# JUDGMENT OF THE COURT
31 March 1998 *

In Joined Cases C-68/94,

**French Republic,** represented by Edwige Belliard, Deputy Director in the Directorate for Legal Affairs, Ministry of Foreign Affairs, Catherine de Salins, Assistant Director in that directorate, and Jean-Marc Belorgey, Chef de Mission in that directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

applicant,

v

**Commission of the European Communities,** represented by Berend Jan Drijber, of its Legal Service, acting as Agent, assisted by Jacques Bourgeois, of the Brussels Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

**Federal Republic of Germany,** represented by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Bernd Kloke, Regierungsrat in that ministry, acting as Agents,

intervener,

* Language of the case: French.

APPLICATION for annulment of Commission Decision 94/449/EC of 14 December 1993 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (Case No IV/M.308 — Kali + Salz/MdK/Treuhand) (OJ 1994 L 186, p. 38),

and C-30/95,

**Société Commerciale des Potasses et de l'Azote (SCPA)** and **Entreprise Minière et Chimique (EMC)**, represented by Charles Price, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Lucy Dupong, 14A Rue des Bains,

applicants,

supported by

**French Republic**, represented by Edwige Belliard, Deputy Director in the Directorate for Legal Affairs, Ministry of Foreign Affairs, Catherine de Salins, Assistant Director in that directorate, and Jean-Marc Belorgey, Chef de Mission in that directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

intervener,

v

**Commission of the European Communities**, represented by Berend Jan Drijber, of its Legal Service, acting as Agent, assisted by Jacques Bourgeois, of the Brussels Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

**Kali und Salz GmbH** and **Kali und Salz Beteiligungs-AG**, represented by Karlheinz Quack, Rechtsanwalt, Berlin, and Georg Albrechtskirchinger, Rechtsanwalt, Frankfurt am Main, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

interveners,

APPLICATION for partial annulment of Article 1 of Commission Decision 94/449/EC of 14 December 1993 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (Case No IV/M.308 — Kali + Salz/MdK/Treuhand) (OJ 1994 L 186, p. 38) in so far as it makes the declaration that the concentration is compatible with the common market conditional on compliance with the conditions set out in point 63 of the decision, and for partial annulment of that decision in so far as it accepted the commitment referred to in point 65 by which Kali und Salz AG undertook to adapt the structure of Potacan by 30 June 1994,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann (Rapporteur), H. Ragnemalm (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward, J.-P. Puissochet, G. Hirsch and P. Jann, Judges,

Advocate General: G. Tesauro,
Registrar: R. Grass,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 March 1996, at which the French Republic was represented in Cases C-68/94 and C-30/95 by Jean-François Dobelle, Deputy Director in the Directorate for Legal Affairs, Ministry of Foreign Affairs, acting as Agent, and by Jean-Marc Belorgey; the Commission, in Cases C-68/94 and C-30/95, by Berend Jan Drijber, assisted by Jacques Bourgeois; the Federal Republic of Germany, in Case C-68/94, by Ernst Röder; Société Commerciale des Potasses et de l'Azote (SCPA) and Entreprise Minière et Chimique (EMC), in Case C-30/95, by Charles Price; and Kali und Salz GmbH and Kali und Salz Beteiligungs-AG, in Case C-30/95, by Karlheinz Quack and Georg Albrechtskirchinger,

after hearing the Opinion of the Advocate General at the sitting on 6 February 1997,

gives the following

## Judgment

### Facts and procedure

1 On 14 July 1993 the Commission, pursuant to Article 4(1) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1990 L 257, p. 14, hereinafter 'the Regulation'), was notified of a proposed concentration between Kali und Salz AG (hereinafter 'K+S'), a subsidiary of the BASF chemicals group, and Mitteldeutsche Kali AG (hereinafter 'MdK'), whose sole shareholder is the Treuhandanstalt (hereinafter 'Treuhand'), a public-law institution entrusted with the task of restructuring the undertakings of the former German Democratic Republic.

2 K+S essentially operates in the potash, rock salt and waste disposal sectors. MdK combines all the activities of the former German Democratic Republic in the potash and rock salt sectors.

3 The concentration plan was for MdK to be converted into a private limited company (MdK GmbH), to which K+S would contribute its potash and rock salt activities and Treuhand would contribute DM 1 044 million. K+S would have 51% and Treuhand 49% of the shares and voting rights in the joint venture thus created.

4 By letter of 5 August 1993 the Commission informed the parties to the proposed concentration of its decision to continue the suspension of the concentration, pursuant to Articles 7(2) and 18(2) of the Regulation, pending its final decision.

5 On 16 August 1993 the Commission decided, pursuant to Article 6(1)(c) of the Regulation, to initiate the detailed examination procedure on the ground that the concentration notified raised serious doubts as to its compatibility with the common market.

6 On 13 October 1993 the Commission informed the parties of the objections against them, in accordance with Article 18 of the Regulation. In its opinion, the concentration as envisaged in the plan notified could create a collective dominant position on the Community market apart from Germany and Spain.

7 Following that statement of objections, the parties offered to enter into certain commitments vis-à-vis the Commission, in order to dispel its concern that the concentration would create an oligopolistic dominant position on the market in question.

8 The Commission thereupon submitted a draft decision to the Advisory Committee on Concentrations set up under paragraph 3 et seq. of Article 19 of the Regulation, which delivered a favourable opinion, by a majority of its members, at its meeting on 3 December 1993 (OJ 1994 C 199, p. 5).

9 By Decision 94/449/EC of 14 December 1993 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (Case No IV/M.308 — Kali + Salz/MdK/Treuhand) (OJ 1994 L 186, p. 38, hereinafter 'the contested decision'), the Commission declared the proposed concentration compatible with the common market, subject however to compliance with certain commitments entered into by the parties vis-à-vis the Commission, in accordance with the second paragraph of Article 8(2) of the Regulation. Under that provision, the Commission 'may attach to its decision [declaring a concentration compatible with the common market] conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to modifying the original concentration plan'.

10 The relevant product market, as identified in the contested decision, concerns potash-salt-based products for agricultural use, which include both potash sold for direct application in agriculture and potash sold for use in the manufacture of compound fertilisers. As to the geographical market of the product in question, the Commission identified two distinct markets: the German market, and the Community market apart from Germany.

11 With respect to the German market, the Commission found in point 46 of the contested decision that the planned concentration would lead to a *de facto* monopoly, since the market shares of K+S and MdK were 79% and 19% respectively, and concluded in point 50 that the effect of the proposed concentration

would be to strengthen the dominant position of K+S on the German potash market. However, applying the theory of the 'failing company defence', it reached the conclusion that the proposed concentration was not the cause of the strengthening of the dominant position of K+S on the German market. According to point 95 of the contested decision, the conditions for the 'failing company defence' were met, namely that 'K+S's dominant position would be reinforced even in the absence of the merger, because MdK would withdraw from the market in the foreseeable future if it was not acquired by another undertaking and its market share would then accrue to K+S; it can be practically ruled out that an undertaking other than K+S would acquire all or a substantial part of MdK' (see also point 71 of the contested decision). The Commission further observed in point 95 that, given the severe structural weakness of the regions in East Germany which were affected by the proposed concentration, and the likelihood of serious consequences for them of the closure of MdK, the conclusion it had reached was also in line with the fundamental objective of strengthening the Community's economic and social cohesion, referred to in the 13th recital in the preamble to the Regulation.

12 With respect to the Community market apart from Germany, the Commission stated in point 51 of the contested decision that, as a result of the proposed concentration, two entities would enjoy a dominant position: K+S/MdK and Société Commerciale des Potasses et de l'Azote (hereinafter 'SCPA'), a subsidiary of the French group Entreprise Minière et Chimique (hereinafter 'EMC') which distributes potash.

13 The Commission's analysis was based, first of all, on its finding that supply outside the K+S/MdK and SCPA grouping was fragmented and came from operators who did not appear to be able to attack the total market share of about 60% held by the duopoly, and, second, on the strong probability that there would be no effective competition between K+S/MdK and SCPA, because of the characteristics of the potash market, the past behaviour of K+S and SCPA, and their long-standing close commercial links. Those links consisted essentially of (a) the control of a joint venture in Canada, Potacan, in which K+S and SCPA each had 50% of the shares, (b) cooperation in the export cartel Kali-Export GmbH (hereinafter 'Kali-Export'), a company governed by Austrian law established in Vienna, which

coordinated its members' sales of potash-based products in non-member countries and in which K+S, MdK, EMC/SCPA and the Spanish potash producer Coposa each had a 25% interest, and (c) long-established links on the basis of which SCPA provided almost all of K+S's supplies in France (see points 54 to 61 of the contested decision).

14 In those circumstances, the Commission considered in points 57 and 62 that the concentration, which would involve the addition of the market share in the Community outside Germany held by MdK, the second largest Community producer, would lead to the creation of a K+S/MdK and SCPA duopoly enjoying a dominant position.

15 To prevent the Commission from declaring the concentration between K+S and MdK incompatible with the common market, the parties to the concentration offered the Commission certain commitments, set out in point 63 of the contested decision, as follows:

'— *Kali-Export GmbH, Vienna*

K+S and the joint venture will withdraw without delay from Kali-Export GmbH ...

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

— *Distribution in France*

K+S and the joint venture will establish in the Community their own distribution organisation — where not already in existence — and will distribute their products through this distribution network in accordance with normal commercial practice. A distribution organisation will be established in France for potash products, including potash specialities. This will cover the whole of the French market and its nature and size will be commensurate with the importance of the French market. Its establishment will conform to the principle of economic efficiency.

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

It was precisely in consideration of those commitments that the Commission, as noted in paragraph 9 above, declared the proposed concentration compatible with the common market.

16 Point 65 of the contested decision notes that K+S, acknowledging the Commission's concerns about the negative effects of the concentration on conditions of competition, undertook to adapt the structure of Potacan by 30 June 1994 in such a way as to enable each partner to market the potash produced by Potacan independently of each other on the Community market. However, point 67 of the decision states that the Commission has decided not to make that commitment into a formal obligation, since 'in the event that K+S is not able to reach an agreement with EMC, despite K+S's best efforts, an appropriate solution of the competition problems arising from the current form of the Potacan joint venture is to be found in the proceedings [of notification of the Potacan joint venture] under Regulation No 17/62 [Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty, OJ, English Special Edition 1959-1962, p. 87, hereinafter "Regulation No 17"]'.

17 By application lodged at the Court Registry on 18 February 1994, the French Republic sought annulment of the contested decision under Article 173 of the EC Treaty (Case C-68/94).

18 By order of the President of the Court of 9 September 1994, the Federal Republic of Germany was granted leave to intervene in that case in support of the form of order sought by the Commission.

19 By application lodged at the Registry of the Court of First Instance on 25 February 1994, SCPA and EMC sought partial annulment of the contested decision under Article 173 of the Treaty.

20 In those proceedings, the President of the Court of First Instance, by order of 10 May 1994 in Case T-88/94 R *Société Commerciale des Potasses et de l'Azote and Entreprise Minière et Chimique* v *Commission* [1994] ECR II-263, ordered operation of Article 1 of the contested decision to be suspended, inasmuch as it might entail dissolution of Kali-Export, until an order was made terminating the interim proceedings, and dismissed the remainder of the application for interim measures.

21 By order of the President of the Court of First Instance of 15 June 1994 in Case T-88/94 R *Société Commerciale des Potasses et de l'Azote and Entreprise Minière et Chimique* v *Commission* [1994] ECR II-401, operation of Article 1 of the contested decision was suspended, in so far as it required K+S/MdK to withdraw from Kali-Export, until judgment in the main action.

22 By order of the President of the First Chamber of the Court of First Instance of 7 July 1994, the French Republic was granted leave to intervene in Case T-88/94 in support of the form of order sought by the applicants.

23 By order of the President of the Second Chamber, Extended Composition, of the Court of First Instance of 18 January 1995, Kali und Salz Beteiligungs-AG (formerly K+S) and Kali und Salz GmbH (formerly MdK) (hereinafter 'the intervener undertakings') were granted leave to intervene in Case T-88/94 in support of the form of order sought by the Commission.

24 In view of the fact that the cases before the Court of Justice and the Court of First Instance called into question the validity of the same act, the Court of First Instance, by order of the Second Chamber, Extended Composition, of 1 February 1995 in Case T-88/94 *Société Commerciale des Potasses et de l'Azote and Entreprise Minière et Chimique* v *Commission* [1995] ECR II-221, declined jurisdiction in order to enable the Court of Justice to rule on the application for annulment. That case was registered in the Registry of the Court of Justice on 8 February 1995 as Case C-30/95.

25 Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure in the two cases without any preparatory inquiry.

**Forms of order sought by the parties**

*Case C-68/94*

26 The French Republic claims that the Court should:

— Annul the contested decision;

— Order the Commission to pay the costs.

27 The Commission contends that the Court should:

— Dismiss the application as unfounded;

— Order the French Republic to pay the costs.

28 The Federal Republic of Germany, intervening in support of the form of order sought by the Commission, contends that the Court should:

— Dismiss the application.

*Case C-30/95*

29 SCPA and EMC claim that the Court should:

— Annul Article 1 of the contested decision in part, in so far as it makes the declaration that the concentration is compatible with the common market conditional on compliance with the conditions set out in point 63 of the decision;

— Annul the contested decision in part, in so far as it accepted the commitment referred to in point 65 by which K+S undertook to adapt the structure of Potacan by 30 June 1994 so as to enable each partner in Potacan to market the potash obtained from Potacan in the Community independently of the other partner;

— Order the Commission to pay the costs;

— Order the interveners to bear their own costs.

30 The Commission contends that the Court should:

— Dismiss the application as inadmissible;

— Dismiss the application as unfounded;

— Order the applicants to pay the costs.

31 The French Republic, intervening in support of the form of order sought by the applicants, contends that the Court should:

— Uphold the applicants' claim for partial annulment of the contested decision;

— Order the Commission to pay the costs.

32 The intervener undertakings Kali und Salz Beteiligungs-AG and Kali und Salz GmbH, the successors to K+S and MdK respectively, support the form of order sought by the Commission and ask the Court to order the applicant companies to pay the costs.

**Joinder of Cases C-68/94 and C-30/95**

33 In view of the connection between the two cases, confirmed during the oral procedure, it is appropriate to join them for the purposes of the judgment in accordance with Article 43 of the Rules of Procedure.

## Admissibility (Case C-30/95)

34 The Commission, while presenting argument on the substance of the case, raises a plea of inadmissibility against the application for annulment brought by SCPA and EMC, consisting of three limbs. First, it disputes the possibility of bringing an application for partial annulment in the present case. Second, it submits that the applicant companies are neither directly nor individually concerned by the contested decision. Third, it submits that the commitment relating to Potacan, which the Commission merely took note of, is not in the nature of a decision.

*Partial annulment*

35 The Commission submits that annulment even of one only of the conditions attached to the declaration of compatibility with the common market would alter the very substance of the contested decision, as the conditions for authorising the concentration would no longer be satisfied. The Commission would consequently be compelled to revoke the decision in its entirety.

36 The applicant companies submit, on the other hand, that the conditions in issue could be severed from the rest of the decision, and the effect of their annulment would merely be to make it unconditional. Article 8(5) of the Regulation, which authorises the Commission to revoke its decision if a commitment is not complied with by the parties, does not therefore apply.

37 As the Advocate General observes in point 26 of the Opinion, this objection should be examined together with the substance of the case, since it will thus be possible to establish whether annulment of the conditions would be liable to affect the remainder of the decision by making it necessary to annul it in its entirety.

*Right to bring proceedings*

38 The Commission submits that under Article 173 of the Treaty, individuals who are not addressees of a decision of the institutions addressed to other individuals may bring an action for its annulment only if the decision is of direct and individual concern to them. In its view, neither SCPA nor EMC is directly and individually concerned by the contested decision.

39 The Commission observes in particular that, contrary to what is required by settled case-law (see Case 25/62 *Plaumann* v *Commission* [1963] ECR 95 and Case 26/86 *Deutz und Geldermann* v *Council* [1987] ECR 941), the applicant companies are not affected by reason of certain attributes which are peculiar to them or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the person to whom the decision is addressed. The applicant companies, who were mentioned by name in the contested decision, did not take part in the proceedings before the Commission, and thus cannot be regarded as individually concerned by the decision. In this respect the Commission submits in particular that, contrary to the criteria laid down in Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, the applicant companies were not involved in the procedure from the outset and did not largely determine its course by their observations. Moreover, SCPA, as a shareholder in Kali-Export, is affected by the contested decision in the same way as the other member of the cartel, Coposa, while EMC cannot argue that it is individually concerned by a concentration decision on the basis that it is a shareholder of a company involved in that decision (Case T-83/92 *Zunis Holding and Others* v *Commission* [1993] ECR II-1169). Finally, the fact that EMC owns a 50% shareholding in Potacan is not sufficient for it to be regarded as individually concerned by the decision, since the commitment concerning Potacan is not in the nature of a decision.

40 The intervener undertakings submit that only they are affected by the conditions imposed by the Commission. Those conditions could at most have an indirect effect on the interests of the applicant companies, which, according to the case-law,

is not sufficient reason to give them a right of action against the said conditions (Case 72/74 *Union Syndicale-Service Public Européen and Others* v *Council* [1975] ECR 401 and Case 135/81 *Groupement des Agences de Voyages* v *Commission* [1982] ECR 3799).

41 In support of the admissibility of their action, the applicant companies submit in the first place that not only are they mentioned by name in the contested decision, they are at the centre of the Commission's arguments and reasoning.

42 They observe, moreover, that in deciding whether a person is individually concerned by a decision, account must be taken, according to the case-law, in particular *Cofaz and Others* v *Commission*, both of the detriment caused to the undertaking in question and of the role played by that undertaking in the procedure before the Commission.

43 With respect to detriment, the applicant companies submit that SCPA suffers detriment by reason of the dissolution of Kali-Export, which is a direct consequence of the compulsory withdrawal of K+S from Kali-Export. Similarly, K+S's obligation to terminate the distribution arrangements with SCPA is necessarily detrimental to the latter. Furthermore, the acceptance by the Commission of K+S's commitment to change the structure of Potacan amounts to requiring production to be shared, which would cause severe damage to EMC and Potacan but would be likely to be of considerable benefit to K+S. As to the second condition laid down by the Court in the *Cofaz and Others* judgment, it is beyond doubt that the applicant companies both took part in the procedure which culminated in the contested decision.

44 Finally, SCPA and EMC submit that they are affected by the decision by reason of certain attributes which are peculiar to them.

45 They submit that SCPA is largely dependent on Kali-Export for its large-scale export sales, a factor which distinguishes it clearly from Coposa: between 50% and 60% of SCPA's exports are effected via Kali-Export, with large-scale export sales accounting for some 15% of all sales. SCPA's situation is also distinguished from Coposa's by the fact that SCPA is affected by the condition concerning the termination of the existing distribution links between itself and K+S and by the commitment concerning Potacan. In any event, it does not follow from *Plaumann* that two or more persons cannot be individually concerned by the same decision. On the contrary, the Court has often held that actions brought by several persons may all be declared admissible (*Cofaz and Others*; Joined Cases 41/70 to 44/70 *International Fruit Company and Others* v *Commission* [1971] ECR 411; and Case 323/82 *Intermills* v *Commission* [1984] ECR 3809).

46 According to the applicant companies, EMC is individually concerned by the contested decision, which, on the one hand, means that K+S will have to propose changes to the structure of Potacan which will be detrimental to both Potacan and EMC, and, on the other, entails the dissolution of Kali-Export, thus leaving the EMC group with no sales network as regards large-scale exports. Moreover, EMC owns all the shares in SCPA.

47 As to the question whether the applicant companies are directly concerned by the contested decision, they observe that both the withdrawal of SCPA from Kali-Export and the termination of the existing distribution links between SCPA and K+S are direct consequences of that decision.

48 The Court notes that, under the fourth paragraph of Article 173 of the Treaty, a natural or legal person may bring proceedings against a decision addressed to another person only if that decision is of direct and individual concern to him. Since the contested decision is addressed to K+S, MdK and Treuhand, it must be ascertained whether the applicant companies are directly and individually concerned by it.

49 With respect, first, to the question whether the contested decision is of direct concern to the applicant companies, it is clear that the conditions with which the declaration of compatibility of the concentration with the common market must comply relate to commitments, entered into by the parties to the concentration vis-à-vis the Commission, the implementation of which affects the position of SCPA in law and in fact. First, fulfilment of the condition concerning the withdrawal of K+S/MdK from Kali-Export will call into question the very survival of that export cartel, and hence in particular the position of SCPA, which has no sales network for disposal of its products on large-scale export markets. Second, fulfilment of the other condition referred to in Article 1 of the contested decision will involve termination of the distribution links between SCPA and K+S.

50 As to EMC, it appears from the contested decision that the Commission regarded it as forming part of one and the same entity with SCPA. In particular, EMC was regarded in point 64 of the contested decision as the relevant addressee, with SCPA, of the condition relating to Kali-Export, despite the fact that only SCPA is formally a member of the cartel in question. In this case the confusion between the two companies derives from the fact that EMC owns all the shares in SCPA. The position of EMC therefore cannot be differentiated from that of SCPA as regards the right to bring proceedings.

51 Finally, while the conditions attached to the contested decision of the Commission can admittedly affect the applicant companies' interests only in so far as the commitments referred to therein are implemented by the parties to the concentration, it is beyond doubt that since those parties have undertaken vis-à-vis the Commission to take certain measures in return for a declaration that the concentration is compatible with the common market, they are firmly resolved to comply with those commitments, especially as under Article 8(5)(b) of the Regulation the Commission may revoke its decision if the undertakings concerned commit a breach of an obligation attached thereto (see to that effect Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraphs 7 to 9).

52 Consequently, SCPA and EMC must be regarded as directly concerned by the contested decision in that it sets out the conditions referred to in paragraph 49 above.

53 With respect, second, to the question whether the contested decision is also of individual concern to the applicant companies, it should be borne in mind first of all that, as the Court held in *Plaumann*, persons other than those to whom a decision is addressed may only claim to be individually concerned if the decision affects them by reason of certain attributes which are peculiar to them or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the persons addressed.

54 In view of the fact that the Court's case-law in this respect underlines the part played by natural or legal persons in the administrative procedure (see to that effect Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849, and *Cofaz and Others*, paragraph 24), it should be noted, first, that the applicant companies submitted observations in the administrative procedure before the Commission, which took those observations into account for the purposes of the contested decision. In particular, the documents in the case show that in response to the concerns expressed by the applicant companies, the Commission decided not to make the commitment of the parties to the concentration relating to Potacan a formal condition for the concentration to be compatible with the common market.

55 Moreover, the very wording of the contested decision, in particular points 51 to 64 thereof, shows that the situation of EMC/SCPA with respect to the concentration in issue is clearly differentiated from that of the other potash suppliers considered. The conditions attached to the declaration of compatibility are the result of the Commission's assessment of the competitive situation after the concentration, taking account principally of the position of EMC/SCPA as a constituent of a duopoly with K+S/MdK.

56 Finally, it appears that those conditions, which are aimed at dissolving the links between K+S and EMC/SCPA, touch primarily the interests of the latter, and are liable to have an appreciable effect on its position on the market.

57 In those circumstances, the mere fact that Coposa's interests are also concerned by one of the conditions in question, that relating to the withdrawal of K+S/MdK from Kali-Export, cannot in itself preclude the applicant companies from being individually concerned by the contested decision in that it lays down those conditions.

58 Accordingly, it must be held that the applicant companies are individually concerned by the contested decision in so far as it lays down the abovementioned conditions.

59 The second limb of the plea of inadmissibility raised by the Commission must therefore be rejected.

*Possibility of contesting the decision at issue in so far as it concerns the commitment relating to Potacan*

60 The Commission and the intervener undertakings submit that the part of the decision which relates to the commitment concerning Potacan may not be treated as a decision which may be the subject of an action under Article 173 of the Treaty, since it is not liable to produce binding legal effects of such a kind as to affect the interests of the applicant companies. That commitment was not made the subject of a formal condition within the meaning of Article 8(2) of the Regulation. The Commission observes that it merely took note of the commitment by K+S.

61 According to the applicant companies, the commitment proposed by K+S and accepted by the Commission must, inasmuch as it creates an obligation on the part of K+S, be treated as a condition within the meaning of Article 8(2) of the Regulation. In their view, the commitment in question may be regarded as similar to that entered into by the undertakings concerned in the '*Woodpulp II*' case (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström and Others* v *Commission* [1993] ECR I-1307), in which the Court treated the obligations imposed on those undertakings by that commitment as equivalent to directions under Article 3 of Regulation No 17 requiring infringements to be brought to an end.

62 It is settled case-law that any measure which produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 of the Treaty for a declaration that it is void (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9).

63 To determine whether an act or decision produces such effects, it is necessary to look to its substance.

64 It appears from points 65 and 67 of the contested decision that the Commission took note, but without making it a formal obligation, of the commitment by K+S to adapt the structure of Potacan by 30 June 1994 so as to enable each partner to market the potash produced by Potacan independently of the other on the Community market, and proceeded on the assumption that K+S would use its best efforts to reach an agreement with EMC/SCPA on restructuring Potacan to meet those conditions.

65 Point 66 of the contested decision states that the restructuring of Potacan can be carried out only by agreement with the French partner.

66 It is thus apparent that the object of K+S's commitment, in short, is to enter into negotiations with EMC/SCPA with a view to restructuring Potacan.

67 Even if, therefore, the part of the contested decision which relates to K+S's commitment concerning Potacan is legally binding on K+S, it cannot in any event produce binding legal effects of such a kind as to affect the interests of EMC/SCPA by bringing about a distinct change in that entity's legal position. The legal position of EMC/SCPA cannot be affected in the present case except of its own volition. That amounts in this case essentially to a finding that the part of the contested decision which concerns the commitment relating to Potacan does not directly affect EMC/SCPA.

68 That being so, attention should nevertheless be drawn, as the Advocate General does in point 38 of the Opinion, to the ambiguous nature of the Commission's approach, which, as appears from point 67 of the contested decision referred to in paragraph 16 above, created an unfortunate blend of the procedure under the Regulation and that pursuant to Regulation No 17.

69 In the light of the foregoing, the third limb of the Commission's plea of inadmissibility must be upheld.

*No interest in bringing proceedings*

70 The intervener undertakings submit that since the two commitments which the applicant companies were subject to as a result of the conditions imposed by the operative part of the contested decision have already been complied with, they no longer have any interest in the annulment by the Court of conditions which have thus become obsolete. The Commission, on the other hand, has not challenged the applicant companies' interest in bringing proceedings.

71 According to the applicant companies, it follows from Case 76/79 *Könecke* v *Commission* [1980] ECR 665 that the fact that a decision has been implemented does not preclude an application for annulment, since an interest in making the application still subsists as the basis for a possible action for damages.

72 On this point, it should be noted that under the fourth paragraph of Article 37 of the Protocol on the EC Statute of the Court of Justice, submissions made in an application to intervene are limited to supporting the submissions of one of the parties. Moreover, under Article 93(4) of the Rules of Procedure, the intervener must accept the case as he finds it at the time of his intervention. It follows that the interveners have no standing to raise a plea of inadmissibility and the Court is thus not obliged to examine the pleas put forward by them (see to that effect Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraphs 11 and 12).

73 However, as the Court stated in its order of 24 September 1987 in Case 134/87 *Vlachou* v *Court of Auditors* [1987] ECR 3633, paragraph 6, under Article 92(2) of the Rules of Procedure it may at any time of its own motion consider whether there exists any absolute bar to proceeding with the case.

74 Whether or not the objection raised by the intervener undertakings should be considered an absolute bar to proceeding with the case, the fact remains that, according to *Könecke* v *Commission*, paragraph 9, even if in the circumstances it proved impossible for the institution whose act was declared void to fulfil the obligation to take the necessary measures to comply with the Court's judgment, an interest in making the application would still subsist, at least as the basis for a possible action for damages.

75 In any event, therefore, the applicant companies would not appear to lack an interest in bringing proceedings.

## Substance

*Pleas in law of the applicants*

76 The French Republic and the applicant companies seek respectively annulment of the whole, and annulment of part, of the contested decision. The various complaints they make overlap in part and may be grouped around four main pleas in law, the first two of which have been put forward by the French Government only. The other two are joint pleas and will be treated together. First, the Commission is alleged to have failed to comply with its obligation to cooperate with the national authorities. Second, it made an incorrect assessment of the effects of the concentration on the German market. Third, it made an incorrect assessment of the effects of the concentration on the Community market apart from Germany. Fourth, the Regulation does not permit the declaration of compatibility to be subjected to conditions and obligations affecting third parties not involved in the concentration.

A — Failure to comply with the obligation to cooperate with the national authorities

77 By this plea the French Government criticises the Commission for failing to comply with the obligations laid down by Article 19 of the Regulation to remain in close and constant liaison with the competent authorities of the Member States, in particular by transmitting to them as soon as possible copies of the most important documents lodged with it or issued by it, and to place the Advisory Committee in a position to deliver its opinion in full knowledge of the facts.

78 As to the first obligation, the French Government submits that the Commission did not provide the competent national authorities in good time with the data

which was essential for assessing the correctness of the definition of the relevant markets and the effect of the concentration on competition. These were figures, used by the Commission as a basis for its statement of objections, which concerned the breakdown of each operator's sales by Member State, expressed in terms of volume. Following repeated requests by the French authorities (Service de la Concurrence et de l'Orientation des Activités du Ministère de l'Économie), the Commission merely communicated by telephone some of the data sought. The French Government states that although the French authorities then sent the Commission another letter asking for communication of all the necessary information and for confirmation in writing of the information given orally, it was not until 3 December 1993, the date of the Advisory Committee's meeting, that the Commission formally communicated the information which had been asked for since 18 October of that year. Furthermore, the document containing that information incorrectly stated that SCPA sold 221 000 tonnes of products, instead of 22 000, in Belgium and Luxembourg.

79 As to the second obligation, the French Government submits that the provision of the figures on the occasion of the Advisory Committee meeting was far too late. In its view, that information should have been transmitted at the latest with the preliminary draft decision annexed to the notice of the Advisory Committee meeting, which must be sent at least fourteen days before the meeting. By acting as it did, the Commission prevented the Advisory Committee from delivering an informed opinion on the preliminary draft decision.

80 In conclusion, the French Government submits that the Commission infringed the essential procedural requirements for taking the contested decision and that this may very well have led to an outcome different from that which would have been reached if those requirements had been complied with (Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959).

81 The Commission denies that the data on the volume of potash sold in each Member State by the various undertakings operating in the Community are amongst the most important documents in the procedure before it, within the meaning of

Article 19(1) of the Regulation. In any event, that data had been communicated to the French authorities by telephone on 5 November 1993, subject to verification in view of the fact that the Commission's examination was in progress.

82 The Commission observes that the statement of objections, which was transmitted to the French Government on 14 October 1993, and the preliminary draft decision, communicated on 16 November 1993, contained all the main elements, including the market shares of the operators in the Community, so that the competent authorities of the Member States were sufficiently well informed to be able to give a well-founded opinion. The information on the volume of potash sold in fact served only to substantiate the information on market shares.

83 The typographical mistake concerning the volume of potash sold by SCPA in Belgium and Luxembourg cannot, in the Commission's view, have had any influence on the Advisory Committee's opinion, given that it was an obvious mistake. On this point, the Commission observes that the incorrect figure had no effect either on the market shares entered in the second column of the part of the table relating to the Belgian/Luxembourg market or on the total amount of sales attributed to that market. In those circumstances, it is unlikely that the members of the Advisory Committee, who are experts on concentrations, could have been misled by the error.

84 Article 19(1) of the Regulation requires the Commission to 'transmit to the competent authorities of the Member States copies of notifications within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to this Regulation'. Article 19(2) prescribes that the Commission is to 'carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures'. Finally, Article 19 provides for representatives of the authorities of the Member States to serve on an

*ad hoc* Advisory Committee whose task is to deliver an opinion on the basis of a summary of the case together with an indication of the most important documents and a preliminary draft of the decision.

85 It is not disputed in the present case that the Commission transmitted to the French authorities and the Advisory Committee in good time both the objections sent to the parties who had notified the proposed concentration and the preliminary draft of the decision relating to that concentration.

86 The latter document included the following information:

The German market

— The German potash producers have a quasi-monopoly of the German market, which for various reasons is a market not easily penetrable by imports;

The Community market apart from Germany

— Coposa has about 85% of the Spanish market. However, unlike Germany, Spain imports considerable and increasing quantities of potash from the British producer Cleveland Potash Ltd (hereinafter 'CPL') and to a lesser extent from producers in non-member countries such as DSW (an Israeli producer);

— SCPA does not control distribution in France to the same extent as K+S in Germany. Thus CPL has succeeded in establishing its own distribution network there. Moreover, unlike the situation in Germany, the range of potash fertilisers which the French mines are able to produce is also available from sources outside France;

— K+S/MdK and SCPA have aggregated market shares of approximately 50% (between 15% and 20% for K+S, less than 10% for MdK and about 25% for SCPA). However, taking into account the fact that SCPA also markets large quantities of potash from other producers, in particular imports from non-member countries, the total sales controlled by K+S/MdK and SCPA represent a combined market share of about 60%;

— Imports from the Commonwealth of Independent States (CIS) amount to 8% (about 5% if imports from the CIS via SCPA are excluded);

— CPL has 15% of the market;

— Coposa has less than 10% of the market;

— DSW has a market share of slightly over 5%;

— PCA (a Canadian producer) has a market share of less than 5%;

— Canpotex (a Canadian producer) has a market share of less than 1%;

— APC (a Jordanian producer) has a market share of less than 1%;

— All the Member States apart from Germany, whether or not they have their own potash production, import considerable quantities of products from other Member States, and sometimes from non-member countries.

87 In those circumstances, the document giving a breakdown by Member State of each operator's sales cannot be regarded as one of the most important documents which the Commission was obliged, under Article 19 of the Regulation, first, to transmit to the competent authorities of the Member States as soon as possible and, second, to indicate in the summary of the case annexed to the notice of the Advisory Committee meeting. The data in that document are not such as to call into question the state of the market, as reflected by the information in the preliminary draft decision, mentioned in paragraph 86 above. That is also true of the figure given in that document for the volume of potash sold by SCPA in Belgium and Luxembourg, its erroneous character being made evident, as the Commission rightly observes, by the other relevant figures in the document.

88 Consequently, the Commission's obligations under Article 19 of the Regulation would not appear to have been infringed in the present case.

89 The first plea must therefore be rejected as unfounded.

B — Incorrect assessment of the effect of the concentration on the German market

90 The French Government criticises the Commission for applying the Regulation incorrectly by authorising, through the use of the 'failing company defence' and without imposing any conditions, a concentration leading to the creation of a monopoly on the German potash market.

91 As regards the incorrect use of the 'failing company defence', the French Government notes that this defence is derived from United States antitrust legislation, under which a concentration may not be regarded as causing a dominant position to come into being or strengthening it if the following conditions are met:

(a) one of the parties to the concentration is in a position such that it will be unable to meet its obligations in the near future;

(b) it is unable to reorganise successfully under Chapter 11 of the Bankruptcy Act;

(c) there are no other solutions which are less anticompetitive than the concentration; and

(d) the failing undertaking would be forced out of the market if the concentration were not implemented.

92 The Commission, it is submitted, referred to the 'failing company defence' without taking into account all the criteria used in the United States antitrust legislation, in particular those mentioned at (a) and (b), whereas only application of the United States criteria in full ensures that a derogating mechanism is established whose application does not have the effect of aggravating a competitive situation already in decline.

93 The French Government submits that the Commission, which considered that K+S would take over MdK's market share in Germany in any case, arbitrarily introduced the criterion of the absorption of market shares.

94 It submits that the absorption by K+S of MdK's market share if MdK is forced out proves that the German market is impermeable to competition, but does not mean that the anticompetitive nature of the concentration can be dismissed.

95 In addition, it submits that the Commission did not show that the criteria it adopted concerning the undertaking's elimination from the market and the absence of a less anticompetitive alternative were in fact satisfied in this case.

96 As regards the allegation that MdK would be forced out if the concentration did not take place, the French Government states that the Commission completely ignored the possibility that MdK might become viable again following an autonomous restructuring operation carried out with financial assistance from Treuhand compatible with Articles 92 and 93 of the EC Treaty.

97 Finally, it considers that the Commission has not shown that there was no other way of carrying out the acquisition which was less harmful to competition. It observes in this respect that the MdK trade unions had stated that there was a lack of transparency in the tendering procedure.

98 As regards the absence of conditions for authorisation of the concentration on the German market, the French Government submits that in any event the contested decision is vitiated by a manifest error of assessment, inasmuch as it authorises without any conditions the concentration on the German market where the joint undertaking will have a market share of 98%, and is contrary to Article 2(3) of the Regulation. The concentration will clearly strengthen K+S's dominant position in Germany, with the result that competition will be significantly impeded in a substantial part of the common market.

99 On this point, the Government observes that while the objective of economic and social cohesion mentioned in Articles 2 and 3(j) of the EC Treaty and also referred to in the 13th recital in the preamble to the Regulation, which the Commission referred to in its decision, must be taken into account in assessing concentrations, it cannot in any case justify an authorisation which frustrates the essential aim of Community control of concentrations, namely the protection of competition. Ultimately, the Commission could authorise the concentration by reference to the objective of economic and social cohesion only if the notifying undertakings had entered into precise and adequate commitments to open the relevant market to competition, as Nestlé did in Commission Decision 92/553/EEC of 22 July 1992 relating to a proceeding under Council Regulation (EEC) No 4064/89 (Case No IV/M.190 — Nestlé/Perrier) (OJ 1992 L 356, p. 1, hereinafter 'the Nestlé/Perrier decision').

100 The Commission concedes that in the contested decision it did not adopt the American 'failing company defence' in its entirety. However, it fails to see how that could affect the lawfulness of its decision.

101 It considers, moreover, that it has shown to the necessary legal standard that the criteria it used for the application of the 'failing company defence' were indeed satisfied in the present case.

102 With respect to the likelihood that MdK would soon be forced out unless it was acquired by another operator, the Commission observes that in points 76 and 77 of the contested decision it stated that Treuhand could not be expected to use public funds to cover the long-term debts of an undertaking which was no longer economically viable, and that even if it does not happen immediately, for social, regional and general policy reasons, it is very probable that MdK will close down in the near future.

103 It is also not disputed that MdK's share of the market in Germany will in all probability be absorbed by K+S.

104 As regards the condition that there should be no less anticompetitive alternative to the acquisition of MdK, the Commission refers to points 81 to 90 of the contested decision. It considers, moreover, that the French Government has not shown how the criticisms of the MdK trade unions could call into question its assessment. After all, the Commission was not satisfied with the finding that the tendering procedure had not permitted another purchaser to be found, but had itself carried out a further inquiry.

105 With respect to the absence of conditions for authorisation of the concentration on the German market, the Commission observes that the French Government does not specify what commitments K+S and MdK could have entered into in order to open the German market to competition. The argument which the French Government attempts to base on the Nestlé/Perrier decision is immaterial. In that decision, according to the Commission, it was possible to authorise the concentration in view of certain commitments relating to the structure of competition in the relevant product market. In the present case, however, in order to open the German market to competition, it would be necessary to attack not the structure of competition but the behaviour of buyers. In the Commission's opinion, even if the means to open the German market could have been structural, no solution to the acquisition of MdK with a lesser effect on competition was available.

106 The German Government submits that, under Article 2(3) of the Regulation, a concentration may be prohibited only if it will worsen conditions of competition. There is no causal link between the concentration and its effect on competition where the identical worsening of conditions of competition is to be expected even without the concentration. That will be the case when the three conditions applied by the Commission are satisfied.

107 The German Government submits that, contrary to the French Government's contention, the Commission has shown to the necessary legal standard that the conditions it laid down were satisfied. First, MdK is not viable on its own, that is to say, it is not possible to restructure the undertaking while preserving its autonomy in the market. In point 76 of the contested decision, the Commission gave solid reasons for considering that with Treuhand's 100% ownership being maintained MdK was not likely to be rescued in the long term. Second, there is no doubt that MdK's market share would automatically be absorbed by K+S, since K+S would be alone on the relevant market after MdK had been forced out, and that is an essential condition in this context. Third, the German Government submits that the Commission gave exhaustive reasons as to why no alternative means of acquiring MdK was available.

108 As to the approval of the concentration on the German market without conditions or obligations, the German Government observes that in the absence of a causal link between the concentration and the strengthening of a dominant position, one of the conditions for imposing a prohibition under Article 2(3) of the Regulation was not fulfilled. The concentration therefore had to be authorised without obligations or conditions.

109 The Court observes at the outset that under Article 2(2) of the Regulation, a 'concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market'.

110 Thus if a concentration is not the cause of the creation or strengthening of a dominant position which has a significant impact on the competitive situation on the relevant market, it must be declared compatible with the common market.

111 It appears from point 71 of the contested decision that, in the Commission's opinion, a concentration which would normally be considered as leading to the creation or reinforcement of a dominant position on the part of the acquiring undertaking may be regarded as not being the cause of it if, even in the event of the concentration being prohibited, that undertaking would inevitably achieve or reinforce a dominant position. Point 71 goes on to state that, as a general matter, a concentration is not the cause of the deterioration of the competitive structure if it is clear that:

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

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

— there is no less anticompetitive alternative purchase.

112 It must be observed, first of all, that the fact that the conditions set by the Commission for concluding that there was no causal link between the concentration and the deterioration of the competitive structure do not entirely coincide with the conditions applied in connection with the United States 'failing company defence' is not in itself a ground of invalidity of the contested decision. Solely the fact that the conditions set by the Commission were not capable of excluding the possibility that a concentration might be the cause of the deterioration in the competitive structure of the market could constitute a ground of invalidity of the decision.

113 In the present case, the French Government disputes the relevance of the criterion that it must be verified that the acquiring undertaking would in any event obtain the acquired undertaking's share of the market if the latter were to be forced out of the market.

114 However, in the absence of that criterion, a concentration could, provided the other criteria were satisfied, be considered as not being the cause of the deterioration of the competitive structure of the market even though it appeared that, in the event of the concentration not proceeding, the acquiring undertaking would not gain the entire market share of the acquired undertaking. Thus, it would be possible to deny the existence of a causal link between the concentration and the deterioration of the competitive structure of the market even though the competitive structure of the market would deteriorate to a lesser extent if the concentration did not proceed.

115 The introduction of that criterion is intended to ensure that the existence of a causal link between the concentration and the deterioration of the competitive structure of the market can be excluded only if the competitive structure resulting from the concentration would deteriorate in similar fashion even if the concentration did not proceed.

116 The criterion of absorption of market shares, although not considered by the Commission as sufficient in itself to preclude any adverse effect of the concentration on competition, therefore helps to ensure the neutral effects of the concentration as regards the deterioration of the competitive structure of the market. This is consistent with the concept of causal connection set out in Article 2(2) of the Regulation.

117 As to the criticism of the Commission that it failed to show that if the concentration did not proceed MdK would inevitably have been forced out of the market, it should be observed that the Commission stated in point 73 of the contested decision that, even though MdK had been restructured by 1 January 1993, that undertaking continued to make considerable losses in the first six months of the year. According to the Commission, MdK's serious economic situation was essentially a result of its obsolete operating structure and the crisis in sales attributable primarily to the collapse of markets in eastern Europe. MdK also lacked an efficient distribution system (see points 74 and 75 of the contested decision).

118 In point 76 of the contested decision, the Commission observed that MdK had been able to continue operating until now only because Treuhand had consistently covered its losses. The Commission added, however, that Treuhand could not cover MdK's losses in the long term from public aid, since that was in any case incompatible with the Treaty provisions on State aid.

119 In the light of the foregoing, the Commission cannot be criticised for finding that MdK was no longer economically viable and for considering that it was probable that, on its own, MdK would continue to accumulate losses even if Treuhand provided the funds envisaged for restructuring purposes in the proposed concentration.

120 In those circumstances, the Commission's forecast that MdK was highly likely to close down in the near future if it were not taken over by a private undertaking cannot be regarded as unsupported by a consistent body of evidence.

121 Finally, with respect to the condition concerning the absence of an alternative, less anticompetitive method of acquiring MdK, it should be noted that the French Government's complaint is that the Commission, because of the lack of transparency in the tendering procedure, failed to show that that condition was in fact satisfied.

122 Suffice it to note that the French Government has merely observed that the MdK trade unions pointed to a lack of transparency in the tendering procedure, without providing any details as to what constituted the alleged lack of transparency.

123 In the absence of any details of that complaint, it cannot be upheld.

124 It follows from the foregoing that the absence of a causal link between the concentration and the deterioration of the competitive structure of the German market has not been effectively called into question. Accordingly, it must be held that, so far as that market is concerned, the concentration appears to satisfy the criterion referred to in Article 2(2) of the Regulation, and could thus be declared compatible with the common market without being amended. Consequently, contrary to the French Government's assertion, it is not possible without contradicting that premiss to require the Commission, with respect to the German market, to attach any condition whatever to its declaration of the concentration's compatibility.

125 The second plea must therefore be rejected as unfounded.

C — Incorrect assessment of the effects of the concentration on the Community market apart from Germany

126 By this plea the French Government and SCPA and EMC criticise the Commission, first, for incorrectly defining the geographical market outside Germany, second, for interpreting the Regulation as applying to collective dominant positions and, third, for misapplying the concept of a collective dominant position.

1. Definition of the relevant geographical market

127 According to the applicants, the definition of the Community apart from Germany as a distinct relevant geographical market for potash is unsupported by a sufficient statement of reasons and is based on an incorrect and in any event partial analysis of the factors to be taken into account. Besides, the Commission lumped together competitive situations which were entirely heterogeneous.

128 Thus the Commission, it is said, equated States with no domestic production, producer States in which production is structurally greater than or equal to consumption, such as Spain and the United Kingdom, and producer States in which production is structurally smaller than consumption, such as France.

129 The French Government observes that virtually all intra-Community trade results from one-way flows, not from the reciprocity in trade which characterises a genuine homogeneous market. It notes that the non-producer Member States are exclusively importers, that Spain imports only from the United Kingdom and does not export there, that France imports from Germany, Spain and the United Kingdom but exports almost nothing to those countries, and that the United Kingdom imports large quantities from Germany but that its exports there are insignificant.

130 Moreover, the purchasing strategies of the Member States differ. France obtains relatively balanced supplies from the other three producer States and also imports from non-member countries. By contrast, the United Kingdom's imports come essentially from Germany. Of the non-producer States, Ireland and Portugal import exclusively potash of Community origin, whereas Denmark, Belgium and Luxembourg import about a quarter of their consumption from non-member countries, and Italy and the Netherlands over half.

131 Further evidence of the lack of homogeneity of the relevant market derives, according to the French Government, from an examination of the suppliers' market shares, which vary considerably from one State to another. Only K+S actually operates in all the Member States, with the exception of Spain.

132 The degree of concentration of supply is substantial in Spain, France and Belgium and Luxembourg. That factor militates in principle in favour of an approach which isolates the markets where there is such a concentration.

133 According to the French Government, even an analysis of the characteristics of demand confirms that a geographical market consisting of all the Member States apart from Germany does not exist. The Commission's assessment of the interchangeability of products is incorrect, since the choice of potash-based products depends on the geological nature of the soil, the agricultural surface area, consumer habits and agricultural policies, and on the presence of potash industries within the national territory. Thus almost twice as much potash is sold in the United Kingdom as in Italy, and three times as much in Belgium and Luxembourg as in the Netherlands, countries which are comparable in size. In Portugal twelve times less potash is sold than in Denmark.

134 The applicants challenge the reliability of the Commission's examination of transport costs and potash prices within the reference market. As regards transport costs, the Commission essentially did no more than assert that they do not appear to constitute a barrier to trade flows. In particular, the circumstance that there is no trade flow from the United Kingdom to Italy or from Spain to the Netherlands or Denmark raises doubts as to the conclusion that transport costs have no influence on supplies. As regards prices, the Commission omitted to carry out a comparative examination of the prices charged by the various operators in each Member State. The French Government submits that the Commission based its analysis of transport costs and prices only on some information provided by K+S and on statistics which were five years old.

135 The French Government considers that the Commission should have isolated the Spanish and French markets, where, because of their particular characteristics, the conditions of competition are not comparable to those found in other Member States. In particular, the Spanish market has similar characteristics to the German

market, whereas the French market is clearly distinguished from all the other national markets by production which is lower than consumption and the presence of a largely dominant major operator.

136 The Commission counters that the inclusion in one market of Member States with no domestic production or with domestic production either higher or lower than consumption does not mean that the relevant geographical market was wrongly defined. Moreover, the existence of one-way trade flows in the geographical market so defined does not, in economic theory, rule out the possibility of that market being a homogeneous one as regards conditions of competition.

137 According to the Commission, the extent to which producers from one geographical area operate on the market of another geographical area depends on the sales strategies of the suppliers, who for various reasons prefer to focus their efforts on one or other geographical area. The alleged purchasing strategies of the Member States do not as such point to the absence of sufficiently homogeneous conditions of competition.

138 As to the argument that there are considerable differences between States in terms of the market shares of the suppliers, the Commission argues that those differences may not as such be regarded as evidence that suppliers cannot penetrate the markets and hence that there are separate geographical markets. That criterion is thus not a decisive factor in defining the relevant geographical market.

139 Nor is the relatively high degree of concentration of supply in certain Member States a decisive criterion in defining a separate market, in particular where there are substantial trade flows between those Member States.

140 As to the characteristics of demand for potash products, the Commission observes that it has already established, first, a high degree of interchangeability, given that in no Member State apart from Germany do users have a clear preference for local products, and, second, the capacity of all the Community producers in the sector concerned to produce the various kinds of potash. Moreover, it observes that despite the considerable differences between the quantities of potash consumed in the various Member States, potash is sold in substantial quantities throughout the Community apart from Germany. In short, there is no factor in the present case to establish that the structure of demand reflects the existence of separate national markets.

141 The Commission does not accept that its analysis of transport costs is superficial or mistaken, arguing that the lack of trade flows between producer countries and importer countries is not necessarily caused by such costs. In addition, the presence of trade movements between certain non-contiguous States shows that transport costs are by no means prohibitive. As regards the prices of potash in Member States other than Germany, the Commission observes that the differences between them are slight. The maximum price difference between Member States other than Germany is 10%, while for Germany it is never less than 15%.

142 Finally, the Commission submits that neither the Spanish nor the French market may be regarded as distinct relevant markets. With its 16% share of imports the Spanish market is more open than the German market, where imports account for only 2%. The share of imports on the Spanish market has a tendency to grow at the expense of the market share held by Coposa. Moreover, Spanish potash products can largely be substituted for those of other Member States apart from Germany. Finally, there are no noticeable differences between potash prices in Spain and in the rest of the Community apart from Germany. As to the French market, the Commission observes that it is even more widely supplied by imports than the Spanish market. The observations regarding prices and the interchangeability of

Spanish potash products apply *mutatis mutandis* to French products. The Commission also points out that the distribution methods used in those two States are identical to those used in the rest of the Community apart from Germany.

143 The Court notes, to begin with, that a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition. With reference to the application of the Regulation as envisaged in the present case, the relevant geographical market is a defined geographical area in which the product concerned is marketed and where the conditions of competition are sufficiently homogeneous for all economic operators, so that the effect on competition of the concentration notified can be evaluated rationally (see, to this effect, Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 11 and 44).

144 It is common ground that all Member States apart from Germany import substantial quantities of potash from other Member States, and sometimes from non-member countries. Thus Spain, whose domestic producer Coposa is the most firmly established on its national market of all Community producers, imports potash amounting to over 15% of the Spanish market. France for its part imports potash amounting to more than 20% of its market, and the United Kingdom more than 50%. The other Member States apart from Germany have no production of their own and are therefore necessarily dependent on imports.

145 As appears from points 53 and 56 of the contested decision, producers from non-member countries hold, in the Community apart from Germany, a free market share for potash of approximately 15%. That percentage is moreover confirmed by the figures contained in the document giving a breakdown of sales by each operator by Member State, produced during the administrative procedure and referred to in paragraph 78 et seq. above.

146 A geographical zone such as that referred to in the present case, in so far as it is substantially open to the circulation of potash of both Community and non-Community origin, constitutes in principle an area open to competition.

147 It is also common ground that users in the various Member States apart from Germany obtain supplies of potash-based products which are largely interchangeable and have no marked preference for speciality products available only from local producers.

148 Moreover, it may be seen from data provided by the United Nations Food and Agriculture Organisation that in the period from 1987 to 1989 potash prices in each Member State apart from Germany did not differ significantly, whereas German prices were 20% higher than those in other Member States. According to information supplied by the parties, the prices charged in 1992 by K+S for 'Korn-Kali' (a potash product containing magnesium) and kali granular 40/8 were strictly identical in Belgium and the Netherlands, for example, but were respectively 15% and 20% lower than the German prices for the same products (see point 43 of the contested decision). That information, although approximate, as the French Government observes, nevertheless indicates, in the absence of any evidence to the contrary, that potash prices charged in the Community apart from Germany are reasonably homogeneous and differ markedly from those charged in Germany.

149 Furthermore, as the Commission observes, transport costs do not appear to constitute a barrier to trade flows within the Community apart from Germany. That view is supported by the fact that trade flows exist between non-contiguous States such as the United Kingdom and Spain, Spain and Ireland, Spain and Italy, Spain and Belgium/Luxembourg, Germany and Ireland, Germany and Portugal, Germany and Italy, and France and the Netherlands.

150 Finally, the Commission's assertion that there do not appear, at distribution level, to be any barriers to the entry of products in the Community apart from Germany of the kind that exist in Germany has not been contested by the applicants.

151 In those circumstances and in the absence of evidence to the contrary, the Commission's economic assessment that the Community apart from Germany constitutes a unit which is sufficiently homogeneous to be regarded overall as a separate geographical market appears sufficiently well founded, in particular by contrast with the German market where imports are negligible, as K+S and MdK hold 98% of the national potash market.

2. Applicability of the Regulation to collective dominant positions

152 The French Government and the applicant companies submit that the Regulation does not authorise the Commission to apply it in cases where there is a collective dominant position. On this point, they observe that the wording of the Regulation, in particular Article 2 thereof, unlike Article 86 of the EC Treaty does not expressly refer to collective dominant positions. Whereas Article 86 of the Treaty prohibits 'abuse by one or more undertakings of a dominant position', Article 2 of the Regulation regards as compatible with the common market concentrations which do not create or strengthen an anticompetitive dominant position, and as incompatible those which do.

153 Moreover, the legal bases of the Regulation do not justify the interpretation adopted by the Commission. It is not a measure for the application of Article 86 of the Treaty. According to the French Government, the Regulation is based primarily on Article 235 of the EC Treaty, and while it is also based on Article 87 of the

Treaty, which empowers the Council to adopt appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86, that is precisely because, although the Court had decided that Article 86 may be used to control certain concentrations (Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215), it reduces the scope thereof, by providing in particular in Article 22(1) that 'this Regulation alone shall apply to concentrations as defined in Article 3'.

154 Furthermore, there is nothing in the legislative history of the Regulation to support the view that the legislature intended it also to cover collective dominant positions. To accept that such positions are covered by the Regulation would amount to adopting a very wide and, above all, very uncertain scope for prohibitions or conditional authorisations. The French Government therefore considers that if the Community legislature, one of whose essential concerns was to ensure legal certainty for undertakings, had wished to introduce that concept in the Regulation, it would have done so expressly, as in Article 86 of the Treaty.

155 EMC and SCPA submit that the interpretation of the Regulation put forward by the Commission has the effect of distorting its scheme. In support of that argument, they submit that that interpretation may lead to the Regulation being applied even where the market share of the undertakings concerned does not exceed 25% either in the common market or in a substantial part of it, contrary to the 15th recital in the preamble to the Regulation. According to that recital, an indication that concentrations are not liable to impede effective competition and may therefore be presumed to be compatible with the common market exists in particular where the market share of the undertakings concerned does not exceed 25% either in the common market or in a substantial part of it.

156 Finally, the lack of adequate procedural safeguards for third parties confirms, in the applicants' view, that the Regulation is not designed to be used as a framework for the application of the concept of a collective dominant position. Thus undertakings which are not parties to the concentration being examined under the Regulation but which in the Commission's view constitute an oligopoly together with

the undertakings involved in the concentration are not at the outset given any specific information to indicate what the consequences of the procedure in progress might be for them. The French Government observes that while the Commission or the competent authorities of the Member States do indeed, under the first sentence of Article 18(4) of the Regulation, have the possibility of hearing third parties and hence, if appropriate, the representatives of undertakings not involved in the concentration, that step is not compulsory, and if it is taken, it is informal and does not offer the safeguards prescribed for hearings of parties to the concentration. Furthermore, since third parties who are regarded as sharing in a collective dominant position are not informed of the decision the Commission intends to take, by the same token they are deprived of the opportunity to make effective use of the possibility, provided for in the second sentence of Article 18(4) of the Regulation, of applying to be heard.

157 The Commission counters that the wording of the Regulation does not exclude its being used also to prevent the creation or strengthening of collective dominant positions. In particular, Article 2(3) of the Regulation links the dominant position to the concentration, not to the undertakings concerned, and refers to the consequences of the proposed concentration for the structure of competition, thus referring to an objective situation.

158 Moreover, the use in conjunction with one another of Articles 87 and 235 of the Treaty as the legal basis of the Regulation shows that its objective is to fill in a lacuna in competition law left by Articles 85 and 86 of the Treaty, with reference to the control of oligopolistic dominant positions.

159 According to the Commission, nothing in the *travaux préparatoires* permits the conclusion to be drawn that the Council intended to exclude the use of the Regulation to prevent collective dominant positions on the market, that is, situations of dominance linked to the presence of several strongly interdependent economic entities. The Commission notes that when it appeared that the delegations of the Member States were divided on the question of the control of oligopolies, agreement was reached on a neutral formulation which left the question open. That is the formulation eventually adopted in Article 2 of the Regulation.

160 Moreover, the interpretation advanced by the French Government would mean that, following the adoption of the Regulation, concentrations previously subject to the control of oligopolies in some Member States were henceforth subject only to Community control as to the existence of an individual dominant position.

161 According to the Commission, the procedural rules for applying the Regulation give ample protection to the interests of third parties, since they permit them to put forward their views. In any event, a decision to authorise a concentration, even if conditions and obligations are attached as permitted by Article 8(2) of the Regulation, is binding only on the parties to the concentration. Those conditions and obligations are intended to ensure that the parties to the concentration comply with the commitments they have entered into vis-à-vis the Commission. Alternatively, the Commission submits that since the right to a hearing is a fundamental principle of Community law, which must apply even in the absence of any express provision, it cannot be deduced from the lack of any reference to a third party's right to be heard that the Regulation intended to exclude measures which might affect the interests of third parties.

162 Finally, the Commission submits that the possibility of prohibiting a concentration which strengthens the oligopolistic nature of the market derives, first, from the economic theory that competition, where certain conditions are satisfied, does not function properly in an oligopolistic market and, second, from the need to maintain and develop effective competition in the common market, in accordance with Article 2(1)(a) of the Regulation.

163 According to the German Government, the Regulation applies to cases involving a collective dominant position in particular because it is an instrument which supplements Articles 85 and 86 of the Treaty and because it was adopted in order to attain the general objective set out in Article 3(f) of the EEC Treaty (now Article 3(g) of the EC Treaty). The Regulation should allow effective control of concentrations which might prove incompatible with a system of undistorted competition. For such control to be effective, it must be possible to prohibit any concentration leading to the creation or strengthening of a dominant position, whether it derives from one or from several undertakings.

164 The German Government observes that if the Regulation were interpreted as meaning that its scope was limited to cases where a dominant position is held by a single undertaking, the effect would be that concentrations taking place after the adoption of the Regulation which were previously subject to control by a Member State would no longer be subject to control.

165 The Court finds, first of all, that the applicants' submission, to the effect that the choice of legal bases in itself militates in favour of the argument that the Regulation does not apply to collective dominant positions, cannot be accepted. As the Advocate General observes in point 83 of the Opinion, Articles 87 and 235 of the Treaty can in principle be used as the legal bases of a regulation permitting preventive action with respect to concentrations which create or strengthen a collective dominant position liable to have a significant effect on competition.

166 Second, it cannot be deduced from the wording of Article 2 of the Regulation that only concentrations which create or strengthen an individual dominant position, that is, a dominant position held by the parties to the concentration, come within the scope of the Regulation. Article 2, in referring to 'a concentration which creates or strengthens a dominant position', does not in itself exclude the possibility of applying the Regulation to cases where concentrations lead to the creation or strengthening of a collective dominant position, that is, a dominant position held by the parties to the concentration together with an entity not a party thereto.

167 Third, with respect to the *travaux préparatoires*, it appears from the documents in the case that they cannot be regarded as expressing clearly the intention of the authors of the Regulation as to the scope of the term 'dominant position'. In those circumstances, the *travaux préparatoires* provide no assistance for the interpretation of the disputed concept (see, to that effect, Case 15/60 *Simon* v *Court of Justice* [1961] ECR 115).

168 Since the textual and historical interpretations of the Regulation, and in particular Article 2 thereof, do not permit its precise scope to be assessed as regards the type of dominant position concerned, the provision in question must be interpreted by reference to its purpose and general structure (see, to that effect, Case 11/76 *Netherlands* v *Commission* [1979] ECR 245, paragraph 6).

169 As may be seen from the first and second recitals in its preamble, the Regulation is founded on the premiss that the objective of instituting a system to ensure that competition in the common market is not distorted is essential for the achievement of the internal market by 1992 and for its future development.

170 It follows from the sixth, seventh, tenth and eleventh recitals in the preamble that the Regulation, unlike Articles 85 and 86 of the Treaty, is intended to apply to all concentrations with a Community dimension in so far as they are likely, because of their effect on the structure of competition within the Community, to prove incompatible with the system of undistorted competition envisaged by the Treaty.

171 A concentration which creates or strengthens a dominant position on the part of the parties concerned with an entity not involved in the concentration is liable to prove incompatible with the system of undistorted competition which the Treaty seeks to secure. Consequently, if it were accepted that only concentrations creating or strengthening a dominant position on the part of the parties to the concentration were covered by the Regulation, its purpose as indicated in particular by the abovementioned recitals would be partially frustrated. The Regulation would thus be deprived of a not insignificant aspect of its effectiveness, without that being necessary from the perspective of the general structure of the Community system of control of concentrations.

172 Neither the argument based on the lack of procedural safeguards nor the argument based on the 15th recital in the preamble to the Regulation can cast doubt on its applicability to cases where a collective dominant position is the result of a concentration.

173 As to the first argument, it is true that the Regulation does not expressly provide that undertakings, not involved in the concentration, which are regarded as the external members of the dominant oligopoly must be given an opportunity to make their views known effectively where the Commission intends to attach to the 'authorisation' of the concentration conditions or obligations specifically affecting them. The same applies in a situation where the Commission intends to attach conditions or obligations affecting third parties to a concentration which will lead simply to the creation or strengthening of an individual dominant position.

174 In any event, even on the assumption that a finding by the Commission that the proposed concentration creates or strengthens a collective dominant position involving the undertakings concerned on the one hand and a third party on the other may in itself adversely affect that third party, it must be borne in mind that observance of the right to be heard is, in all proceedings liable to culminate in a measure adversely affecting a particular person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure (see, to that effect, Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461 and Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21).

175 Given the existence of that principle, and the purpose of the Regulation as explained above, the fact that the Community legislature did not expressly provide in the Regulation for a procedure safeguarding the right to be heard of third party undertakings alleged to hold a collective dominant position together with the undertakings involved in the concentration cannot be regarded as decisive evidence of the Regulation's inapplicability to collective dominant positions.

176 As to the second argument, the presumption that concentrations are compatible with the common market if the undertakings concerned have a combined market share of less than 25%, as stated in the 15th recital in the preamble, is not developed in any way in the operative part of the Regulation.

177 The 15th recital in the preamble to the Regulation must, having regard in particular to the realities of the market underlying this recital, be interpreted as meaning that a concentration which does not give the undertakings concerned a combined share of at least 25% of the reference market is presumed not to create or strengthen an anticompetitive dominant position on the part of those undertakings.

178 It follows from the foregoing that collective dominant positions do not fall outside the scope of the Regulation.

3. Finding of the existence of a collective dominant position in the present case

179 In the third limb of this plea, both the French Government and EMC and SCPA submit that the Commission's reasoning concerning the alleged creation of a dominant duopoly is based on an assessment which is wrong in fact and in law, and is in any event inadequate. They submit that the Commission based its analysis of the collective dominant position on criteria which are not those stated in the case-law on Article 86 of the Treaty, and further made manifest errors in applying the criteria it had itself laid down in other decisions for the purpose of establishing whether a collective dominant position had been created.

180 In reply, the Commission states that there is no contradiction between the criteria it used in the contested decision and those it used in other decisions concerning collective dominant positions. To establish, in the present case, the existence of a collective dominant position, it based its decision essentially on three criteria: the degree of concentration on the market which would follow from the concentration, the structural factors relating to the nature of the market and the characteristics of the product, and the structural links between the undertakings concerned. Furthermore, the Commission does not accept that the criteria for determining the

existence of a collective dominant position must be the same in the context of Article 86 of the Treaty as in the context of the Regulation. With Article 86 it is the past which must be referred to, whereas in the case of the Regulation the analysis is directed to the future, its purpose being to maintain an effective competitive structure, not to put an end to an abuse of a dominant position.

(a) The degree of concentration on the market

181 The French Government and the applicant companies submit that the increase in the degree of concentration on the market is not substantial, since the market shares held by K+S and SCPA increased as a result of the concentration from 54% to 61%. According to the French Government, the Commission's analysis is only a partial one, because it does not take into account that following the concentration the number of competitors on the market fell only from ten to nine, nor does it take proper account of the role of two substantial operators, CPL and Coposa.

182 In reply, the Commission states that its analysis takes full account of the market shares of all the Community producers and those from outside. It did not discount the existence of CPL and Coposa, but found that those two Community producers could not further increase their sales to win a share of the market from K+S/MdK and SCPA.

(b) Characteristics of the eliminated competitor

183 The French Government submits that it follows from the Nestlé/Perrier decision that, in evaluating the creation of a collective dominant position, the Commission attaches great importance to the fact that the concentration entails the elimination of a competitor who, by virtue of his size and market share, is an essential factor if competition is to be effective. In the present case, however, it is clear that the

acquisition of MdK by K+S would not entail the elimination of such a competitor. MdK accounts for only 7% of the relevant market. In addition, the question of MdK's 'impressive production capacities' mentioned by the Commission in its defence was not addressed in the contested decision.

184 According to the French Government, the Commission, having considered that MdK was experiencing serious difficulties, ought to have concluded that MdK was not a competitor whose elimination would bring about a substantial alteration in market structures which could give rise to the formation of a duopoly.

185 The Commission, referring to point 120 of the Nestlé/Perrier decision, considers that in order to determine whether the reduction in the number of producers should be taken into account for the purpose of establishing whether a collective dominant position exists, it is essential to ascertain whether that reduction is more than a purely formal alteration to the structure of the market. That is indeed the case with respect to the acquisition of MdK by K+S. On this point, the Commission refers to MdK's impressive production capacities which, after a thorough restructuring, will constitute very substantial competitive potential. It submits, in addition, that the significance of MdK as a competitor on the Community market apart from Germany is also apparent from the fact that it has not been established with a sufficient degree of certainty that the competitive situation would be practically the same whether MdK was forced out of the market or the concentration went ahead.

(c) Position of the competitors

186 According to the French Government, the Commission's analysis relating to the degree of competitive pressure which rivals will be able to exert on the alleged duopoly formed by K+S/MdK and SCPA tends to give a false impression of the

true competitive situation on the Community market apart from Germany. The Commission attempts to minimise the importance of the various operators who might counterbalance the alleged predominance of the leading undertakings.

187 In the French Government's view, there are inconsistencies in the Commission's analysis. It observes that while the Commission emphasises the limited production capacities of CPL and Coposa in the context of defining the geographical market, it stresses the substantial volume of exports from Spain and the United Kingdom to other Member States. The Commission further minimises the significance of imports from non-member countries by observing that France is the largest potash consumer in the Community and that its imports from non-member countries are channelled through SCPA. Thus, in a manner inconsistent with its own definition of the relevant geographical market, the Commission assesses the position of competitors either from the point of view of the French market or from that of the Community apart from Germany. The French Government further submits that, contrary to the Commission's assertion, potash continues to be imported from the CIS and the market share represented by such imports has not declined, as is shown by the initiation of a review of Council Regulation (EEC) No 3068/92 of 23 October 1992 imposing a definitive anti-dumping duty on imports of potassium chloride originating in Belarus, Russia or Ukraine (OJ 1992 L 304, p. 41, hereinafter 'the anti-dumping regulation'). Moreover, according to IFA and Customs sources, imports from the CIS amounted to 11% of sales in the Community in 1993.

188 According to the French Government, the Commission's reasoning is in fact fundamentally flawed, since it is based on the existence of a geographical market comprising all the States of the Community apart from Germany, whereas it is clear that France at least should not have been included, in view of its particular characteristics regarding production, importation and distribution of potash products.

189 The Commission submits that there is no contradiction between the finding that there are significant export flows from Spain to other Member States and the finding that Coposa does not constitute a counterweight to the duopoly.

190 According to the Commission, the channelling of imports from non-member countries through one member of the duopoly, namely SCPA, in a substantial part of the relevant geographical market, namely France, the most buoyant market, implies that the competitive pressure of non-member countries on that duopoly is necessarily limited.

191 The Commission submits that it did not confine itself to adopting criteria relating exclusively to the French market. As to imports from the CIS, it found merely that the market share of K+S/MdK and SCPA would increase further in future not only because of the anticipated decline in imports from the CIS but also because the last independent potash producer in Canada, PCA, had been acquired by PCS, a member of the Canpotex export cartel, whose supplies to France and Ireland are channelled through SCPA. Moreover, the review of the anti-dumping measures does not constitute proof of continuing potash imports from the CIS. In that regard, the Commission notes, it found that sales by the main distributor of CIS potash in the Community had declined since the adoption of the anti-dumping regulation to one-eighth of their 1992 level.

(d) The market position of K+S/MdK and SCPA

192 In the first place, the French Government criticises the Commission for giving excessive weight, among the criteria applied to establish the existence of an oligopolistic dominant position, to the aggregate market share held by K+S/MdK and SCPA.

193 In the second place, the French Government criticises the Commission for failing to take account of the absence of symmetry between the two entities alleged to constitute the duopoly, even though in previous decisions that absence had on the contrary been a significant factor in ruling out the existence of an oligopolistic dominant position. The Government states that there is a substantial difference between the market shares of K+S/MdK (23%) and SCPA (37%). In addition, the Commission is said to have disregarded numerous factual elements which revealed a manifest imbalance between SCPA and K+S/MdK, such as their production capacity, economic strength and differing degree of vertical integration.

194 The Commission observes that it is settled-case law that a market share of about 60% points to the existence of a collective dominant position, in particular where, as in the present case, there is an appreciable difference as compared with the market shares held by the competitors.

195 While conceding that there are differences between K+S/MdK and SCPA, the Commission challenges the notion that a duopoly is conceivable only if the positions of the undertakings in question are similar, especially where, as in the present case, there are significant links between those undertakings which prevent effective competition on the market.

(e) Economic power of the customers

196 The French Government criticises the Commission for not taking account of the criterion relating to the economic power of the customers. In its view, an analysis of that factor would have led the Commission to conclude that the customers constitute a counterweight such as to cast doubt on the creation of the alleged duopoly. Moreover, the noticeable fall in demand for potash following the changes to the common agricultural policy is a factor of intensive competition as regards

potash producers. That is all the more so since, as the French Government observes, demand for potash fell from 1988 to 1993 by almost 30% in Europe, while imports declined by only 23% over the same period.

197 In reply, the Commission states that although in some of its decisions it was able to conclude that there was no dominant position in view of the counterweight formed by customers, that is only one factor among others which it takes into consideration. As to the fall in demand for potash, the Commission admits that it took place, but adds that it affects all Community producers. Furthermore, the fall was not very substantial, given that the elasticity of demand is limited as potash is an essential fertilizer for agriculture which cannot be replaced by any other.

(f) Barriers to entry for potash products in the Community

198 The French Government submits that in the passage in the decision relating to the geographical market, the Commission put forward factors which point to an open market easy to attack. However, when finding that K+S/MdK and SCPA were in a collective dominant position, the Commission completely disregarded the low level of barriers to entry for potash products within the Community.

199 According to the Government, the Commission's arguments, advanced for the first time in its defence and based on anti-dumping duties and SCPA's statutory monopoly, do not establish the existence of barriers to entering the geographical reference market. With regard to the first argument, the Government submits that anti-dumping duties are measures intended to restore competitive conditions, not to introduce a restriction on cross-border trade. With reference to the second argument concerning SCPA's statutory monopoly, the Government considers that

while that monopoly may create a barrier to entering the French market, it has no effect on the access of products from non-member countries to the markets of the other Member States which, together with the French market, make up the relevant geographical market.

200 The Commission observes that there are no barriers to entry within the Community. On the other hand, there are two kinds of barrier to the entry of products from undertakings in non-member countries: anti-dumping measures for imports from the CIS, and SCPA's statutory monopoly under which all French imports from non-member countries must pass through SCPA. According to the Commission, anti-dumping duties constitute barriers to entry because, together with transport costs, they limit the price margin available to importers. It also submits that the fact that all imports from non-member countries into France, which is the most buoyant market with consumption three times greater than that of the second largest market, pass through SCPA is a barrier to entry for imports on the Community market generally.

(g) Characteristics of the market and of the product

201 The French Government considers that the Commission's analysis in point 57 of the contested decision, concerning the objective factors favouring the creation of a collective dominant position, on which it laid emphasis in earlier decisions such as the Nestlé/Perrier decision cited above, and Decision 94/359/EC of 21 December 1993 declaring a concentration to be compatible with the common market (Case No IV/M.358 — Pilkington-Techint/SIV) (OJ 1994 L 158, p. 24), is vague and inconclusive. It submits that the Commission completely ignored basic analytical criteria such as prices and price trends, the degree of elasticity of demand, and the costs of the two undertakings alleged to constitute the duopoly. It also contests the soundness of some of the considerations relied on by the Commission. With respect to the homogeneity of the product, it observes that the general designation 'potash' covers a wide variety of products. As to the Commission's assertion that the potash market is transparent, that is contradicted by the difficulty the Commis-

sion encountered in obtaining without delay a clear view of the market in terms of value and volume.

202 The Commission counters, first, that it referred quite clearly to the structural factors relating to the characteristics of the market and the product. It states that the contested decision refers to a situation different from those which were the subject of the decisions cited by the French Government. The background to that decision was a situation in which even before the concentration there was no effective competition between the two largest suppliers of potash in the Community. In those circumstances, the factors examined in the decisions referred to by the French Government are only one of the factors to be taken into consideration. Second, with reference to the homogeneity of the product, the Commission finds that potash is identical as regards both its chemical composition and its use. Third, with reference to the transparency of the market, the Commission submits that each producer is aware of his position and that of his competitors. Production figures and prices are generally known, and there are statistics on potash consumption and detailed studies of the potash market.

(h) Existence of parallel conduct

203 According to the French Government, the Commission's aim is to establish a pattern of persistent anticompetitive conduct between K+S and SCPA by stating that despite the declaration of incompatibility with Article 85 of the Treaty of a cooperation agreement made in the 1970s between those two undertakings (Commission Decision 73/212/EEC of 11 May 1973 (OJ 1973 L 217, p. 3)), and despite the excess production capacity in Germany, there is very little trade between Germany and France which is not routed through SCPA. On this point, the Government observes, first of all, that to demonstrate the existence of a collective dominant position it is essential for the anticompetitive conduct to be recent. Second, the practices declared incompatible with Article 85 of the Treaty concerned the whole of the Community, yet to support its view that the agreement in question still

subsists, the only factual element the Commission refers to is limited to trade movements from Germany to France. Third, the low level of trade not channelled through SCPA is highly relative. Supplies to France amount to only 87 000 tonnes, or 6% of French consumption, of which only 47 000 tonnes pass through SCPA. Finally, the French Government disputes the Commission's argument that the weak presence of K+S on the French market is enough to show that a duopoly between K+S/MdK and SCPA exists in the Community apart from Germany.

204 The Commission observes that it did not state in the contested decision that it had based its conclusion as to the existence of a collective dominant position on a cooperation agreement from the 1970s. It found that the virtual absence of K+S from the French market and the channelling of most of its imports through SCPA indicated that a collective dominant position existed.

(i) Existence of structural links between the undertakings

205 According to the French Government, the three links between K+S and SCPA listed by the Commission, namely the Potacan joint venture, the cooperation within the Kali-Export export cartel and the channelling of K+S's supplies to France through SCPA, are incapable of establishing that the duopoly was created following the acquisition of MdK by K+S. As to the Kali-Export export cartel, its purpose, according to the French Government, is to promote and coordinate exports of its members' potash outside the Community. The cartel does not, on the other hand, concern their sales within the Community. The Commission's fear that cooperation within that cartel would restrict competition between K+S and SCPA in the Community is not based on any evidence.

206 As to Potacan, the applicant companies submit that the Commission has failed to justify the assertion that the present structure of Potacan prevents its shareholders K+S and SCPA from obtaining supplies independently from their joint subsidiary to supply the European Community markets.

207 In its reply, the French Government points to four errors of assessment. First, it states that in its analysis of the links between K+S and SCPA the Commission has not established any connection between those links and their consequences over the whole of the relevant market, but has merely shown that those links extend only to France. Thus the Commission concluded, from the fact that there is no competition between K+S and SCPA in the State which consumes the largest quantity of potash produced, that those undertakings enjoy a dominant position on the entire Community market apart from Germany. Such an approach runs counter to the Commission's argument that national situations are of little importance once it has been established that the reference market is the Community apart from Germany.

208 Second, the French Government observes that for the purposes of its argument the Commission at one point considers that Coposa exports autonomously substantial quantities to France (in the context of the definition of the geographical market) and at another point submits that Coposa is hardly present in France and that a large proportion of its sales is channelled (to show that cooperation within Kali-Export influences the cartel members' competitive behaviour in the Community). Moreover, the criteria as applied by the Commission could equally have led to the finding of an oligopoly involving K+S/MdK, SCPA and Coposa. The contested decision is at the very least inadequately reasoned on this point.

209 Third, the French Government considers that the channelling in France through SCPA of part of K+S's supplies of potash, accounting for only 1.4% of consumption in the reference market, cannot be regarded as evidence of the creation of a duopoly on that market following the acquisition of MdK by K+S. Similarly, the relatively low level of sales by K+S in France is not sufficient to support the conclusion that anticompetitive links exist between K+S and SCPA, since there may

well be other reasons for it. Thus it might derive from the structures of the French market or from K+S's industrial strategy. In this respect, the French Government states that K+S's export policy appears to be directed towards countries outside Europe, non-producer Member States, and one producer State, the United Kingdom, where there is demand for potash.

210 On this point, the applicant companies submit that the only distribution link between K+S and SCPA consists of a contract for the distribution of kieserite, a non-potash product which belongs to a different product market. Relations between K+S and SCPA concerning potash products, on the other hand, do not include any cooperation regarding distribution and are strictly limited to relations between supplier and purchaser in normal market conditions.

211 Fourth, the French Government submits that the Commission has not established a causal link between the acquisition of MdK and the alleged creation of a duopoly between K+S/MdK and SCPA. In its view, neither the fact that the combined market share of K+S and SCPA has increased from 54% to 61% following the concentration nor the fact that MdK is one of the largest Community producers is a factor in the creation of a duopoly on the relevant market.

212 The applicant companies for their part submit that since the Commission had found in its examination of the effects of the concentration on the German market that MdK would be forced out of the market in any case, it could not conclude that the acquisition of MdK by K+S would give rise to the creation of a dominant position on the part of K+S/MdK and SCPA.

213 With regard to Potacan, the Commission observes that it follows in particular from its organisational structure that no important decision on the policy of the undertaking may be taken against the will of either partner. Thus supplying the French group with potash in substantial quantities would not be possible if K+S opposed it.

214 With regard to Kali-Export, the Commission submits that a finding that an export cartel does not concern its members' sales within the Community is not sufficient to establish that it does not restrict competition between them in the Community. Because K+S and SCPA are interdependent in various ways, there is no effective competition between the two members of the oligopoly in the Community apart from Germany. The Commission observes that (i) although French territory is the most buoyant market for potash products in the Community and there are no barriers to entry, K+S is present only marginally on that market despite having sufficient production capacity broadly to supply the whole Community; (ii) although K+S has established a well-developed distribution network in all the Member States, it has as yet no distribution network of its own in France; and (iii) CPL was not able to gain access to the French market until it had left Kali-Export, and in six years it won a share of the French market amounting to 13%; Coposa, a member of Kali-Export, is scarcely present on the French market and a substantial proportion of its potash is sold in France by SCPA. On the basis of those elements, the Commission concludes that participation in Kali-Export clearly interferes with sales in France.

215 In its rejoinder the Commission submits, first of all, that it established a clear relationship between the links binding together K+S and SCPA, which concern France only, and the lack of competition on the entire Community market apart from Germany (points 57, 59, 61 and 67 of the contested decision).

216 The Commission submits, second, that it did not assert that Coposa's exports to France are substantial. On the contrary, it stated that although Coposa does export to France, those exports are limited and pass mainly though SCPA. According to the Commission, Coposa should not be included in the duopoly with K+S/MdK and SCPA, since it is linked to K+S and SCPA only by its holding in Kali-Export. Moreover, it exports more potash to France than K+S, despite the geographical proximity of the German deposits and the fact that in Germany production is four times higher than consumption. In addition, the distribution links between K+S and SCPA have been in existence for a long time.

217 The Commission submits, third, that the structure of the French market has not prevented CPL from penetrating French territory without passing through SCPA. Moreover, K+S's commercial policy of not selling in France is incomprehensible commercially in view of the fact that France is also a State where there is demand for potash and in view of the substantial overcapacity in Germany and the geographical proximity of the German deposits.

218 The Commission submits, fourth, that the acquisition of MdK substantially altered the structural conditions of the market and led to the creation of a collective dominant position between K+S/MdK and SCPA for the following reasons: (i) MdK accounts for 25% of total potash production in the Community (point 51 of the contested decision) and has substantial potash reserves; (ii) only about 50% of MdK's capacity is currently being utilised (point 73 of the decision), which implies that production could easily be increased; (iii) MdK's market share of 7% is the crucial factor in creating the joint dominant position (point 62), having regard to the fact that supply outside the K+S/MdK and SCPA grouping is fragmented (point 54) and that the market share of K+S/MdK and SCPA is likely to increase further (point 53).

219 Before the applicants' criticisms are examined of the manner in which the Commission applied the concept of a collective dominant position in the present case, it should be noted that, in concluding that a collective dominant position between K+S/MdK and SCPA would be created which was likely significantly to impede competition in the Community market apart from Germany, the Commission found in the contested decision in particular that:

— the potash market is a mature market characterised by a largely homogeneous product and the lack of technical innovation (point 57 of the contested decision);

— the market circumstances are very transparent, so that information on production, demand, sales and prices is generally available (point 57);

— exceptionally close links have existed for a long time between K+S and SCPA, which might in themselves suggest that there is no effective competition between those undertakings which, moreover, account for about 53% of the Community market apart from Germany, calculated on the basis of sales, including not only sales from K+S and SCPA's own production but also sales by SCPA of potash imported directly from non-member countries, which has to be channelled through SCPA, thus giving it control over supplies from outside the Community (points 52, 56 and 57);

— despite over-production in Germany, there is still only a small flow of potash supplies from K+S to France which is not channelled through SCPA, France being by far the largest potash-consuming State in the Community (points 56 and 57);

— K+S and MdK, which will form a joint undertaking following the concentration, and SCPA account for 35%, 25% and 20% respectively of total potash production in the Community (point 51);

— MdK is the second largest potash producer in the Community, even though utilisation of the undertaking's capacity is currently only around 50% (points 51 and 73);

— following the concentration, the K+S/MdK and SCPA grouping will hold a total market share, calculated on the basis of sales, of about 60% (point 52);

— supply outside that grouping is fragmented (point 54);

— the other producers do not have the sales base necessary to survive on the market against a K+S/MdK and SCPA duopoly (point 62).

220 As stated above, under Article 2(3) of the Regulation, concentrations which create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it must be declared incompatible with the common market.

221 In the case of an alleged collective dominant position, the Commission is therefore obliged to assess, using a prospective analysis of the reference market, whether the concentration which has been referred to it leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of factors giving rise to a connection between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers.

222 Such an approach warrants close examination in particular of the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the reference market.

223 In this respect, however, the basic provisions of the Regulation, in particular Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature.

224 Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations.

225 That being so, it must be held that the Commission's analysis of the concentration and of its effects on the market in question is flawed in certain respects which affect the economic assessment of the concentration.

226 As points 51 and 52 of the contested decision show, K+S/MdK and SCPA will hold shares of the relevant market, after the concentration, of 23% and 37% respectively, calculated on the basis of sales. A market share of approximately 60%, subdivided in that way, cannot of itself point conclusively to the existence of a collective dominant position on the part of those undertakings.

227 As to the alleged structural links between K+S and SCPA, which were the essential factor relied on by the Commission in making its own assessment, some of the applicants' criticisms playing down the significance of those links as evidence of the creation of a collective dominant position on the part of the two undertakings are well founded.

228 Thus the Commission's finding that the holding of K+S and SCPA in the Kali-Export export cartel may have an impact on their competitive behaviour in the Community would not appear to be supported by a sufficiently cogent and consistent body of evidence. The Commission merely notes, on this point, that the British producer CPL started marketing its products independently on the French market only after it had left the cartel in 1987, because it could not reconcile direct competition with SCPA on the French market with its membership of the cartel (see point 60 of the contested decision). Even if the fact were disregarded that the Commission's argument concerns the alleged effects of membership of the cartel only on part of the Community market apart from Germany, it must be observed that the Spanish producer Coposa, likewise a member of Kali-Export, markets independently in France a quantity of potash corresponding to slightly over 5% of French consumption. That quantity accounts for about 47% of Coposa's exports to the market in question as well as two-thirds of its exports to France, and was indeed also considered significant in the context of the definition of the relevant geographical market (see point 38 of the contested decision). In those circumstances, it would appear that the Commission has not established to the necessary legal standard the existence of a causal link between K+S and SCPA's membership of the export cartel and their anticompetitive behaviour on the relevant market.

229 As regards the alleged links between K+S and SCPA relating to supplies by K+S in France, the Commission required K+S to terminate its existing cooperation with SCPA as associated distributor on the French market, and accepted that K+S could conclude sales contracts with SCPA in normal market conditions (see point 63 of the contested decision). The Commission accordingly considered that there was a partnership between K+S and SCPA for the distribution of German potash in France.

230 It appears from the documents in the case that the only specific distribution links between those two undertakings related to kieserite, that is to say, a product not

forming part of the relevant product market. Apart from that, SCPA merely bought from K+S, on normal market conditions, potash used by EMC or intended for sale outside the French market.

231 It is thus apparent that K+S and SCPA did not have a privileged relationship for the distribution of potash-based products.

232 It follows from the foregoing that the cluster of structural links between K+S and SCPA, which, as the Commission itself concedes, constitutes the core of the contested decision, is not in the end as tight or as conclusive as the Commission sought to make out.

233 It should be noted, moreover, that the Commission stated in the contested decision that there was no effective competition between K+S and SCPA on the relevant market. According to point 57 of the contested decision, 'the main reason for assuming an absence of real competition between K+S and SCPA is the existence of exceptionally close links between the two companies extending over a long period of time'.

234 It also follows from point 57 of the contested decision that the acquisition of MdK by K+S following the concentration would involve the addition of MdK's market share to K+S, an addition which the Commission described in its observations as substantial.

235 On this point, it should be noted that in addition to its market share of 7% in the Community apart from Germany, MdK, although operating its plants at only 50% of capacity, is the second largest potash producer in the Community, after K+S (see points 51, 52, 62 and 76 of the contested decision).

236 The effect of the concentration would thus be considerably to strengthen K+S's industrial capacity. K+S and MdK account for 35% and 25% respectively of total potash production in the Community, while SCPA levels off at 20% and its own potash reserves will be completely exhausted by 2004 (see points 51 and 66 of the contested decision).

237 In addition, the documents in the case show that K+S is a subsidiary of one of the leading fertiliser processors, BASF, whose economic power is much greater than that of the EMC group to which SCPA belongs.

238 Finally, it is common ground that demand for potash fell by nearly 30% in Europe from 1988 to 1993, particularly as a result of changes to the common agricultural policy. A falling market is generally considered to promote, in principle, competition between the undertakings in the sector concerned.

239 In those circumstances, and bearing in mind that the structural links between K+S and SCPA have been shown to be less substantial than alleged by the Commission, the argument underlying the finding of a collective dominant position between K+S/MdK and SCPA, namely that the 'substantial' addition of MdK to K+S alone would preserve a common interest on the part of the German group and SCPA in not actively competing with each other, does not appear to be sufficiently well founded in the absence of other decisive factors.

240 With regard to the other evidence adduced by the Commission in support of its conclusion that the acquisition of MdK by K+S would lead to the creation of a collective dominant position, reference must be made to point 57 of the contested decision, according to which: 'The potash market is a mature commodity market characterised by a largely homogeneous product and the lack of technological innovation. The market circumstances are very transparent, information on production, demand, trade and prices being generally available in the industry. In addition, the market shares of K+S and SCPA have been stable over the last four years ... Finally, in the past there was an agreement between K+S and SCPA relating *inter alia* to the joint determination of the quantities and qualities of potash products exported by each party. That agreement was declared incompatible with Article 85 of the EEC Treaty ... In this context, it should, however, be noted that, subsequent to this decision and despite over-production in Germany, there is still little cross-border trade from Germany into France that is not channelled through SCPA.'

241 In the present case, those facts cannot be regarded as lending decisive support to the Commission's conclusion. In particular, the agreement between K+S and SCPA, which was declared incompatible with Article 85 of the Treaty in 1973 (OJ 1973 L 217, p. 3), constitutes, in view of the lapse of time of 20 years between the declaration of incompatibility and the notification of the proposed concentration, extremely weak, indeed insignificant evidence of the absence of competition between K+S and SCPA and *a fortiori* between K+S/MdK and SCPA. The assertion by the Commission that there is still only little cross-border trade from Germany to France that is not channelled through SCPA cannot in this case corroborate the evidential value of that agreement in the way the Commission contends. First, the alleged minor cross-border trade flow nevertheless accounts for almost half of K+S's potash sales in France. Second, the Commission's analysis, in so far as it is confined exclusively to the French market, is in any event incomplete, since the relevant market is the Community market apart from Germany.

242 As regards the Commission's analysis of the degree of competitive pressure which rivals could exert on the grouping allegedly formed by K+S/MdK and SCPA, the

Commission explained in the contested decision that imports from the CIS, which in 1992 amounted to 8% of the Community market apart from Germany (including imports channelled through SCPA), appear to have declined since the anti-dumping regulation was adopted (see point 53 of the contested decision).

243 However, according to information provided by the French Government which has not been challenged by the Commission, those imports amounted in 1993 to 11% of sales within the Community.

244 In view of the fact that the German market is not easily accessible to foreign producers and that the ratio of approximately 4 to 1 between the Community market apart from Germany and the German market does not appear to have changed in the meantime, it may thus be concluded that if imports of potash from the CIS constituted 11% of sales within the Community in 1993, they must have accounted for a greater percentage of sales within the Community apart from Germany.

245 Consequently, the Commission's assertion in point 53 of the contested decision that, with reference to the Community market apart from Germany, those imports appear to have fallen, at least in part, since the anti-dumping regulation was adopted does not correspond to the true state of affairs, in that it obscures the fact that the market share of the CIS increased on the reference market.

246 Moreover, having regard to the growth in 1993 of imports from the CIS to the Community apart from Germany, the finding that the competitive pressure which those imports might exert on the K+S/MdK and SCPA grouping would be limited for reasons related to the quality of the products and the difficulty of ensuring rapid supplies delivered on time appears to be based on reasoning which is, to say

the least, inconsistent. To assess with a sufficient degree of probability the effect which a concentration might have on competition on the relevant market, it is essential to rely on a rigorous analysis of the competitors' weight.

247 With regard to Coposa, which holds a market share in the Community apart from Germany of slightly under 10%, the Commission asserted that its production capacity would be considerably reduced in the following year because of the closure of one of its mines. On this point, the French Government has observed, without being challenged by the Commission, that Coposa's present level of overcapacity is about 70%. Hence the statement that Coposa's production capacity would soon fall appreciably, without further detail, does not in itself support the argument that Coposa lacks the necessary base to maintain, let alone increase, its market share and thus exert pressure on the alleged duopoly, especially as the potash market is declining, as stated in paragraph 238 above.

248 Thus the Commission has not succeeded in showing that there is no effective competitive counterweight to the grouping allegedly formed by K+S/MdK and SCPA.

249 In the light of the foregoing, and without its being necessary to decide whether the Commission's findings in the contested decision would, in the absence of the flaws described above, provide a sufficient basis for the conclusion that a collective dominant position exists, it is apparent that the Commission has not on any view established to the necessary legal standard that the concentration would give rise to a collective dominant position on the part of K+S/MdK and SCPA liable to impede significantly effective competition in the relevant market.

250 The third limb of the applicants' plea in law must therefore be upheld.

## Annulment in whole or in part

251 The French Government, in its pleadings, seeks the annulment of the contested decision in its entirety, whereas the applicant companies expressly limit their application for annulment to the conditions attached to the declaration of compatibility in that decision.

252 According to the applicant companies, partial annulment would leave intact the core of the contested decision, which would simply become unconditional.

253 The Commission submits that the conditions attached to the contested decision cannot be the subject of limitation, since they form part of the very substance of the decision.

254 It must be observed that the section of the operative part declaring the concentration to be compatible with the common market is favourable to the interests of the undertakings formally concerned by the contested decision and has not been regarded by the applicant companies as adversely affecting them.

255 As to the French Government, although in its pleadings it sought annulment of the decision in its entirety, it explained during the procedure before the Court that it did not seek to have the concentration between K+S and MdK prohibited.

256 It follows from the Court's case-law that partial annulment of a decision, limited solely to the conditions it imposes, is possible if those conditions may be severed

from the remainder of the decision (see, to that effect, Case 37/71 *Jamet* v *Commission* [1972] ECR 483, paragraph 11, and Case 17/74 *Transocean Marine Paint* v *Commission* [1974] ECR 1063, paragraph 21). The partial annulment of a Commission decision concerning the control of concentrations is, moreover, one of the cases expressly provided for in Article 10(5) of the Regulation.

257 However, it does not appear that annulment limited to the section of the operative part of the contested decision which relates to the conditions and obligations set out in point 63 thereof is possible without the substance of the decision being altered.

258 It follows from the decision and the documents in the case taken as a whole that those conditions and the declaration of compatibility in the operative part form an indivisible whole. The conditions are the result of a negative assessment by the Commission of the concentration as notified, and are regarded by that institution as essential if the concentration is to be declared compatible with the common market.

259 Consequently, the whole of the operative part of the contested decision must be annulled.

## Costs

260 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's

pleadings. In Case C-68/94 the Commission must therefore be ordered to pay the costs. In Case C-30/95 the Commission must likewise be ordered to pay the costs, since Société Commerciale des Potasses et de l'Azote (SCPA) and Entreprise Minière et Chimique (EMC) have essentially been successful. In accordance with the final subparagraph of Article 69(4) of the Rules of Procedure, which provides that the Court may order an intervener to bear his own costs, Kali und Salz GmbH and Kali und Salz Beteiligungs-AG are to bear their own costs.

261 Under the first subparagraph of Article 69(4) of the Rules of Procedure, Member States which intervene in the proceedings are to bear their own costs. The Governments which have intervened in the present cases must therefore be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

1. **Annuls Commission Decision 94/449/EC of 14 December 1993 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (Case No IV/M.308 — Kali + Salz/MdK/Treuhand);**

2. **In Case C-68/94, orders the Commission of the European Communities to pay the costs;**

**3. In Case C-30/95, orders the Commission of the European Communities to pay the costs, and Kali und Salz GmbH and Kali und Salz Beteiligungs-AG to bear their own costs;**

**4. Orders the Federal Republic of Germany, which intervened in Case C-68/94, and the French Republic, which intervened in Case C-30/95, to bear their own costs.**

Rodríguez Iglesias Gulmann Ragnemalm

Mancini Moitinho de Almeida Kapteyn

Murray Edward Puissochet

Hirsch Jann

Delivered in open court in Luxembourg on 31 March 1998.

R. Grass G. C. Rodríguez Iglesias

Registrar President