COMMISSION

COMMISSION DECISION

of 28 November 1979

relating to a proceeding under Article 85 of the EEC Treaty (IV/29.672 — Floral)

(Only the French and German texts are authentic)

(80/182/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof,

Having regard to Council Regulation No 17 of 6 February 1962 (1), and in particular Articles 3 and 15 thereof,

Having regard to the Commission Decision of 27 September 1978 to initiate proceedings in respect of the cooperation through Floral Düngemittel-verkaufsgesellschaft mbH between Générale des Engrais SA, Compagnie Française de l'Azote SA, and Société Chimique des Charbonnages SA and the German firm Franz Schiffer, which began on 10 May 1968 and was notified on 10 July 1978,

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

Having regard to the opinion delivered on 25 July 1979 pursuant to Article 10 of Regulation No 17 by the Advisory Committee on Restrictive Practices and Dominant Positions,

I. THE FACTS

1. The products

This proceeding cernings cooperation between three leading French manufacturers of fertilizers in the export of compound fertilizers to the Federal Republic of Germany through Floral GmbH.

The fertilizers concerned are compound (nitrogen, phosphate, potassium) fertilizers, with the proportions of ingredients being either 13:13:21 or 15:15:15 (the remainder representing inactive ingredients).

2. The undertakings concerned

(a) Générale des Engrais SA (hereinafter GESA) is the legal successor to Société de Produits Chimiques Péchiney-Saint Gobain, which arose from the merger of the fertilizer businesses of Rhône-Poulenc and Péchiney-Ugine-Kuhlmann. GESA manufactures nitrogenous and compound fertilizers, with 1977 fertilizer sales of FF 1 500 million. GESA has seven compound fertilizer production plants, notably in Rouen/Grand Quevilly (Northwest France), la Madeleine and, until 1977, Chauny (Northern France), Riemst (Belgium) and, via its Dutch subsidiary Zuid-Chemie, Sas van Gent, (Netherlands).

In 1978 GESA acquired a majority of the shares in SOPAG, a holding company which controls 61 % of the capital of the Gardinier Group, a further 36 % being held by SOPIA. The shares in SOPIA are held as to 80 % by UGCA (3) and cooperatives and as to 20 % by the Gardinier family. Gardinier manufactures nitrogenous, phosphate and compound fertilizers.

(b) Compagnie Française de l'Azote (hereinafter COFAZ) came into existence as a result of

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No 127, 20. 8. 1963, p. 2268/63.

(3) Union des Groupements de Coopératives agricoles.

agreements between Pierrefitte-Auby and the Total group. It manufactures nitrogenous and compound fertilizers, with 1977 fertilizer sales of FF 1 300 million. It has compound fertilizer production plants in Feuchy and Le Havre (Northern France).

(c) Société Chimique des Charbonnages SA (CdF) combines the fertilizer business of the State-owned Charbonnages de France and Houillères de Bassin. 37·5 % of the shares are held by Entreprise Minière et Chimique (EMC), which is in its turn controlled by Azote et Produits Chimiques (APC). EMC also holds 70 % of the shares in Société Commerciale de Potasse et d'Azote (SCPA), which manufactures potash fertilizers. APC and the German fertilizer manufacturer BASF each hold 50 % of the shares in Produits et Engrais Chimiques du Rhin (PEC Rhin), which has a compound fertilizer plant in Ottmarsheim, Alsace, that began producing in 1978. CdF has compound fertilizer plants in Mazingarbe, Grand Quevilly (Northwest France) and until 1975, Carling (Eastern France). It owns Chemische Werke Saar-Lothringen GmbH (CSL), which manufactures and sells fertilizers in the Saarland. CdF group sales in 1977 were FF 1 800 million.

The three undertakings concerned in this proceeding are the biggest fertilizer manufacturers in France. They are followed by Société Chimique de la Grande Paroisse, a subsidiary of Air Liquide; Atlantique d'Engrais Chimiques, a subsidiary of the American firm of Grace; Reno, a subsidiary of the German Oetker group; Société d'Engrais Chimiques et Organiques, a subsidiary of the Belgian manufacturers Prayon and Carbochimique; and Ets. Lecoester, a subsidiary of the Dutch manufacturer UKF.

3. The organization of distribution in general

Apart from their cooperation on exports of compound fertilizers to Germany (see below, heading 4) the three manufacturers currently sell their fertilizers in the Community individually. Until 1967, all the French manufacturers had placed the distribution of their straight nitrogenous fertilizers at home and abroad in the hands of the Comptoir Français de l'Azote (CFA), which they had set up. This joint sales agency was the subject of a statement of objections sent by the Commission to the CFA members — including the three companies concerned here or their legal predecessors Auby, Pierrefitte, and Péchiney-Ugine — on 15 March 1967, informing them that the agreement on the joint sale of straight fertilizers entered into by CFA and its members was caught by Article 85 (1) of the Treaty and did not qualify for an Article 85 (3) exemption. Having received this statement of objections the companies decided to terminate the offending practices on 28 July 1967. They cancelled CFA's concession for distribution in other Member States, which they thereafter handled themselves. By Decision of 6 November 1968 [1] the Commission gave negative clearance pursuant to Article 2 of Regulation No 17 for their cooperation thus confined to sales on the domestic market and outside the Community.

In 1969, the CFA members decided to handle their own sales of straight nitrogenous fertilizers in France individually, without working through CFA. Sales outside the Community were still made through CFA, and for certain countries Nitrex, a company established in Zurich, was also involved.

The CFA members continued to sell their compound fertilizers in the Community independently of each other. Trade between Member States in these fertilizers developed more slowly than trade in straight fertilizers. At the beginning of the 1970s Complexport was founded to handle exports outside the Community; its members include the three companies concerned in this proceeding. Complex, established in Zurich, is involved in supplies to certain non-member countries, and other European manufacturers also export through it to the same countries.

4. The organization of exports of compound fertilizers to Germany

On 10 May 1968 Alfa GmbH was formed by the following:

— Société des Produits Chimiques d'Auby (now COFAZ),

— Société Chimique des Charbonnages (CdF),

— Société Produits Chimiques Péchiney-Saint Gobain (now GESA),

— Pierrefitte, Société Générale d'Engrais et de Produits Chimiques (now COFAZ), and

— Mr F. Schiffer, in his capacity of fertilizer dealer.

The formation of Alfa was preceded by talks between Mr Schiffer and Auby on ways and means of promoting exports to Germany, and other manufacturers were brought in later.

On 6 July 1970 GESA, COFAZ and CdF agreed that Alfa would be renamed Floral GmbH, without any

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[1] OJ No L 276, 14. 11. 1968, p. 29.

change in the objects set out in its constitution. The object of the company remained the purchase or manufacture of fertilizers for resale in Germany.

At the present time GESA, COFAZ and CdF each hold 30 % of the shares in Floral, the remaining 10 % being held by Mr Schiffer. By an agreement on appointments made on 10 May 1968 Mr Schiffer was to be managing director of Alfa, and subsequently of Floral. The managing director is required to inform the members of all business dealings and must seek their approval for more important transactions (such as long-term business arrangements). Costs and profits are shared among the members in proportion to their shareholdings.

Distribution agreements were entered into between Alfa or Floral, as the case may be, and Mr Schiffer's firm Franz Schiffer (hereinafter 'Firma Schiffer') on 10 May 1968, 1 May 1972 and 1 May 1975. The agreements give Firma Schiffer the exclusive right to sell Floral products in southern and western Germany (south of the Münster area) and guarantee it supplies of the relevant products in specified quantities.

Lastly, the agreements provide that the Floral trademark will be registered for the use of Firma Schiffer and the products will be distributed under this trademark, the packaging also to bear the trademark of whichever French manufacturer provided the product.

5. Market shares of the relevant companies

In the Community, France is second only to the United Kingdom in production of compound fertilizers. In 1977/78 production — as can be seen from Annex I — ran to 547 500 tonnes N (quantity of nitrogen incorporated in compound fertilizers). GESA/Gardinier, COFAZ and the CdF/APC/EMC group are by far the largest producers, with more than two-thirds of total French production. This represents more than 10 % of total Community production (about three million tonnes N).

German production of coumpound fertilizers, largely accounted for by VEBA/Ruhrstickstoff, BASF and Hoechst, ran to 365 400 tonnes N in the same year (see Annex II), when 379 000 tonnes were consumed in Germany and 627 000 tonnes in France. Large quantities are imported into both countries, which are also, however, major exporters: between 1968/69 and 1977/78, Germany exported annually on average 120 000 tonnes N (29 % of output) and France 65 000 tonnes N (11·7 % of output). In both countries plants are working below capacity except at a few short exceptional periods.

Details of trade in compound fertilizers between France and Germany are shown in the table in Annex III. Exports from France to Germany increased sharply from 1969 to 1972, but have since grown only a little (102 000 tonnes in 1972 and 110 000 tonnes in 1977). By comparison, German exports to France are smaller, ranging between 38 000 tonnes in 1970 and 1974, and 84 000 tonnes in 1976.

French exports to Germany in 1976/77 accounted for two-thirds of French intra-Community exports and 38 % of total French exports. These exports to Germany amounted to about 110 000 tonnes, made up as follows: about half consisted of deliveries by PEC Rhin to BASF, one of its parent companies; about 40 000 tonnes represented shipments by the undertakings concerned from their French production plants (1); and a very small proportion consisted of exports by French dealers. No other French manufacturer exported to Germany.

In 1968/69 they supplied 12 000 tonnes of compound fertilizer, which rose in the following years to roughly 50 000 tonnes annually from 1976/77 onwards. Between 1968/69 and 1971/72 their deliveries to the German market had been made exclusively through Alfa/Floral or through Firma Schiffer. Since 1972/73 GESA and COFAZ have sold about 2 000 tonnes per annum (4·5 % of total exports) to another customer, Deutsche Raiffeisen Warenzentrale GmbH. Between 1972/73 and 1977/78 CdF sold exclusively via Floral or Firma Schiffer. Not until the 1978/79 marketing year — after the Commission opened investigations — did deliveries other than through Floral begin to increase markedly.

CdF accounted for 68 % of all supplies to Floral, GESA for 18 % and COFAZ for 14 %. Their respective shares of deliveries thus do not reflect their respective shareholdings in the company (30 % each).

There are no distinctions as to quality in the products supplied. They are delivered by road, whereas German manufacturers mostly supply by rail or ship to the nearest station or port. The packed goods bear the manufacturer's trademark together with the Floral trademark. The customers are 30 or so buying cooperatives and fertilizer wholesalers.

6. Prices

Although the three French manufacturers sell to Floral and Firma Schiffer at varying prices, the products are resold at uniform prices and on uniform terms. These

(1) The difference between these 40 000 tonnes and the quantities shown in Annex IV was supplied from GESA's Belgian plant.

are aligned on those of German manufacturers, whose list prices — like those of French manufacturers — vary from month to month and include transport costs. The rebates and discounts granted on these prices are identical, as are the terms of delivery. A 2 % rebate is normally given on imported fertilizers.

Prices for compound fertilizers containing equal proportions of nitrate, phosphate and potassium, which represent most of the business of the undertakings concerned, in Germany are, together with those in the Netherlands, the highest in the Community. They are 5 % to 10 %, and sometimes as much as 15 %, higher than in France (1). The comparison prepared by the Statistical Office of the European Communities (Annex V) shows that the differences at the retail level (in bags, including transport costs) are of the same order of magnitude. The only exception was in 1974/75, when demand and prices on the world market rose sharply as a result of the oil crisis, driving up prices in France more than in Germany. Nevertheless, this temporary rise in French prices brought not a drop, but an increase in exports to Germany. Since then world prices have fallen back and in general are appreciably (often as much as 20 %) lower than Community prices, although with considerable variation between different exporting countries.

The undertakings concerned have submitted calculations showing that their returns on German sales were smaller than could have been achieved by selling the same quantities on the French domestic market. However, this comparison is distorted, firstly because it includes additional transport costs and the commission paid to Mr Schiffer; if both of these are discounted, German prices were 11·4 % higher than the French in 1976/77 (the figure arrived at in Annex V was 11·4 % for 1977) and 7·7 % higher in 1977/78 (Annex V: 10·6 % for 1978). Secondly the French price used for the comparison was higher than the price which, according to the Commission's information, wholesalers actually pay after deduction of all hidden end-of-year 'competition discounts' and rebates.

7. Freight costs

Both in France and in Germany selling prices include freight costs to the nearest station or port (free delivered prices). In Germany freight costs are estimated to account for approximately DM 30 per tonne, corresponding to carriage by rail over an average distance of about 275 km; carriage by inland waterway is substantially cheaper, costing no more than half of that.

In France the average freight cost is estimated at about FF 55 (roughly DM 25 per tonne), corresponding to carriage by rail or lorry over an average distance of 310 km; here again, carriage by inland waterway is substantially cheaper. The cost of carriage by rail works out at an average DM 8 per 100 km in France and DM 10·90 in Germany. Average freight costs are thus over one-third higher in Germany than in France.

The average freight cost accounts for about 6·8 % of the retail price in Germany and about 6·6 % in France.

The companies concerned have submitted a comparison of the actual freight costs showing that carriage by rail over a distance of 300 km costs FF ... (2) in France and FF ... in Germany. For carriage by road the corresponding figures are FF ..... For a French manufacturer exporting to Germany the freight costs from the production plant to the German frontier are much less than for the same distance within Germany.

8. The arguments of the companies concerned

The companies concerned argue that Article 85 (1) is inapplicable, alternatively that the tests for exemption under Article 85 (3) are satisfied and that there can be no question of imposing fines. In particular they argue that at 2 % of German consumption of compound fertilizers their exports via Floral account for an insignificant share of the market.

They argue that the purpose of their cooperation was to promote their exports to Germany. Whereas earlier they had hardly exported at all, deliveries made as a result of their cooperation had risen to 50 000 tonnes. The cost of carriage from distant plants provided a natural barrier corresponding to the limits set by the distribution agreement between Floral and Firma Schiffer. Delivery by inland waterway, considerably cheaper than by rail or road, was out of the question as regards Floral's customers who, being generally inadequately served by railway stations, attach particular importance to having the products supplied

(1) As regards GESA's exports from its Belgian plant, it should be added that Belgian domestic prices are generally even lower than French ones.

(2) In the published version of this Decision, some data have hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

by road at free delivered prices. Access to the German market, where production is far in excess of consumption and forces producers to export, is in any case very difficult.

They further argue that joint use of the Floral distribution network saves distribution costs. If they are in a position to export individually to other Community markets such as the Netherlands and Belgium, then this is because these are geographically easier countries and the manufacturers have their own plants either there or nearby. It is also necessary to have a permanent presence on the German market in view of specific consumption patterns (and particularly the habit of contracting for 90 % of annual requirements at the beginning of each year).

9. Change in ownership of Floral

On 19 October 1979 the three French manufacturers transferred all their shares in Floral to the fourth shareholder, Mr Schiffer, who has this become sole shareholder in Floral GmbH. In the light of this solution the three manufacturers have since the beginning of the marketing year 1979/80 increased their individual exports to Germany through other outlets than Floral.

Floral has consequently made an effort to obtain supplies of compound fertilizer from other sources too. However, by far the largest proportion of Floral's supplies in the current marketing year (1979/80) will still come from the three French manufacturers concerned.

II. APPLICABILITY OF ARTICLE 85 OF THE TREATY

Article 85 (1) of the Treaty establishing the European Economic Community prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

1. Agreements and concerted practices between undertakings

The cooperation between the relevant companies, expressed in the joint formation and management of Floral (formerly Alfa), is based on an agreement, or at least a concerted practice, consisting in exportation by the three French manufacturers to Germany via the distribution undertaking formed and controlled by them jointly. Before the joint subsidiary was formed there were talks between Auby (now COFAZ) and Mr Schiffer in the course of which it was agreed that it would be worth bringing in other manufacturers so as to set the cooperation on a broader footing. The equal participation of the three French manufacturers in Floral (Alfa) presupposes an understanding between them which need not necessarily be evidenced in writing.

The business activities of the companies concerned within the joint distribution undertaking also presupposes a standing agreement. While the French manufacturers may not have explicitly undertaken to channel all their exports to Germany exclusively through Floral (Alfa), they nevertheless did so until 1974/75, and since then they have channelled the bulk of their exports (with the exception of only small quantities supplied to only one other customer) through their joint venture. Not until the Commission opened investigations did they increase their individual exports to Germany. Even in the absence of any explicit exclusive rights clause, the three manufacturers as parent companies can hardly be expected to compete with their joint subsidiary. Inevitably, if they make any exports to Germany otherwise than through Floral, they will take account of the sales policy jointly determined with the other companies through Floral and align their sales activities on the common policy practised there.

The fact that the quantities sold by the three manufacturers through Floral do not correspond exactly to their shareholdings is immaterial for the purposes of Article 85 (1). Because the profits of the joint distribution subsidiary are distributed in proportion to their holdings they are obliged, even if no quotas are set, to coordinate their activities in the compound fertilizer export business.

2. Restriction of competition within the common market

The cooperation between the undertakings concerned restricts competition between them as regards exports of compound fertilizers to Germany.

In the absence of the joint distribution subsidiary they could offer compound fertilizers for sale in Germany in competition with each other. They have adequate output available for sale and have plant that is quite

capable of supplying for export to Germany. In 1968 Auby planned exports via Firma Schiffer although its plant was not so close to the German border as, for instance, CdF's plant. Following the closure of its Carling plant in 1975 and before taking up production at Ottmarsheim, CdF exported substantial quantities from more distant plants. Carriage costs in France are at least one-third lower than in Germany; carriage over greater distances within France would thus cause only a slight increase in total carriage costs.

There are favourably located plants, such as the CdF Ottmarsheim plant and the GESA plant at Riemst, Belgium, from which supplies can also be made by inland waterway, enabling northern Germany, which is excluded from Firma Schiffer's allotted sales territory, to be supplied. Certainly Floral's customers may attach particular importance to receiving supplies by road. But this is not to say that French manufacturers are incapable of making such deliveries by road or waterway outside Floral's regular clientele, whether or not situated in Floral's area of operations.

If the three French manufacturers unanimously refrain from so doing, this can only be attributed to their collective undertakings through Floral as their jointly-controlled sales subsidiary. If, as they argue, supplies by road account for a segment of the market that has been neglected by the German manufacturers, the fact that they make no supplies by inland waterway, where the French manufacturers would be in direct competition with the German manufacturers, can only be explained by a concerted decision of the French manufacturers to work through their joint subsidiary Floral in such a way as to refrain from competing directly with it and with their German competitors, so that there should be no interference by the German manufacturers with the joint subsidiary's sales policy.

The coordination of exports to Germany by the three French manufacturers is evidenced by the fact that German customers are confronted with uniform terms of supply: products of the French manufacturers are offered for sale by Floral or Firma Schiffer at identical prices and on identical terms. This is a result of the fact that in the case of bulk goods the products offered for sale are absolutely interchangeable, while packed goods all uniformly bear the additional Floral trademark.

In the face of this standardized supply German customers have virtually no opportunity of obtaining their requirements direct from the three manufacturers. On 6 July 1977 COFAZ refused to meet an order from a Cologne wholesaler on the grounds that the company already had a sales outlet and did not at that time wish to expand its sales, since its plants were at such a distance. This refusal is merely the logical consequence of the three French manufacturers' cooperation through Floral: so long as they are the controlling members of their joint sales subsidiary Floral, they cannot be expected to supply German customers outside Floral, and there is no doubt that, if they did, their prices and terms would not be more advantageous than those offered by Floral.

The three French manufacturers have not only channelled and standardized their supplies to Germany but also imposed geographical limits on them by requiring Firma Schiffer, via Floral, to sell their fertilizers only in a specified territory. This territory is not even predetermined by carriage costs, since for one thing it includes places that are further away from the French plants than what the companies concerned allegedly regard as the maximum tolerable distance of 310 km; and secondly, this calculation takes account neither of the lower cost for the part of the journey accomplished within France (which varies according to the production plant concerned) nor of the lower cost of waterway transport; and thirdly, if carriage costs were prohibitive above a certain distance, there would be no need to delimit expressly the sales territory.

The competitive intentions of the three French manufacturers are thus geographically confined by means of action concerted in advance without their being any real economic constraints militating in favour of this. Moreover, this geographically restricted supply, standardized by means of the jointly determined sales policy, is aligned on German domestic market prices. Finally, for the purposes of carriage the manufacturers do not use the particularly cheap mode of inland waterways but prefer road transport. The three French manufacturers have thus conceived their competitive intentions on the German market in agreement with each other and in such a way as to create only the minimum of conflict with the German manufacturers. This, combined with their agreement in practice to refrain from competing with each other outside Floral, is the nub of the anti-competitive effect of the cooperation between them.

3. Effect on trade between Member States

The cooperation between the undertakings concerned is liable adversely to affect trade between Member States. It regulates exports from France (or, as regards GESA, from Belgium) to Germany. Its effect is that the three French manufacturers refrain from exporting to Germany otherwise than through the Floral distribution network. In consequence, offers by the three French manufacturers for exports to another Member State are standardized and competition between them on the

German market is excluded. Trade between Member States is therefore conducted in conditions different from those which would prevail if the cooperation between the companies concerned did not exist.

4. **Appreciability of the restriction of competition and adverse effect on trade**

The companies concerned point out that exports by the three French manufacturers to Germany represent only about 2 % of total German consumption of compound fertilizers. The quantities actually delivered by the French manufacturers to the German market via Floral are however not necessarily the only yardstick for measuring the impact on the market.

The three manufacturers concerned are France's largest manufacturers. They are large manufacturers, even in relation to total Community production (more than 10 %). They have production facilities working below capacity, substantial exportable output and plants that are capable of exporting to Germany. For a large part of Germany, freight costs are no higher than for destinations within France, particularly if account is taken of the facilities for waterway transport which exist but are not used.

Moreover, account must be taken of the structure of competition on the market concerned, that is the German market. The number of competitors on the German market is very small. By far the largest are Ruhrstickstoff, BASF and Hoechst, which together have an exceptional position on the market, although, in terms of size, they are comparable as manufacturers of compound fertilizers with the three French manufacturers concerned.

On a market with such an oligopolistic structure, if three of the few suppliers (who despite their size have only a small share of that market) standardize their supply through a joint sales organization, the oligopoly merely becomes tighter. Even relatively small quantities can, if put on the market by the suppliers individually, have an appreciable impact on market conditions. The share of the market captured by the three French manufacturers seemed to them significant enough to warrant planning and effecting a scheme of cooperation to standardize their supplies, and there is no evidence that their influence on this market could not be increased through changes in competitive conditions, market structure and their own sales policy.

Contrary to what is argued by the undertakings concerned, the question of whether or not their exports to Germany were less profitable than would have been sales of similar quantities within France — which amounts to the question of whether German prices were higher or lower than French ones — is irrelevant to consideration of the appreciability of the effect upon competition. As the Court of Justice has found [1], this argument is based on a situation which can change from year to year as a result of changes in competitive conditions or of market structures in both the common market as a whole and individual national markets; whereas the concentration of supply for export, which has the effect of restricting competition, is meant to last.

Moreover, for an undertaking active on various markets, it is not the price obtained on a given market that is the determining factor, but the average price over all the markets in question. Accordingly, it would in any event be necessary also to make comparisons with exports to other Member States and, especially, to non-member countries, where — with the exception of the year 1974/75 — prices were much lower than in the Community. In comparison with these countries, exports to Germany were certainly more profitable, except in 1974/75. The price comparison submitted by the undertakings concerned also omits certain elements (see I.6, third paragraph) and therefore arrives at conclusions different from those of the Statistical Office; the latter's price comparison, notwithstanding reservations concerning currency conversions and product differences, gives representative results which agree with the Commission's findings.

The effects on their cooperation on competition and interstate trade are accordingly appreciable.

5. **Inapplicability of Article 85 (3)**

Under Article 85 (3), the provisions of Article 85 (1) may be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,

— any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or

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[1] Judgment of 1 February 1978 in Case 19/77, 'Miller International', [1978] ECR 131, ground of judgment 14.

economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

1. The concerted practices underlying the cooperation between the companies concerned were notified to the Commission only after the Commission commenced investigations on 10 July 1978. There can be no question of exemption for the period preceding that date since, pursuant to Article 8 (1) of Regulation No 17, a decision giving exemption can be valid only with effect from the date of the notification, and none of the exceptions in Article 4 (2) of Regulation No 17 applies.

2. Nor are the tests for exemption satisfied in respect of the subsequent period:

(a) The practices that are the subject of this proceeding have no beneficial effects on production or distribution such as might offset the competitive disadvantages created by the restrictions of competition between the parties.

The production of goods is unaffected, since each of the companies concerned continues to manufacture the full range of its products. As regards distribution, there is no evidence of any improvement made by the joint selling arrangement in view of the tightly organized, integrated distribution system in the fertilizer industry in the Community (cooperatives, wholesalers, importers, etc). The undertakings concerned have provided the Commission with no evidence and the Commission has no evidence from other sources, indicating that in the Community in general and in Germany in particular there are difficulties in planning production, storage, carriage and resale which could not be solved individually by any company of the same size as the undertakings concerned here and which might make the introduction of a joint distribution system essential.

Indeed they have shown that they have the requisite know-how and resources to market their fertilizers in other Community countries independently of each other, albeit in somewhat smaller quantities. Whatever difficulties may have arisen during the launching period in 1968 and 1969 — when exports were low and had to be promoted — cannot be pleaded in support of the cooperation that is still going on today. CdF was quite capable of setting up its own subsidiary in the Saarland and of equipping it with a sales network working through the wholesale trade. In other Member States the companies concerned have also acquired their own independent sales contacts and sell straight nitrogenous fertilizers on their own, though only in small quantities. Undertakings of this size cannot argue that they are forced to cooperate with each other.

The Commission cannot accept the undertakings' argument that straight and compound nitrogenous fertilizers have to be sold through separate distribution networks. For years now, they have been sold by the same wholesalers and retailers. If economies in distribution costs are to be the decisive criterion, then this would have to apply primarily to the rationalization of distribution in one and the same firm and not to the rationalization of distribution by a series of competing firms.

(b) Apart from that, the consumer has not been allowed a fair share of the benefit that results from a reduction in buying prices, for the prices payable by German dealers and users have not in fact fallen as the prices charged by Floral on the German market are virtually as high as the prices charged by its domestic competitors. The German user, consequently, derives no benefit from the cooperation arrangement, and indeed has to bear the disadvantages in terms of quantities available and the prices charged for them resulting from the rigid channelling of standardized supplies.

The tests for exemption are accordingly not satisfied.

6. **Applicability of Article 3 of Regulation No 17**

It follows that both during the period from 10 May 1968 to 10 July 1978 (the date of notification) and during the period thereafter the cooperation between the companies concerned constituted an infringement of Article 85.

On 19 October 1979 the three French manufacturers concerned transferred their shares in Floral to Mr Schiffer, so relinquishing their joint control and management of the company, which is to become an independent wholesaler/importer. However, the Commission must ensure that the companies' existing anti-competitive cooperation is in fact terminated by the end of the 1979/80 marketing year. It must also ensure that their current cooperation is not replaced by other forms of concerted practice. The fact that the companies

concerned have terminated their participation in Floral does not obviate the need for the requirement set out in Article 3 of this Decision.

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

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

(a) The three French manufacturers to which this Decision is addressed have been infringing Article 85 (1) since 10 May 1968. The infringement was committed either by them or by their legal predecessors, for whose conduct they remain accountable. COFAZ took over the business of AUBY and Pierrefitte, and GESA that of Péchiney-Saint Gobain, after the reconstruction of the undertakings concerned; and they assumed the benefit and the burden of the Alfa/Floral arrangements. They have at the very least negligently infringed Article 85 (1). They ought to have known that the coordination of their exports of compound fertilizers to German through a joint subsidiary was caught by Article 85 (1).

These French manufacturers or their legal predecessors knew that the Commission regarded fertilizer export cartels within the Community as prohibited by Article 85 and as not qualifying for exemption. The Commission had given them full information on the reasons for this in its proceeding against CFA shortly before Floral (Alfa) was formed, when it demanded termination of the infringement in that case (effective from 28 July 1967). At the Commission's insistence the manufacturers then involved withdrew their undertaking to export exclusively via CFA and even went so far as to take exports to other Member States right out of CFA's responsibilities. This meant that CFA members could no longer work through CFA when exporting to other Community countries. The Commission was thereby seeking to ensure that the exclusive rights clauses were not replaced by some informal concerted practice to the like effect.

The fact that the CFA proceeding concerned straight nitrogenous fertilizers rather than compound fertilizers does not shield the companies concerned against an accusation of negligence. They must have known that the selected procedure for the joint sale of their compound fertilizers would not be scrutinized for the purpose of Article 85 (1) in any different way than their stright fertilizer arrangement. Nor was it likely that the restriction of cooperation to a single export market in the Community would be regarded in a different light from the restriction of Community sales to a relatively small volume.

(b) As regards the gravity of the infringement regard must be had to the fact that the pooling of deliveries by the three largest manufacturers in one Member State on the market of another Member State virtually eliminates all the competition between them on that market. On the other hand, the effect of their cooperation on users was relatively small.

If they exported individually the three French manufacturers would be able to exert greater competitive pressure on quantities, price and mode of transport. Individual and independent activities by the French manufacturers would almost certainly have improved or helped to improve the competitive structure of a substantial part of the common market. It is of course impossible to quantify the influence upon competition of such individual exports. In fixing the amount of the fine the Commission must accordingly proceed on the basis of the relatively small turnover achieved by the manufacturers via Floral, without, however, ignoring completely their importance in the total market for compound fertilizers.

The Commission has taken into account the fact that the manufacturers concerned have, without waiting for the Commission's Decision, ended their involvement in Floral and so have taken the first step towards ending their infringement.

(c) As regards the duration of the infringement, the period to be taken into consideration runs from 10 May 1968 until 10 July 1978, the date of notification. The period following the date of notification is to be disregarded pursuant to Article 15 (5) of Regulation No 17.

(d) The three French manufacturers concerned benefited in equal proportions from the profits achieved from Floral. The fact that they shared equally in the profits prevails over the fact that they distributed different quantities via Floral. The difference in the total fertilizer sales of the various companies is not so great as to warrant differences in the amounts of the fines. It follows that each of the three French manufacturers should be required to pay a fine of 85 000 EUA (FF 493 944·35).

No fine need be imposed on Firma Schiffer, which is now the sole shareholder in Floral, since Firma Schiffer was only a minor instrument of the anti-competitive cooperation between the three French manufacturers,

HAS ADOPTED THIS DECISION:

Article 1

The agreement and concerted practice concerning the joint formation and management of Floral Düngemittelverkaufsgesellschaft mbH (formerly Alfa GmbH) by Générale des Engrais SA, Compagnie Française de l'Azote SA and Société Chimique des Charbonnages SA together with Mr Franz Schiffer and the joint export of compound fertilizers to the Federal Republic of Germany have since 10 May 1968 constituted an infringement of Article 85 (1) of the Treaty establishing the European Community.

Article 2

The application for exemption pursuant to Article 85 (3) of the Treaty with effect from 10 July 1978, made with the notification, is hereby refused.

Article 3

The undertakings specified in Article 6 shall terminate the infringement found in Article 1.

Article 4

The following fines are imposed:

1. on Générale des Engrais SA, eighty-five thousand (85 000) EUA, that is to say FF 493 944·35;
2. on Compagnie Française de l'Azote SA, eighty-five thousand (85 000) EUA, that is to say FF 493 944·35;
3. on Société Chimique des Charbonnages SA, eighty-five thousand (85 000) EUA, that is to say FF 493 944·35.

These sums shall be paid, within three months of notification of this Decision to the companies concerned, into the following account of the Commission of the European Communities: Société Générale, Direction de l'Étranger, Boîte Postale 317-09, 75454 Paris Cedex 09, Account No 5.770.006.5.

Article 5

This Decision shall be enforceable in the manner provided in Article 192 of the Treaty establishing the European Economic Community.

Article 6

This Decision is addressed to:

1. Compagnie Française de l'Azote SA,
   4, avenue Velasquez,
   Boîte Postale 198–08,
   F 75361 Paris Cedex 08;
2. Générale des Engrais SA,
   47 rue de Villiers,
   F 92527 Neuilly-sur-Seine;
3. CdF Chimie,
   Société Chimique des Charbonnages SA,
   Tour Aurore,
   Place des Reflets, Cedex 5,
   F 92080 Paris Défense 2;
4. Mr Franz Schiffer,
   Am Güterbahnhof,
   D 6601 Hanweiler;
5. Floral Düngemittelverkaufsgesellschaft mbH,
   D 6601 Kleinblittersdorf 2.

Done at Brussels, 28 November 1979.

For the Commission

Raymond VOUEL

Member of the Commission

ANNEX I

French compound fertilizer market

Year	Production	+ Imports	= Total supply	− Domestic consumption	= Surplus (exports)
1968/69	424·1	81·6	505·7	465·7	40
1969/70	479	75·1	554·1	503·5	50·6
1970/71	519	109·1	628·1	589·1	39
1971/72	554·5	118·6	673·1	633·1	40
1972/73	618·4	133·7	752·1	706	46·1
1973/74	693·1	135·4	828·5	760·9	67·6
1974/75	590·2	100	690·2	562·5	127·7
1975/76	491·4	145·4	636·8	573·7	63·1
1976/77	531·9	173·8	705·7	638·2	67·5
1977/78	547·5	173·2	720·7	626·6	94·1
	5 449·1				635·7

Source: Chambre syndicale nationale des Fabricants d'Engrais composes.

ANNEX II

German compound fertilizer market

Year	Production	+ Imports	= Total supply	− Domestic consumption	= Surplus (exports)
1968/69	412·4	23	435·4	290·6	144·8
1969/70	433·2	32	465·2	334·3	130·9
1970/71	430·8	28	458·8	367·6	91·2
1971/72	406·4	45·9	452·3	336·7	115·6
1972/73	458·2	29·7	487·9	321·2	166·7
1973/74	463·2	27·9	491·1	318	173·1
1974/75	466·8	36·3	503·1	367·1	136
1975/76	309·8	45·3	355·1	313·8	41·3
1976/77	371·4	78·6	450	361·7	88·3
1977/78	365·4	126·4	491·8	378·9	112·9
	4 117·6			1 200·8	

Source: Statistisches Bundesamt Wiesbaden.

ANNEX III

French and German exports of compound fertilizers

(tonnes product)

Year	French exports			German exports		
	Germany (*)	Community	World	France	Communitiy	World
1969	34 045 (29·8 %)	114 335	172 530	25 095	80 226	625 080
1970	41 659 (26·2 %)	158 967	277 306	37 650	74 590	510 525
1971	75 902 (45 %)	166 837	209 932	64 425	109 551	480 565
1972	102 047 (66·1 %)	154 489	220 248	45 065	89 411	430 652
1973	97 879 (55·3 %)	177 057	254 134	66 057	216 965	585 754
1974	146 395 (61·1 %)	239 794	426 926	38 424	206 687	560 003
1975	123 598 (72·4 %)	170 798	328 093	47 212	226 103	413 380
1976	111 989 (66·6 %)	168 246	291 879	84 092	210 977	355 429
1977	109 988 (54 %)	203 668	381 941	59 048	321 608	637 720

Source: Statistical Office of the European Communities.

(*) The percentages indicate the proportion of total exports within the Community accounted for by exports to Germany.

ANNEX IV

Exports by the manufacturers concerned to Germany (*)

(tonnes product)

Year	Straight N	NPK		
	Others	Floral (1)	Others	Total
1968/69				
1969/70				
1970/71				
1971/72				
1972/73				
1973/74				
1974/75				
1975/76			(2)	
1976/77				
1977/78				
1878/79				
1979/80 (3)				

(*) In the published version of this Decision, some data have hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

Source: Figures supplied by the companies concernend.

(1) Including deliveries to Mr F. Schiffer.
(2) Including ... tonnes to a French exporter.
(3) Export orders.

ANNEX V

Comparison of prices for compound fertilizers 17:17:17

(Price in u.a. per 100 kg product, before tax)

Year	Germany	Belgium	France	Ireland	Italy	Luxembourg	Netherlands	United Kingdom	Variations % D/F
1969	—	—	8·77	—	11·07	—	8·95	—	(*) + 2·1
1970	—	—	7·99	—	10·83	7·34	8·86	—	(*) + 10·9
1971	—	8·38	8·19	8·73	10·49	7·90	9·27	—	(*) + 13·2
1972	—	9·69	8·35	9·24	10·51	9·72	9·84	10·62	(*) + 5·2
1973	11·31	9·99	10·33	8·71	9·12	9·27	10·61	9·99	+ 9·5
1974	14·71	13·05	15·96	13·88	13·09	13·06	14·02	14·28	− 8·5
1975	17·50	15·49	17·91	16·34	15·32	15·13	17·18	16·66	− 2·3
1976	18·46	17·78	17·03	16·33	15·69	17·51	18·11	15·25	+ 8·4
1977	18·87	16·36	16·94	16·61	15·87	17·54	18·60	15·71	+ 11·4
1978	19·64	17·43	17·75	16·58	16·22	16·09	18·73	16·98	+ 10·6

(*) % calculated on the basis of the Dutch figures which closely resemble those for Germany.
Source: EUROSTAT.