽⁵¹⁾.

61. Purchasing JVs contribute to the rationalization of ordering and to the better use of transport and store facilities but are at the same time an instrument for the setting of uniform purchase prices and conditions and often of purchase quotas. By combining their demand power in a JV, the parents can obtain a position of excessive influence *vis-à-vis* the other side of the market and distort competition between suppliers. Consequently, the disadvantages often outweigh the possible benefits which can accompany purchasing JVs, particularly those between competing producers. The EFTA Surveillance Authority is correspondingly prepared to grant exemptions only in exceptional cases and then only if the parents retain the possibility of purchasing individually⁽⁵²⁾. No decision has, however, concerned the most important of the purchasing JVs so far.

62. Production JVs can serve different economic purposes. They will often be set up to create new capacity for the manufacture of particular products which are also manufactured by the parents⁽⁵³⁾. In other cases the JV will be entrusted with the manufacture of a new product in the place of the parents⁽⁵⁴⁾. Finally, the JV can be entrusted with the combination of the production capacities of the parents and their expansion or reduction as necessary.

63. In view of the various tasks of production JVs their assessment for exemption purposes will be carried out according to different yardsticks. JVs, for the expansion of production capacity

⁽⁴⁶⁾ See below V.2, point 70 *et seq.*

⁽⁴⁷⁾ Cited in footnote 7.

⁽⁴⁸⁾ See points 62 and 63.

⁽⁴⁹⁾ See point 64.

⁽⁵⁰⁾ See the NCH, OJ No L 22, 26. 1. 1972, p. 16; Cementregeling voor Nederland, OJ No L 303, 31. 12. 1972, p. 7; Cimbel, OJ No L 303, 31. 12. 1972, p. 24; CSV, OJ No L 242, 4. 9. 1978, p. 15 and Astra, OJ No L 20, 28. 1. 1993, p. 23.

⁽⁵¹⁾ See Decision 89/467/EEC (UIP), OJ No L 226, 3. 8. 1989, p. 25.

⁽⁵²⁾ See the National Sulphuric Acid Association, OJ No L 260, 3. 10. 1980, p. 24; Filmeinkauf deutscher Fernsehanstalten, OJ No L 284, 3. 10. 1989, p. 36; IJsselcentrale decisions, OJ No L 28, 2. 2. 1991, p. 32.

⁽⁵³⁾ See Exxon/Shell, OJ No C, 2. 4. 1993, p. 2.

⁽⁵⁴⁾ See the KSB/Goulds/Lowara/ITT, OJ No L 19, 25. 1. 1991, p. 25.

or product range, can contribute not only to the prevention of parallel investment — which results in costs savings — but also to the stimulation of competition. The combination or reduction of existing production capacity is primarily a rationalization measure and is usually of a defensive nature. It is not always obvious that measures of this kind benefit third parties, especially consumers and they must therefore be justified individually. Generally applicable quantitative thresholds, for instance in the form of market share limits, cannot be fixed for production JVs. The more the competition between the parents is restricted, the more emphasis must be put on the maintenance of competition with third parties. The market share limit of 20 % in the group exemption regulations can serve as a starting point for the assessment of production JVs in individual cases.

64. Full-function JVs, in so far as they are not price-fixing, quota-fixing or market-sharing cartels or vehicles for a coordination of the investment policies conducted by the parents which goes beyond the individual case, often form elements of dynamic competition and then deserve a favourable assessment⁽⁵⁵⁾. As cooperation also includes distribution, the EFTA Surveillance Authority has to take special care in assessing individual cases that no position of market power will be created or strengthened by entrusting the JV with all the functions of an undertaking, combined with the placing at its disposal of all the existing resources of parents. To assess whether a full-function JV raises problems of compatibility with the competition rules or not, an important point of reference is the aggregate market share limit of 10 % contained in the group exemption regulations. Below this threshold it can be assumed that the effect of exclusion from the market of third parties and the danger of creating or reinforcing barriers to market entry will be kept within justifiable limits. A prerequisite is however that the market structure will continue to guarantee effective competition. If the said threshold is exceeded, an exemption will be considered only after a careful examination of each individual case.

V. Ancillary restrictions

1. Principles of assessment

65. A distinction must be made between restrictions of competition which arise from the creation and operation of a JV, and additional agreements which would, on their own, also constitute restrictions of competition by limiting the freedom of action in the market of the participating undertakings. Such additional agreements are either directly related to and necessary for the establishment and operation of the JV in so far as they cannot be dissociated from it without jeopardizing its existence,

or are simply concluded at the same time as the JV's creation without having those features.

66. Additional agreements which are directly related to the JV and necessary for its existence must be assessed together with the JV. They are treated under the rules of competition as ancillary restrictions if they remain subordinate in importance to the main object of the JV. In particular, in determining the 'necessity' of the restriction, it is proper not only to take account of its nature, but equally to ensure that its duration, subject matter and geographical field of application do not exceed what the creation and operation of the JV normally requires.

67. If a JV does not fall within the scope of Article 53 (1) of the EEA Agreement, then neither do any additional agreements which, while restricting competition on their own, are ancillary to the JV in the manner described above. Conversely, if a JV falls within the scope of Article 53 (1) of the EEA Agreement, then so will any ancillary restrictions. The exemption from prohibition is based for both on the same principles. Ancillary restrictions require no special justification pursuant to Article 53 (3) of the EEA Agreement. They will generally be exempted for the same period as the JV.

68. Additional agreements which are not ancillary to the JV normally fall within the scope of Article 53 (1) of the EEA Agreement, even though the JV itself may not. For them to be granted an exemption pursuant to Article 53 (3) of the EEA Agreement, a specific assessment of their benefits and disadvantages must be made. This assessment must be carried out separately from that of the JV.

69. In view of the diversity of JVs and of the additional restrictions that may be linked to them, only a few examples can be given of the application of the principles that will be applied.

2. Assessment of certain additional restrictions

70. Assessment of whether additional restrictions constitute an ancillary agreement must distinguish between those which affect the JV and those which affect the parents.

(a) Restrictions on the JV

71. Of the restrictions which affect the JV, those which give concrete expression to its object, such as contract clauses which specify the product range or the location of production, may be regarded as ancillary. Additional restrictions which go beyond the definition of the venture's object and which relate to quantities, price or customers may not. The same can be said for export bans.

72. When the setting-up of the JV involves the creation of new production capacity or the transfer of technology from the parent, the obligation imposed on the JV not to manufacture or market products competing with the licensed products may usually be regarded as ancillary. The JV must seek to ensure the success of the new production unit, without depriving the parent companies of the necessary control over exploitation and dissemination of their technology⁽⁵⁶⁾.

⁽⁵⁵⁾ See the following Commission decisions: Amersham/Buchler, OJ No L 314, 10. 11. 1982, p. 34; Rockwell/Iveco, OJ No L 224, 17. 8. 1983, p. 19; Carbon Gas Technologie, OJ No L 376, 31. 12. 1983, p. 17; Enichem/ICI, OJ No L 50, 24. 2. 1988, p. 18; Bayer/BP Chemicals, OJ No L 150, 16. 6. 1988, p. 35; Iveco/Ford, OJ No L 230, 19. 8. 1988, p. 39; Alcatel Espace/ANT, OJ No L 32, 3. 2. 1990, p. 19; Eirpage, OJ No L 306, 7. 11. 1991, p. 22; Bayer/Gist-Brocades, OJ No L 30, 5. 2. 1976, p. 13; United Reprocessors and KEWA, OJ No L 51, 26. 2. 1976, p. 7; Vacuum Interrupters I, OJ No L 48, 19. 2. 1977, p. 32 and II, OJ No L 383, 31. 12. 1980, p. 1; De Laval/Stork I, OJ No L 215, 23. 8. 1977, p. 11 and II, OJ No L 59, 4. 3. 1988, p. 32; GEC/Weir, OJ No L 327, 20. 12. 1977, p. 26; Langenscheidt/Hachette, OJ No L 39, 11. 2. 1982, p. 25; Procter and Gamble/Finaf, OJ No C 3, 7. 1. 1992, p. 2 and INFONET, OJ No C 7, 11. 1. 1992, p. 3.

⁽⁵⁶⁾ Commission Decision Mitchell Cotts/Sofiltr, OJ No L 41, 11. 2. 1987, p. 31.

73. In certain circumstances, other restrictions on the JV can be classified as ancillary such as contract clauses which limit the cooperation to a certain area or to a specific technical application of the transferred technology. Such restrictions must be seen as the inevitable consequences of the parent's wish to limit the cooperation to a specific field of activity without jeopardizing the object and existence of the JV⁽²⁷⁾.

74. Lastly, where the parent companies assign to the JV certain stages of production or the manufacture of certain products, obligations on the JV to purchase from or supply its parents may also be regarded as ancillary, at least during the JV's starting-up period.

(b) Restrictions on the parent companies

75. Restrictions which prohibit the parent companies from competing with the JV or from actively competing with it in its area of activity, may be regarded as ancillary at least during the

JV's starting-up period. Additional restrictions relating to quantities, prices or customers, and export bans obviously go beyond what is required for the setting-up and operation of the JV.

76. A territorial restriction imposed on a parent company where the JV was granted an exclusive manufacturing licence in respect of fields of technical application and product markets in which both the JV and the parent were to be active may be regarded as ancillary⁽²⁸⁾. The grant to the JV of an exclusive exploitation licence without time limit may be regarded as indispensable for its creation and operation, e.g. where the parent company granting the licence was not active in the same field of application or on the same product market as that for which the licence was granted⁽²⁹⁾. This will generally be the case with JVs undertaking new activities in respect of which the parent companies are neither actual nor potential competitors.

⁽²⁷⁾ Commission Decision Elopak/Metal Box-Odin, OJ No L 209, 8. 8. 1990, p. 15.

⁽²⁸⁾ See Mitchell Cotts/Sofiltra (footnote 32).

⁽²⁹⁾ See Elopak/Metal Box-Odin (footnote 31).

ANNEX 2

NOTICE OF THE EFTA SURVEILLANCE AUTHORITY MODIFYING THE NOTICE CONCERNING THE ACTS REFERRED TO IN POINTS 2 AND 3 OF ANNEX XIV TO THE EEA AGREEMENT (COMMISSION REGULATIONS (EEC) No 1983/83 AND (EEC) No 1984/83) ON THE APPLICATION OF ARTICLE 53 (3) OF THE EEA AGREEMENT TO CATEGORIES OF EXCLUSIVE DISTRIBUTION AND EXCLUSIVE PURCHASING AGREEMENTS

- A. The present notice is issued pursuant to the rules of the Agreement on the European Economic Area (EEA Agreement) and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement).
- B. The EC Commission issued the notice concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 on the application of Article 85 (3) of the EEC Treaty to categories of exclusive distribution and exclusive purchasing agreements (OJ No C 101, 13. 4. 1984, p. 2). This non-binding act contains principles and rules which the Commission follows in the field of competition. The judgment of the European Court of Justice in Case C-234/89 'Delimitis/Henninger Bräu' required the EC Commission to modify its notice on the application of Article 85 (3) of the EEC Treaty to categories of exclusive distribution and exclusive purchasing agreements by issuing a new notice (OJ No C 121, 13. 5. 1992, p. 2). The EFTA Surveillance Authority considers these acts to be EEA relevant.
- C. The EFTA Surveillance Authority has adopted a corresponding notice on the application on Article 53 (3) of the EEA Agreement to categories of exclusive distribution and exclusive purchasing agreements on 12 January 1994⁽¹⁾. In order to maintain equal conditions of competition and to ensure a uniform application of the EEA competition rules throughout the European Economic Area the EFTA Surveillance Authority considers it necessary to modify its notice by issuing the present one exercising the power conferred to it in Article 5 (2) (b) of the Surveillance and Court Agreement. It intends to follow the principles and rules laid down in this notice when applying the relevant EEA competition rules to a particular case.

In the notice of the EFTA Surveillance Authority concerning the acts referred to in points 2 and 3 of Annex XIV to the EEA Agreement (Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of 22 June 1983) on the application of Article 53 (3) of the EEA Agreement to categories of exclusive distribution and exclusive purchasing agreements the following passage is inserted after point 39, and beneath the heading 'V. Beer supply agreements'. Points 40 to 66 become points 41 to 67. The subheadings, under heading V, become:

'B. Exclusive purchasing obligation';

'C. Other restrictions of competition that are exempted';

'D. Agreements excluded from the block exemption'.

'1. Agreements of minor importance

40. It is recalled that the EFTA Surveillance Authority's notice on agreements of minor importance⁽¹⁾ states that the EFTA Surveillance Authority holds the view that agreements between undertakings do not fall under the prohibition of Article 53 (1) of the EEA Agreement if certain conditions as regards market share and turnover are met by the undertakings concerned. Thus, it is evident that when an undertaking, brewery or wholesaler surpasses the limits as laid down in the above notice, the agreements concluded by it may fall pursuant to Article 53 (1) of the EEA Agreement. The notice, however, does not apply where in a relevant market competition is restricted by the cumulative effects of parallel networks of similar agreements which would not individually fall pursuant to Article 53 (1) of the EEA Agreement if the notice was applicable. Since the markets for beer will frequently be characterized by the existence of cumulative effects, it seems appropriate to determine which agreements can nevertheless be considered *de minimis*.

The EFTA Surveillance Authority is of the opinion that an exclusive beer supply agreement concluded by a brewery, in the sense

of Article 6, and including Article 8 (2) of Regulation (EEC) No 1984/83 does not, in general, fall pursuant to Article 53 (1) of the EEA Agreement if

- the market share of that brewery is not higher than 1 % on the national market for the resale of beer in premises used for the sale and consumption of drinks, and
- if that brewery does not produce more than 200 000 hl of beer per annum.

However, these principles do not apply if the agreement in question is concluded for more than seven and a half years in as far as it covers beer and other drinks, and for 15 years if it covers only beer.

In order to establish the market share of the brewery and its annual production, the provisions of Article 4 (2) of Regulation (EEC) No 1984/83 apply.

As regards exclusive beer supply agreements in the sense of Article 6, and including Article 8 (2) of Regulation (EEC) No 1984/83 which are concluded by wholesalers, the above principles apply *mutatis mutandis* by taking account of the position of the brewery whose beer is the main subject of the agreement in question.

The present communication does not preclude that in individual cases even agreements between undertakings which do not fulfil the above criteria, in particular where the number of outlets tied to them is limited as compared to the number of outlets existing on the market, may still have only a negligible effect on trade between Contracting Parties or on competition, and would therefore not be caught by Article 53 (1) of the EEA Agreement.

Neither does this communication in any way prejudice the application of national law to the agreements covered by it.

⁽¹⁾ See page 32 in this Official Journal.

⁽¹⁾ OJ No L 153, 18. 6. 1994, p. 13.

ANNEX 3

NOTICE OF THE EFTA SURVEILLANCE AUTHORITY CLARIFYING THE ACTIVITIES OF MOTOR VEHICLE INTERMEDIARIES

- A. The present notice is issued pursuant to the rules of the Agreement on the European Economic Area (EEA Agreement) and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement).
- B. The Commission issued a clarification of the activities of motor vehicle intermediaries (OJ No C 329, 18. 12. 1991, p. 20). This non-binding act contains principles and rules which the Commission follows in the field of competition.
- C. The EFTA Surveillance Authority considers the abovementioned act to be EEA relevant. In order to maintain equal conditions of competition and to ensure a uniform application of the EEA competition rules throughout the European Economic Area the EFTA Surveillance Authority adopts the present notice exercising the power conferred to it in Article 5 (2) (b) of the Surveillance and Court Agreement. It intends to follow the principles and rules laid down in this notice when applying the relevant EEA competition rules to a particular case.

This notice is to supplement the notice ⁽¹⁾ published with the act referred to in point 4 of Annex XIV to the EEA Agreement (Regulation (EEC) No 123/85), hereinafter referred to as 'the Act', in order to clarify the scope of the activities of the intermediaries mentioned in the Act. The relationship between an intermediary and the person for whom he or it is acting is primarily governed by their contract and by the national law applicable, and does not affect the rights and obligations of third parties to the contract. This notice does not therefore summarize all the obligations of an intermediary.

1. Principles

The following guidelines, which are in line with the balanced objectives pursued by the Act, are based on two principles. The first is that the intermediary referred to in the Act is a provider of services acting for the account of a purchaser and final user; he cannot assume risks normally associated with ownership, and is given prior written authority by an identified principal, whose name and address are given, to exercise such activity. The second is the principle of the transparency of the authorization, and in particular the requirement that, under national law, the intermediary pass on to the purchaser all the benefits obtained in the negotiations carried out on his behalf.

In this context, three groups of criteria should be distinguished :

- (a) with regard to the validity of the authorization and to the provision of assistance ;
- (b) with regard to the intermediary's scope for advertising ;
- (c) with regard to the intermediary's possibilities of supply.

The EFTA Surveillance Authority suggests that the following guidelines and criteria appear appropriate for dealing with the practical requirements. Activities which do not conform to these guidelines and criteria will justify the presumption, in the absence of evidence to the contrary, that an intermediary is acting beyond the limits set by Article 3 (11) of the Act, or crea-

ting a confusion in the mind of the public on this point by giving the impression that he is a reseller.

2. Practical criteria

(a) *The validity of the authorization and the service of assistance*

The intermediary is free to organize the structure of his activities. However, operations involving a network of independent undertakings using a common name or other common distinctive signs could create the misleading impression of an authorized distribution system.

An intermediary may use an outlet in the same building as a supermarket if the outlet is outside the premises where the principal activities of the supermarket are carried on, provided that he complies with the principles set out in the present notice.

Although he cannot assume the risks of ownership, the intermediary must be free to assume the transport and storage risks associated with the vehicle and the credit risks relating to the final purchaser for the financing of the purchase in a foreign country. The services must be provided in total transparency with regard to the various services offered and to payment, and this must be verifiable through the presentation of detailed and exhaustive accounts to the purchaser.

The intermediary must list in detail to the client, in a document which may be separable from the written authorization, the various services offered to him and must give him the possibility to choose those which suit him. In this document, an intermediary not supplying the full range of services associated with the putting into circulation of an imported vehicle should state which services he is not supplying.

(b) *Advertising by the intermediary*

The intermediary must be able to advertise, though without creating in potential purchasers minds any confusion between himself and a reseller. Subject to this restriction, he should be able to :

⁽¹⁾ OJ No L 153, 18. 6. 1994, p. 20.

- concentrate his activities, and thus his advertising, on a given brand or on a particular model, provided that he expressly adds an appropriate disclaimer indicating that he is not a reseller, but acts as an intermediary offering his services,
- provide full information on the price which he can obtain, making it clear that the price indicated is his best estimate,
- display cars which have been bought by his clients using his services, or a particular type or model which he can obtain for them, provided that he expressly and visibly makes it clear that he is acting as an intermediary offering his services and not as a reseller, and that types or models which he displays are not for sale,
- use all logos and brand names, in accordance with the applicable rules of law, but without creating any confusion in the mind of the public with regard to the fact that he is an intermediary and not part of the distribution network of the manufacturer or manufacturers concerned.

Where a supermarket carries on a distinct activity as an intermediary, all necessary measures must be taken to avoid confusion in

the minds of buyers (final users) with its principal commercial activities conducted under its usual or distinctive sign.

(c) Supply of the intermediaries

In general, the intermediary is free to organize his business relationship with the various dealers in the distribution networks of the different manufacturers; this should not lead the intermediary to establish with such dealers a relationship which is privileged and contrary to contractual obligations accepted in accordance with the Act, especially Article 3 (8) (a) and (b), (9) and Article 4 (1) (3). In particular the intermediary must obtain supplies on conditions which are normal in the market, and he must not:

- make agreements by which he undertakes obligations to buy,
- receive discounts different from those which are customary on the market of the country in which the car is purchased.

In this context, sales of more than 10 % of his annual sales by any one authorized dealer through any one intermediary would create the presumption of a privileged relationship contrary to the Articles cited above.