

## STATE AID

C 74/97 (ex N 793/96)

Germany

(98/C 197/05)

(Text with EEA relevance)

*(Articles 92 to 94 of the Treaty establishing the European Community)***Commission notice pursuant to Article 93(2) of the EC Treaty to other Member States and interested parties concerning aid granted by the German Government to Kali und Salz GmbH**

The Commission has sent the German Government the following letter, informing it that it has decided to initiate proceedings pursuant to Article 93(2) of the EC Treaty.

**1. PROCEDURAL ASPECTS**

By letter dated 23 October 1996, registered on 24 October 1996, the government notified aid for Kali und Salz GmbH (Kali & Salz) to the Commission pursuant to Article 93(3) of the EC Treaty. The complete notification, including annexes, was registered on 9 December 1996. By letters dated 23 December 1996 and 27 May 1997, the Commission asked for further information, which was provided by letter dated 15 April 1997, registered the same day, and by letter dated 24 September 1997, registered on 26 September 1997. During a meeting between officials from the Commission and the government in Leuna on 8 July 1997, further information was provided.

**2. GENERAL DESCRIPTION****2.1. Description of Kali und Salz GmbH**

Kali & Salz is a joint venture between the west German Kali und Salz Beteiligungs AG <sup>(1)</sup> and the east German Mitteldeutsche Kali Aktiengesellschaft (MdK).

**Kali und Salz GmbH**  
(joint venture)

BvS holds 49 %

Kali und Salz Beteiligungs AG holds 51 %

Kali und Salz Beteiligungs AG is a subsidiary of the German chemical group BASF <sup>(2)</sup>.

MdK comprised the potash and rock salt activities of the former GDR which produced more than 3,3 million tonnes p.a. with a workforce of 32 000. The Treuhandanstalt (THA) was the sole shareholder in MdK and its task was to restructure MdK in order to make it competitive and privatise it.

The two companies concluded the contract on the setting-up of the joint venture on 13 May 1993. The THA took over 49 % of the shares in Kali & Salz and the Kali und Salz Beteiligungs AG took over 51 % of the shares. On 1 January 1995 the 49 % of the shares held by the THA were transferred to the BMBG (Beteiligungs-Management-Gesellschaft Berlin mbH). The Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS) as successor to the THA performs the *Vertragsmanagement* and exercises the shareholder's right and responsibilities for the BMBG.

Kali & Salz produces potash and connected speciality products (potassium fertiliser), industrial products based on potash and rock salt (magnesium sulphate mineral, kieserite) and salt, and it provides waste-disposal services (underground landfills). With a world market share of 30 % Kali & Salz is internationally the largest supplier of potassium sulphate, which is used in the cultivation of fruit, vegetables and tobacco. In 1995 the company had obtained a 12,5 % world-market share in the total potassium production <sup>(3)</sup>. The company comprises all production sites on both sides of the former east-west border. After the merger the company's headquarters were moved to Kassel, Hesse, while its plants are located in Thuringia, Saxony-Anhalt, Hesse and Lower Saxony. The company employed 8 107 people

<sup>(1)</sup> Formerly Kali und Salz AG.

<sup>(2)</sup> BASF holds 76 %, independent shareholders hold 24 %.

<sup>(3)</sup> Projections of the 1993 business plan for Kali & Salz' world market-share were 13 % in 1994 and 11,9 % in 1997.

on 31 December 1996. It achieves approximately one third of its sales in Germany, one third in the rest of the EU and the other third in non-member countries. Approximately 70 % of the company's turnover is accounted for by fertilisers, 11,5 % by industrial products, 14,1 % by salt and 5 % by other activities. Its annual production capacity amounts to 3,4 million tonnes of potassium and 2,2 million tonnes of rock salt.

## 2.2. The privatisation

The present measures have to be seen in connection with the Commission's approval (letter dated 31 December 1993, SG(93) D/21735) of aid N 476/93 for the privatisation and restructuring of MdK. The partial privatisation of MdK in connection with the merger Kali und Salz Beteiligungs AG resulted from an international open and unconditional bidding procedure in which the bid from Kali und Salz Beteiligungs AG was accepted as it was the only bid and thus the highest. The merger of both companies was the only option in the THA's privatisation process. For the purposes of this privatisation the Commission approved an amount of DEM 1 536,6 million. The approval was based on Article 92(3)(c) of the EC Treaty and was given to restore the viability of a firm in difficulty. The Commission also took account of the fact that the production sites of MdK are located in the new *Länder*, which are regions eligible for aid pursuant to Article 92(3)(a) of the EC Treaty.

For the purposes of the merger, it was necessary to determine the market values of the two companies. This was done by determining the earning-power values of both companies for each of the five years of the business plan

(i.e. the restructuring period from 1993 to 1997). The earning-power and cash-flow data relating to the respective mining locations of each company, including market analysis and technical examination, were drawn up separately for each of the future business years. The earning-power values of MdK were considerably lower than those of Kali und Salz Beteiligungs AG. MdK's extraordinarily critical economical situation was attributable to the fact that the operating costs as at 31 July 1993 exceeded turnover by almost 47 %; outdated installations, an excessive workforce and a lack of storage capacities accounted for high losses. It was clear that MdK was not viable without the compensation of losses by the THA. Thus, to ensure that MdK would contribute a value corresponding to its 49 % share equivalent, cash in addition to the capital stock contribution had to be paid. The cash contribution by the THA was based on the compensation of the different earning-power values of the merging companies in the five business-plan years according to their share-relationship of 51:49. After considering various tax consequences for MdK and specific requirements for each company, the cash contribution by the THA was determined at DEM 1 044 million. In addition to the cash contribution an amount of DEM 492,6 million was approved. These additional financial amounts had to be seen in context with the entire restructuring efforts. These efforts included the reduction of capacities, a decrease in the workforce, the concentration and relocation of production at the most efficient and suitable sites, including the transfer of special products to the MdK sites. The Commission considered the aid necessary to finance the essential minimum during the restructuring period and provide the company with the necessary strong capital base.

## Survey of approved financial measures (in DEM):

Contribution to capital stock for the share of 49 % of the THA in the joint venture (total equity: DEM 400 million)	196 000 000	
Capital reserves	848 000 000	
<u>91 million</u> omitted repairs		
<u>372 million</u> omitted investments		
<u>85 million</u> restructuring of Merkers mining area		
<u>89 million</u> final shut-down of the Merkers mine (refilling of pits, dismantling of surface plants and equipment)		
<u>69 million</u> losses expected to accumulate in MdK production in the initial phase of the business plan before the investments become effective		
<u>142 million</u> investments (total amount 237 million) necessary for the normal operation of the mines		
Total cash contribution		1 044 000 000
Redemption of bank loans accrued between 1 July 1990 and 1 January 1993	310 600 000	
Social costs for redundancy payments for 1 700 workers	up to 47 000 000	
Additional loss compensation (*)	135 000 000	
Total of additional financial resources		492 600 000
Total amount		1 536 600 000

(\*) Since this part of the original aid concerns the present measures, the details are described under point 2.5.

### 2.3. The restructuring plan

On 13 May 1993 the parties concluded a business plan and a framework contract which laid down the details of the merger and restructuring. They agreed that there would be joint control in the joint venture and that the THA would be able to co-determine the five-year business plan. The restructuring included a substantial reduction in the joint venture's capacity. The combined potash capacity of the joint venture was to be reduced to 3,43 million tonnes in 1994, i.e. a 44 % cut. A further cut was planned for 1997, bringing capacity down to a total of 3,13 million tonnes.

The plan contained a detailed strategy for restructuring the joint company into an efficient and profitable enterprise:

- a total of DEM 509 million was to be provided for omitted investments (DEM 137 million for the plants of Kali und Salz Beteiligungs AG, and DEM 372 million for the plants of MdK),

- a total of DEM 134 million was to be provided for omitted repairs (DEM 43 million for the plants of Kali und Salz Beteiligungs AG, and DEM 91 million for the plants of MdK),

- DEM 192 million was reserved for the final shutdown of mines and the dismantling of installations on the surface (DEM 103 million for plants of Kali und Salz Beteiligungs AG, and DEM 89 million for MdK's Merker site),

- substantial reduction in the joint venture's workforce from 11 000 employees at the beginning of 1993 to 7 500 in 1997.

### 2.4. How Kali & Salz has developed since 1993 in comparison to the initial business plan

The business plan and the budget projection were based on the assumption that Kali & Salz would start operating as a joint venture at the

beginning of 1993. The government, however, submitted the notification of the aid measures only by letter dated 22 July 1993. Consequently, the merger as well as the aid measures were approved by the Commission only at the end of 1993, with the result that the enterprise started benefiting from the cost advantages of the merger later than expected.

Furthermore, the THA and Kali und Salz Beteiligungs AG had based their projections for costs and benefits of the merger on the assumption that the two mines located in the Werra region (Thuringia, Hesse) would start merged operations in 1993/1994. However, approval by the *Land* of Thuringia was not granted until June 1996, so that the cost-reducing effects of the merger will not come into play until after 1997.

The delays forced the company to postpone investments, rationalisation measures, the reduction of the workforce and the closing of unprofitable facilities within other plants. The government estimates the costs resulting from the delay at DEM 198 million (DEM 150 million because of the Commission's late approval of merger and aid measures, and DEM 48 million because of late approval by the *Land* of Thuringia).

The decline in the US dollar has also had a negative impact on Kali & Salz' financial situation. In 1993, the business plan and the calculation of the THA's cash contribution were based on a value of DEM 1,66 to the dollar.

The actual average value of DEM 1,65 in 1993, DEM 1,61 in 1994, DEM 1,43 in 1995 and DEM 1,50 in 1996 has led to a deviation of — DEM 145,6 million from the predicted turnover for the period 1993 to 1996 and therefore to higher-than-expected losses. Evidently this was only partially offset by the rise in the US dollar in 1997. According to the authorities, this evaluation justifies an *ex-post* increase in the THA's contribution, since the cash contribution of the THA/BvS would have been higher if, in 1993, the partners had known about the deviation from the projected value of the US dollar.

According to the 1993 business plan, Kali & Salz planned an annual turnover of DEM [...] million and based its loss projection on this amount. This estimation proved to be wrong, however: for the period 1993 to 1995, the total turnover was DEM [...] million below the expected amount, while in 1996 the turnover amounted to DEM 1 907,8 million. For 1997 Kali & Salz expects a turnover of more than DEM 2 billion and a positive annual result of more than DEM 10 million (\*).

The company's financial data also deviates from the projections. However, Kali & Salz' actual balance sheet reflects the situation of a relatively healthy enterprise.

(\*) See Frankfurter Allgemeine of 30 September 1997, in which Mr Ralf Bethke, chairman of the management committee of Kali & Salz, is quoted.

Summary (in DEM million):

	1993	1994	1995	1996
Estimated turnover according to business plan	[...]	[...]	[...]	[...]
Actual turnover	1 480,4	1 683,3	1 718,2	1 907,8
Annual results	— 300,0	— 383,9	— 29,308	— 7,43
Annual results drawing on capital reserves	— 300,0	— 40,6	— 29,308	— 7,43

[...]

Balance sheet (in DEM million) estimated as at 31 December 1997			
Assets		Liabilities	
Fixed assets	1 055	Equity capital	1 185
Stock	172	Capital reserves (of which DEM 609 for specific mining risks)	835
Liquiditi	920	Other liabilities	229
Special loss account (*)	102		
Total	2 249	Total	2 249

(\*) The special loss account pursuant to Article 17(4) of the DMBilG (DM Balance Sheet Act) reflects, on the assets side of the balance sheet, reserves built up as at 1 July 1990 pursuant to Article 249(1) of the HGB (Commercial Code) when MdK was taken over by the THA.

The table shows that equity capital and liquidity are below 1993 expectations. The government emphasises that the specific risks of a company operating within the mining industry cannot be insured in Germany. Consequently, enterprises must cover damages from their own resources and must have sufficient liquidity in case they are held liable for damages. The authorities pointed out that liquidity is DEM [...] million below the estimations of the initial plan, but have not proven that it is actually too low for Kali & Salz to operate safely.

In 1993, when the market values of the two companies were assessed, an integral element was that Kali & Salz' equity capital would be DEM [...] million instead of the actual DEM [...] million and liquidity would be DEM [...] million instead of the actual DEM [...] million at the end of 1997. The calculation of the different earning-power values, which determined the respective contributions by the two partners in the joint venture, depended fundamentally on those two figures. Therefore, the authorities argue that any supplementary contribution by the BvS cannot be considered an increase in the contribution, but must be considered an *ex-post* adjustment ensuring that the value of the contribution by the THA/BvS to the joint company actually corresponds to its 49 % share equivalent.

## 2.5. The proposed aid measure

### 2.5.1. Necessary background information

The notified aid amounts to DEM 128,87 million. This amount has to be seen in context with the first aid approval by the Commission and with the fundamental considerations of the two parties at the time of the merger.

Out of the total aid amount (DEM 1 536 million) that was approved in 1993, two separate amounts were earmarked for loss compensation. The first one concerned losses (DEM 69 million) expected to accumulate in MdK's production in the initial phase of the business plan before the investments produce effects. The second amount for loss compensation (DEM 135 million) was included in case the losses exceeded DEM 69 million. This extra loss compensation of DEM 135 million was to offset any additional drain on liquidity. Since the risks of the venture were mainly on the side of MdK, it was agreed that the BvS (as the owner of MdK) should cover a disproportionate part of the drain on liquidity. Instead of dividing possible future losses according to the share relationship of 49:51, the BvS consented to cover [...] % for the years 1993 to 1995, [...] % for 1996 and [...] % for 1997. The parties agreed on a loss ceiling of DEM 150 million, equivalent to the aid amount of DEM [...] million (i.e. [...] % of DEM 150 million) in case the losses occur in the years between 1993 and 1995. In its initial decision of 1993 the Commission made sure that notification would be required if the abovementioned ceiling of DEM 150 million were to be exceeded.

The framework agreement (paragraph 4.6) provides that, if the deviation in the net cash flow exceeds the ceiling of DEM 150 million, the management is contractually obliged to adjust the budget and make all possible efforts to minimise and reduce the deviation, i.e. adjusting the net cash-flow projection as well as expenditure. The shareholders then have the alternative of approving the amended business plan or of requesting that operations be continued on the basis of the old business plan. If the BvS or Kali und Salz Beteiligungs AG insist on the old plan, the other shareholder may opt out of the joint venture. In this case the party remaining within the joint company may

ask the other party to transfer its shares in Kali & Salz for the price of DEM 1,00.

On the basis of this provision, the business plan and its budget have been renegotiated and adapted several times since November 1995. The BvS' interest has been to keep its own contribution as low as possible and at the same time not to endanger the privatisation, i.e. to ensure that Kali und Salz Beteiligungs AG does not opt out of the joint company.

On 25 August 1997, based on the data, now audited, for 1993 to 1995, the parties agreed on

a new net cash-flow projection for 1996 and 1997 and decided to raise the negative deviation from the projected cash-flows to be compensated from the ceiling of DEM 150 million up to a total ceiling of DEM 300 million for the entire period from 1993 to 1997.

#### 2.5.2. *The actual calculation of the notified aid*

The DEM 135 million for extra loss compensation were meant to come into effect if the actual net cash-flow was lower than the projected net cash-flow. In 1993 the projection was as follows:

	1993	1994	1995	1996	1997	Total
Projected net cash-flow	[...]	[...]	[...]	[...]	[...]	[...]

The business plan provides in detail how to calculate the net cash-flow relevant for the loss compensation: the annual results according to the commercial balance sheet (after tax) are corrected for all measures without cash effect, i.e. immobilised investments, depreciation, etc.

The projections of the cash-flow proved to be wrong as the audited data for 1993 to 1995 shows:

Summary:

Deviation from the projected net cash-flow for the period 1993 to 1995 (in DEM million) (*)				
	1993	1994	1995	Total 1993 to 1995
Projected net cash-flow according to the initial plan	[...]	[...]	[...]	[...]
Actual net cash-flow	[...]	[...]	[...]	[...]
Deviation	[...] (**)	[...]	[...]	[...]
BvS' share of the compensation (90 %)	[...]	[...]	[...]	[...]

(\*) The cash-flow for 1993 to 1995 has been audited, so that the actual deviation from the projected cash-flow for this period is firmly established.

(\*\*) In 1993 investment could only be carried out to an extent of DEM 210 million instead of the predicted DEM 435 million, thus increasing the net cash-flow.

The reason for these deviations is that certain assumptions of the original business plan did not correspond to actual developments<sup>(3)</sup>.

Moreover, the new projections in the new business plan for the period 1996/1997 were similarly fundamentally different from the original business plan. The old business plan assumed a net cash-flow of + DEM [...]

million for this period. However, according to the latest figures, the actual expected net cash-flow for 1996/1997 will be negative. For this reason the partners want to make sure that any higher negative deviations will be covered by the BvS. They have agreed on a contingency reserve for the period of 1996/1997 of DEM [...] million. Assuming that this negative deviation occurs in 1996, the BvS' share of the compensation amounts to DEM [...] million (i.e. [...] % of DEM [...] million). The following table summarises the calculation of the BvS' contribution:

<sup>(3)</sup> See point 2.4.

## Summary:

Deviation (in DEM million)			
	Total 1993 to 1995	Total 1996/1997	Total 1993 to 1997
Projected net cash-flow according to the initial plan	[...]	[...]	[...]
Deviation from planned cash-flow	[...]		
Contingency reserves for the future(*)		[...]	
Total deviations	[...]	[...]	[...]
Deviation according to initial business plan			[...]
BvS' share of the compensation (**) (new plan)	159,66	104,21	263,87
BvS' share of the compensation (initial plan)			135,00
Additional compensation on top of approved DEM 135 million			128,87

(\*) Since the figures for 1996 have not been verified, they cannot be considered actual cash-flow.

(\*\*) 85 % in 1996, 80 % in 1997; the calculation assumes that the BvS compensates 85 % in 1996.

Since the BvS covered [...] % of the extra losses for the period 1993 to 1995, the BvS' share of the compensation amounted to DEM 159,66 million. Together with the additional aid covering the contingency reserves (DEM 104,21 million), the total extra loss compensation adds up to DEM 263,87 million. Since DEM 135 million have already been approved by the Commission, the government has notified the remaining amount of DEM 128,87 million.

## 2.6. Market analysis (\*)

The EU fertiliser industry has become increasingly concentrated. At present, the five major players (in order of ranking) are Norsk Hydro, Kemira, BASF, Grande Paroisse and Fertiberia. However, DSM, ICI, Enichem, SKW Pieseritz, Agrolinz and Quimigal are also strong and serious competitors in the market.

Potassium is used as an input in fertiliser production, while rock salt is used for the

production of the fertilisers themselves. The fertiliser industry manufactures and markets products which contain one or more of the three primary plant nutrients: nitrogen, phosphorus and potassium. In 1994/1995 potash fertilisers accounted for 21 % (4 million tonnes of K<sub>2</sub>O) of the total nutrient volume. The three primary plant nutrients are, according to market experts, not substitutable, so that the relevant market can be defined as the potassium-based fertiliser market. All fertilisers containing more than one primary nutrient are called "multinutrient fertilisers". The majority of potash fertilisers are applied as multinutrient fertilisers. Potash is predominantly produced in regions rich in this mineral, such as Canada, part of western Europe, Russia and Belarus, Israel and Jordan.

In terms of demand, the fertiliser market is very cyclical. Between 1989/1990 and 1993/1994 worldwide consumption of fertilisers declined by 16 %. This was most significant in western and eastern Europe and in the former Soviet Union. Despite fluctuation in the short-term market, the long-term fundamentals for the fertiliser industry remain very strong. Demand and prices have recovered since 1993/1994 and the demand for fertilisers is forecast to increase in the next few years. According to the FAO study, "World agriculture: towards 2010",

(\*) *Panorama of EU Industry 1997*, NACE 24.14.

fertiliser consumption in developing countries will increase at an annual rate of 3,8 % between 1988/1990 and 2010. The demand in the European Union in the medium term, however, is still towards a gradual fall, due largely to the common agricultural policy reforms. Given these contradictory developments in the world and European markets, it is at present not clear

if the European producers will be competitive in the short and medium term and, hence, if over-capacities exist.

The following table gives an overview of the development of the production of potassium by country.

**International comparison of potash production (by country)**

Country	1991	1992	1993	1994	1995
Belarus	0	0	1 946 700	2 500 000	5 200 000
CIS	0	6 949 000	0	0	0
Canada	7 087 000	7 040 000	6 970 000	8 037 000	8 165 000
Germany	4 673 363	4 259 322	3 509 865	3 277 438	3 278 363
Israel	1 320 300	1 218 320	1 330 410	1 280 390	1 346 270
Jordan	861 640	850 280	865 483	822 000	1 125 279
Russia	0	0	2 597 000	2 800 000	2 800 000
USA	1 749 000	1 705 000	1 506 000	1 400 000	1 480 000
Total (*)	26 737 363	24 635 618	22 790 415	22 802 062	26 216 809

(\*) Total refers to the total world production and is not the sum of the countries listed above.

Source: Weber, L. and Zsak, G. (1997), World mining data '97, Vienna, p. 109.

As the table illustrates, after a decline in the years after 1991, world potassium production had by 1995 regained almost the same level as in 1991. The figures indicate also that the European countries have lost market share in the production of potash. This is especially true for German suppliers, who have lost some 5 percentage points for their world-market share. Thus, although the general outlook for the fertiliser market is good, it seems doubtful whether the European and especially the German suppliers will be competitive in the long run with regard to other countries, especially Belarus and Canada. This sceptical view is confirmed by the Frankfurter Allgemeine Zeitung (30 September 1997, p. 28).

There is no doubt that the additional loss compensation by the BvS constitutes State aid within the meaning of Article 92(1) of the EC Treaty since the measures are derived from State resources, threaten to distort competition, affect trade between Member States and confer an advantage on the enterprise.

### 3.1. Derogations

Certain derogations from the general principle of incompatibility of State aid under Article 92(1) of the EC Treaty are contained in Article 92(2) and (3) of the EC Treaty.

## 3. ASSESSMENT

The granting of State resources to an undertaking in the abovementioned sectors distorts or threatens to distort competition and therefore falls within the scope of Article 92(1) of the EC Treaty and Article 6(1) of the EEA Agreement.

### 3.1.1. Article 92(2) of the EC Treaty

The exceptions set out in Article 92(2)(a) and (b) of the EC Treaty do not apply in this case in view of the features of the aid and the fact that it does not satisfy the conditions for application of those exceptions.

The measures do not fall under the derogation provided for in Article 92(2)(c) of the EC Treaty. In order to apply Article 92(2)(c) to the aid granted to Kali & Salz, one would need to adopt an extremely broad interpretation of that provision. The Commission's position is that this provision is not intended as a general derogation from Article 92(1) of the EC Treaty, but is restricted to the exceptional cases in which infrastructure deficits in the so-called "Zonenrandgebiete" (zonal border areas) are still to be eliminated. The present measures do not fall under this geographical category.

Furthermore, the Commission was not provided with any information that would allow it to assess whether the criteria set out in Article 92(2)(c) of the EC Treaty are met. In particular, the government has not submitted information indicating that the regions in question are still affected by the division of Germany, that the economic disadvantages of the region are caused by the division and that the aid granted to Kali & Salz serves to compensate for these disadvantages. According to the case-law of the Court of Justice (Italy v. Commission, Case C-364/90, 1993 [ECR] 2097, 20), Member States which invoke this exception are obliged to provide all necessary information to the Commission in order to enable it to assess whether the conditions governing this exception are met.

### 3.1.2. Article 92(3)(a) of the EC Treaty

The plants of Kali & Salz originally belonging to MdK in Thuringia and Saxony-Anhalt are located in an area eligible for regional aid pursuant to Article 92(3)(a) (?). Aid to promote the economic development of these areas where the standard of living is abnormally low or where there is serious underemployment may be considered compatible with the common market. In this case, however, there are serious doubts whether the aid contributes to the promotion of the economic development of the region, since the aid serves to compensate losses rather than promote investment and job creation.

### 3.1.3. General State aid rules

The Commission has serious doubts that the aid complies with the relevant horizontal Community guidelines on State aid to enterprises.

The predominant objective of the aid is not the promotion of regional development, but the restructuring of a firm in difficulty. That is why in the case of Kali & Salz the Commission has given particular consideration to the derogation provided for by Article 92(3)(c) of the EC Treaty on "aid to facilitate the development of certain economic activities, where such aid does not affect trading conditions to an extent contrary to the common interest". Such aid may be considered compatible with the common market if the criteria set out in the Community guidelines on State aid for rescuing and restructuring firms in difficulty (\*) are met.

The guidelines require that such aid measures be conditional on the implementation of a sound restructuring plan. The amount and intensity of the aid must be limited to a strict minimum during the restructuring period and the costs to which the aid relates must not exceed the benefit therefrom. The restructuring must restore the long-term viability of the companies in question and undue distortions of competition should be avoided. Such restructuring has to ensure that the common interest is served. Only in this way can the restructuring programme accompanying the aid contribute to the overall improvement of the market situation and sufficiently offset the distortive effect of the aid. In principle, such aid can be granted only once.

On the basis of an assessment of the information submitted by the authorities, Kali & Salz does not appear to be a company in difficulty within the meaning of the Community guidelines. On the contrary, all typical symptoms such as deteriorating profitability, increasing size of losses, diminishing turnover, growing inventories, excess capacity, declining cash-flow, increasing debt, rising interest charges and low net asset value (\*\*) do not apply to Kali & Salz.

The financial data reflects the complete opposite picture of the recipient's situation.

(?) N 464/93; N 613/96, valid 'till the end of 1999.

(\*) OJ C 368, 23.12.1994.

(\*\*) See point 2.1 of the guidelines.

## Summary:

Capacity utilisation				
Year	1994	1995	1996	
Capacity utilisation for potassium	94 %	97 %	93 %	
Capacity utilisation for fertiliser	71 %	87 %	98 %	
Capacity utilisation for industrial products	62 %	77 %	80 %	

  

Net cash-flow (in DEM million)				
1993	1994	1995	1996	1997 (*)
[. . .]	[. . .]	[. . .]	[. . .]	[. . .]

(\*) Latest estimate.

As shown above and under point 2.4, turnover increased from DEM 1,48 billion in 1993 to more than DEM 2 billion in 1997. Capacity utilisation and cash-flow have increased as well. Profitability has increased substantially and Kali & Salz is expecting an annual result exceeding DEM 10 million for 1997. Kali & Salz does not have to pay interest charges, but received interest income of DEM [...] million in 1995 and DEM [...] million in 1996. In 1997 the net income ratio will be positive to the tune of 2 to 3 % and likely to increase to a level between 3 % and 5 % in the following years. In the long run, if the French producers shut down their mines as planned <sup>(10)</sup>, the net income ratio could increase to 8 %. Hence, in the case of Kali & Salz, one cannot speak of deteriorating profitability or increasing size of losses.

It is also open to doubt whether the aid does not unduly distort competition. Although there do not seem to be overcapacities in the markets served by the recipient (see point 2.6), the Commission considers that the fertiliser market in particular, where Kali & Salz achieves 70 % of its sales, is a worldwide one where EU producers compete, and the fertiliser industry is therefore very sensitive to the vagaries of world supply and demand and to global competition. Given the state of the market and the fact that competitiveness of the suppliers is mainly determined by the price of the end-product, the question of fair trade is becoming increasingly important. Consequently, the Commission has doubts that the aid may reduce the firm's financial charges and enable Kali & Salz to unduly cut prices. The fact that the aid is

awarded by means of a direct subsidy to a company that does not seem to be in difficulty gives grounds for doubt whether the aid can be considered to be limited to the strict minimum needed to enable restructuring or rather provides the company with surplus cash which can be used for aggressive, market-distorting activities.

### 3.2. Conclusion

On the basis of the available information, as set out above, the Commission has doubts as to the compatibility of the proposed aid with the common market. According to the information currently available, the aid does not appear to satisfy the criteria laid down in the Community guidelines for rescuing and restructuring firms in difficulty. The recipient does not seem to be a company in difficulty, which raises doubts as to the necessity of granting the aid, and a distorting effect on the market served by the recipient cannot be excluded. Considering the overall positive situation of the recipient, the Commission has serious doubts that the reduced liquidity has an overly negative impact on the company's financial situation or threatens its existence. Moreover, from the Commission's point of view, open-ended loss compensation, i.e. repetitive aid awards, can only be accepted in exceptional cases when they become necessary owing to reasons which lie entirely outside the responsibility of the company. In the case of Kali & Salz, it is not clear to what extent this applies since the declining values of foreign currencies especially are a risk any private investor has to bear himself.

<sup>(10)</sup> See Frankfurter Allgemeine of 30 September 1997.

The Government further argues that the new measures must not be regarded as new aid, but rather constitute an adaptation of the initial aid of 1993. In their opinion the supplementary aid ensures that the total cash contribution actually corresponds to the THA/BvS' 49 % share equivalent. Furthermore, during the meeting on 8 July 1997 in Leuna, their representatives stressed that the BvS acted like a private investor by negotiating its compensation obligations deriving from the privatisation contract downwards. The Commission, however, does not agree with this argument and has serious doubts that this increase in the formerly approved aid may be covered by the initial approval, since, regardless of the overall economic evolution, an additional cash injection raises the total amount contributed by the public authorities and would have also been considered as additional aid in 1993, thus increasing the total amount of aid. Also, the Commission has not been in a position to evaluate whether the BvS' behaviour corresponds to the private investor principle. Considering the social responsibility and the objective of regional development of the public authorities, it is reasonable to assume that the disproportional loss compensation, provided for in the framework contract, has not exclusively been motivated by commercial interests.

Furthermore, it is not evident to the Commission on which legal basis the aid should be authorised. Thanks to Kali & Salz' good financial shape and its positive economic performance in 1996 and 1997, the Commission has serious doubts whether the recipient still qualifies as a company in difficulty. Therefore, the Commission has doubts as to the applicability of Article 92(3)(c) of the EC Treaty and the Community guidelines on State aid for rescuing and restructuring firms in difficulty.

The Commission has accordingly decided to initiate proceedings under Article 93(2) of the EC Treaty in respect of this aid.

The Commission invites interested third parties to submit their comments and, in particular, to explain how the amount of reserves for specific mining risks are calculated.

The Commission draws attention to both the suspensory effect of Article 93(3) of the EC Treaty and to the communication published in the *Official Journal of European Communities* C 318, 24 November 1983, page 3, and C 156 of 22 June 1995, page 5, in which it was stipulated that any aid granted unlawfully, i.e. without prior notification or without awaiting the Commission's final decision under the procedure provided for in Article 93(2) of the EC Treaty, may have to be recovered from the recipient.

The abolishment of the aid involves its repayment, in accordance with procedures and provisions of German law, with interest, based on the interest rate used as reference rate in the assessment of regional aid schemes, starting to run on the date on which the unlawful aid was granted. This measure is necessary in order to restore the status quo by removing all the financial benefits which the firms receiving the unlawful aid have improperly enjoyed since the date on which the aid was paid.

The Commission also requests the government to inform the recipient firm without delay of the initiation of the proceedings and the fact that it may have to repay aid improperly received.

The Commission hereby informs the government that it will publish this letter in the *Official Journal of the European Communities* and the EEA Supplement to the Journal giving the other Member States, the EFTA States which are signatories to the EEA and other parties concerned notice to submit their comments.'

The Commission hereby gives other Member States and other interested parties notice to submit any comments on the measures in question within one month of the date of publication of this notice to:

European Commission,  
Directorate-General for Competition (DG IV),  
Rue de la Loi/Wetstraat 200,  
B-1049 Brussels.

*The comments will be communicated to the German Government.*