II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 13 June 2000
on a measure taken by Germany in respect of Kali und Salz GmbH

(notified under document number C(2000) 1662)

(Only the German text is authentic)

(Text with EEA relevance)

(2001/120/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having given notice to interested parties to submit their comments in accordance with the aforementioned provisions [1], and having regard to those comments,

Whereas:

I. PROCEDURE

(1) On 20 July 1998, Germany informed the Commission of the sale of its remaining 49 % stake in Kali und Salz GmbH to Kali und Salz Beteiligungs AG, which already owned 51 % of the shares. The Commission registered the sale of the shareholding as non-notified aid measure NN 27/99.

(2) On 18 March 1999, the Commission decided to initiate the formal investigation procedure laid down in Article 88(2) of the EC Treaty in respect of the terms of the sale.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission gave notice to interested parties to submit their comments. The Commission received comments from three interested parties. It forwarded them to Germany by letters dated 26 October 1999 and 8 November 1999. Germany's reply was submitted by letter dated 2 December 1999, received on 3 December 1999.

(4) By letter dated 11 April 2000, at the Commission's request, Germany submitted the contract for the sale of its remaining 49 % stake in Kali und Salz GmbH.

II. BACKGROUND

A. The undertaking

(5) Kali und Salz GmbH was set up by contract of 13 May 1993 as a joint venture between the west German company Kali und Salz Beteiligungs AG and the east German Mitteldeutsche Kali Aktiengesellschaft (MdK). Kali und Salz Beteiligungs AG, a subsidiary of the German chemical group BASF, took 51 % of the shares in the joint venture, and the Treuhandanstalt (the THA), the sole shareholder in MdK, took the remaining 49 %. The 49 % stake was taken over first by Beteiligungs-Management Gesellschaft Berlin mbH on 1 January 1995 and then by the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS), as legal successor to the THA, on 29 October 1997.

(6) Kali und Salz GmbH is active in potash mining, the manufacture of industrial products of potash and rock salt, such as potassium fertilisers, and the production of by-products such as magnesium sulphate and kieserite. Kali und Salz GmbH currently employs some 8 000 people. Its annual production capacity amounts to 3,4

[1] OJ C 272, 25.9.1999, p. 7.
[2] See footnote 1.

million tonnes of potash and 2,2 million tonnes of rock salt. It has production sites on both sides of the former east-west border. After the setting-up of the joint venture its headquarters were moved to Kassel in Hesse. Its plants are located in Thuringia, Saxony-Anhalt, Hesse and Lower Saxony.

B. **Aid to Kali und Salz GmbH approved in 1993**

(7) By Decision 94/449/EC of 14 December 1993, the Commission approved aid of DEM 1 536,6 million in connection with the setting up of a joint venture between Kali und Salz Beteiligungs AG and MdK ([1]). Among other things the Commission approved compensation to be given by the THA for losses of up to DEM 135 million, a figure calculated on the basis of the expected negative cash flow during the period 1993 to 1997.

(8) The negative cash flow considerably exceeded the original projections, and on 24 October 1996 Germany notified an increase in the loss compensation to be paid by the BvS, which was to rise from the approved DEM 135 million to some DEM 264,9 million, thus raising the total by about DEM 129,9 million. The Commission registered this measure as notified aid measure N 793/96.

(9) By letter dated 16 December 1997, the Commission informed Germany of its decision to initiate the formal investigation procedure laid down in Article 88(2) of the EC Treaty with regard to the notified aid of DEM 129,9 million which Germany proposed to grant to Kali und Salz GmbH ([2]).

(10) By letter received on 20 July 1998, Germany informed the Commission that the BvS had succeeded in selling its 49 % holding in the joint venture, thus completing the privatisation. Kali und Salz Beteiligungs AG, which was the other partner and the major shareholder in the joint venture, had agreed to take the 49 % stake for a price of DEM 250 million.

(11) In the same letter, Germany also informed the Commission that the additional DEM 129,9 million would not now be disbursed, and consequently withdrew the notification of that aid. The Commission accordingly closed the procedure.

C. **The sale of the remaining 49 % of the shares**

(12) Under the contract setting-up the joint venture, if either party proposed disposing of its shareholding, the shares had first to be offered to the other party. Thus Kali und Salz Beteiligungs AG had first refusal on the remaining 49 % of the shares. The shares could not be offered to third parties for a price lower than that bid by Kali und Salz Beteiligungs AG. Accordingly, the shares were first offered to Kali und Salz Beteiligungs AG.

(13) In a second step, in order to inform all potential interested investors, the German authorities published notices in newspapers and specialised publications announcing their intention of selling the remaining 49 %. The investment bank Goldman Sachs was asked to identify other potential purchasers. Several companies operating in the industry were contacted. According to Germany, three potential investors showed an interest, but two withdrew immediately when they were informed they would be able to buy only a minority stake. The third was discouraged by the price asked by the BvS. According to Germany, none made an offer. As a result, the BvS entered into negotiation with Kali und Salz Beteiligungs AG.

(14) At the outset the German authorities, advised by Goldman Sachs, requested a price of DEM 400 million, whereas Kali und Salz Beteiligungs AG bid [...] (*). Kali und Salz Beteiligungs AG's valuation was based on the price offered in 1997 by a Canadian company for Kali und Salz Beteiligungs AG's own original 51 % stake in Kali und Salz GmbH ([3]). Both positions proceeded on the assumption that the State would compensate the accumulated negative cash flow of DEM 135 million recorded by Kali und Salz GmbH during the period 1993 to 1997, in line with what had been approved by the Commission in 1993.

(15) Kali und Salz Beteiligungs AG's valuation explicitly referred to the uncertain prospects for the potash market, foreign exchange risks, and specific mining risks; Goldman Sachs's valuation clearly did not give these factors the same weight.

(16) One day after the negotiations were formally concluded, a German competitor of Kali und Salz GmbH's indicated that there was a US group that would be interested in taking the shares. Germany states, however, that according to information provided by a research company the US group lacked the financial resources for the transaction. Research had established that the group was a financial holding company with a staff of two. It was classed in the higher risk group and given a payment score of 59 and no credit rating. On the basis of objective information, therefore, the BvS concluded that the group was not a suitable candidate.

(17) The BvS and Kali und Salz Beteiligungs AG finally agreed on a price of DEM 250 million. However, Kali und Salz Beteiligungs AG also agreed that the BvS would reduce its compensation of losses to DEM 70 million instead of the DEM 135 million originally approved by the Commission in 1993.

([1]) OJ L 186, 21.7.1994, p. 38.
([2]) OJ C 197, 23.6.1998, p. 7.

(*) Business secret.
([3]) In 1997 a Canadian firm sought to buy Kali und Salz Beteiligungs AG from BASF. The German merger authorities prohibited the takeover.

(18) The Commission initiated the formal investigation procedure in respect of the disposal of the remaining 49 % of the shares in order to ensure that the price actually corresponded to a fair value for the shares, and did not contain an additional aid component.

(19) As the sale of the holding was not to be the outcome of an open bidding procedure, the Commission doubted whether DEM 250 million was a fair price, and whether all interested parties had had a fair chance to make better offers so as to secure the shares.

III. **COMMENTS FROM INTERESTED PARTIES**

(20) The Commission received comments from the United Kingdom, through its Permanent Representation to the European Union in Brussels, from the European Fertiliser Import Association, and from an international fertiliser producer. None of them made any reference to the exclusion of potential purchasers or to any alternative bid for the shares. They did not provide any evidence of an aid element in the sale.

IV. **COMMENTS FROM GERMANY**

(21) In its response to the initiation of the formal investigation procedure and the comments from interested parties received by the Commission, Germany stated that the sale had received enough publicity, not only through Goldman Sachs, but also through national and local newspapers and specialised publications. According to Germany, the number of firms operating on the relevant market was relatively small, and the efforts to sell the holding were well known in the industry.

(22) As regards the price paid, Germany pointed out first of all that in 1996 an offer of DEM 250 million had been made for 51 % of the shares held by Kali und Salz Beteiligungs AG. It thus considered that it had a market value indication of the price of the latter's minority shareholding.

(23) Second, in addition to the purchase price, Kali und Salz Beteiligungs AG was forgoing DEM 65 million of the DEM 135 million approved by the Commission in 1993. This reduced the compensation to be paid by the BvS to only DEM 70 million including interest.

V. **ASSESSMENT**

(24) In line with the established case-law and Commission policy, the Commission considers that the price paid for a public shareholding does not contain a State aid component when the holding is sold by open, unconditional and non-discriminatory bidding. But Member States wishing to dispose of public shareholdings are under no obligation to follow such a procedure.

(25) In the absence of such a procedure the price may comprise elements of State aid, and where appropriate the Commission may verify whether the price represents fair value. In the present case, the price finally obtained was the outcome of a procedure in which the German authorities, in cooperation with their advisers, contacted all potential interested purchasers, and subsequently entered into intense negotiations with Kali und Salz Beteiligungs AG, which already owned 51 % of the shares. Under the final agreement Kali und Salz Beteiligungs AG was to pay DEM 250 million, but agreed that the BvS would reduce the compensation it was to pay for losses by DEM 65 million. These terms also saved the State interest amounting to DEM 8 million generated by the loss compensation of DEM 135 million outstanding up to that point, which had become legally enforceable at the beginning of 1998. This meant that the BvS had secured an additional financial advantage totalling DEM 73 million over and above the selling price.

(26) The BvS ultimately obtained a net price of DEM 323 million for its remaining 49 % stake. Moreover, the German authorities' advisers concluded that the bid put forward by Kali und Salz Beteiligungs AG was the most advantageous offer that could be obtained at that time.

(27) It should be stressed, finally, that according to the information available no potential investor was arbitrarily excluded from the sale, and none ever made an offer for the shareholding. The negotiations between the interested parties, all acting in their own economic interests, took place according to market principles.

(28) In the formal investigation proceedings, therefore, the Commission has made a detailed assessment of the negotiations and the final terms of the sale, and concludes that there is no evidence of aid,

HAS ADOPTED THIS DECISION:

Article 1

The sale by Germany to Kali und Salz Beteiligungs AG of a residual holding of 49 % in Kali und Salz GmbH does not constitute aid within the meaning of Article 87(1) of the Treaty.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 13 June 2000.

For the Commission

Mario MONTI

Member of the Commission