

COMMISSION DECISION

of 19 December 1990

relating to a proceeding under Article 85 (1) of the EEC Treaty

(IV/33.016 — Ansac)

(Only the English text is authentic)

(91/301/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal, and in particular Article 3 (1) thereof,

Having regard to the application and notification submitted by American Natural Soda Ash Corporation ('Ansac') on behalf of itself and its members on 9 December 1988 with a view of obtaining negative clearance or exemption in respect of arrangements for selling US produced soda-ash in the EEC,

Having regard to the Commission's decision on 3 July 1989 to initiate proceedings,

Having given Ansac and its member companies the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 19 (1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 ⁽²⁾,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

A. Introduction

- (1) This Decision concerns the application of Article 85 of the EEC Treaty to arrangements notified by Ansac for selling in the Community natural dense soda-ash produced in the United States by its member

companies for which Ansac has requested negative clearance or in the alternative exemption under Article 85 (3) of the Treaty.

B. The parties

- (2) Ansac is a 'Webb-Pomerene' Association — a corporation set up in accordance with the provisions of the United States Export Trade Act 1918, commonly called the Webb-Pomerene Act. The purpose of that Act is to exclude the application of the Sherman Act to United States associations engaged solely in export trade and whose activities do not restrain trade within the United States.

The Ansac membership agreement relates solely to export sales, defined as sales of soda-ash produced in the United States and its territories for export to any country other than Canada, except sales made under United States foreign aid or procurement programmes. The EEC market was excluded up to the notification and pending its outcome Ansac has not implemented the agreement with respect to that market.

Ansac in its current form dates from 1983: its membership agreement was adopted in December of that year. It was formerly known as the Soda Ash Export Association.

- (3) Ansac's members are the six United States producers of natural soda-ash:
- FMC Wyoming Corporation ('FMC'),
 - General Chemical (Soda Ash) Partners (formerly known as Allied Corporation) ('General Chemical'),
 - Kerr McGee Chemical Corporation ('KMG'),
 - Stauffer Chemical Company (a division of Rhône-Poulenc Inc., the United States affiliate of the Rhône-Poulenc Group) ('Stauffer'),

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

- Tenneco Minerals Company ('Tenneco'),
- TG Soda Ash Inc. (a wholly-owned subsidiary of Elf Aquitaine Inc., the United States affiliate of the Elf Aquitaine-Group) ('Texas gulf').

C. The product

- (4) Soda-ash (sodium carbonate — Na_2CO_3) is a white powder used principally as a raw material in glassmaking, where it accounts for approximately 60 % of manufacturing costs, and also in making detergents and paper and in metallurgy. It is produced by two distinct processes:

- in Europe soda-ash is produced from brine and limestone by the synthetic process developed by Solvay in the last century. Solvay's patents for the process have long expired;
- in the United States almost all soda-ash is of natural origin. It is produced by refining trona ore (a mixture of sodium carbonate and sodium bicarbonate), found principally in the Green River basin in Wyoming, Colorado and Utah.

Natural soda-ash offers a number of advantages over the synthetic product. Its production uses less energy and is less labour-intensive: it is therefore cheaper to produce. It is also purer, containing only 300—600 ppm of chloride, as against 3 000 ppm for synthetic soda-ash. Removing residual chloride (for example, in the course of glass manufacture) is expensive; and if it is not removed it causes environmental pollution.

Soda-ash exists in two densities, light ($0,5 \text{ g/cm}^3$) and dense ($1,0 \text{ g/cm}^3$). Either form can be produced by either process. Dense soda-ash is preferred for glassmaking and is the only form marketed by Ansac.

D. The market

1. World soda-ash capacity

- (5) World soda-ash capacity (natural and synthetic) is currently around 36 million tonnes (nominal) per annum, of which the EEC accounts for some 7,2

million tonnes. Soda-ash consumption in the EEC is currently around 5,5 million tonnes per year, worth some ECU 900 million.

- (6) The United States natural-ash producers have total nominal capacity of 9,5 million tonnes per year and a domestic market demand of some 6,2 million tonnes. They supply the whole of their home market and export the balance of production. Costs of production of natural-ash are very much lower than for the synthetic product, but the mines are located far from their principal markets and distribution costs are correspondingly high.

2. The EEC

- (7) EEC producers tend to concentrate their end user sales in those Member States where they possess production facilities. Solvay is the market leader with almost 60 % of the total market and sales in all Member States except the United Kingdom and Ireland. The other EEC producers' approximate shares are: ICI 15 %; Rhône-Poulenc 10 %; Akzo 6 %; Chemische Fabrik Kalk and Matthes & Weber 5 % each. ICI sells exclusively in the United Kingdom and Ireland where it has over 90 % of the market.

Some 65 to 70 % of soda-ash produced in the EEC is used in the manufacture of flat and hollow (container) glass. The glass industry has in recent years been the subject of a Europe-wide consolidation with large manufacturers operating on a pan-European basis and manufacturing in several Member States.

3. The United States

- (8) The United States market has since the development of natural-ash mining in the 1960s shown a substantial excess of capacity over domestic demand and a surplus of some 2,5 million tonnes is now available annually for export.

Given the over-supply and the presence of a number of producers with similar costs, the United States domestic market has been characterized by strong price competition. The product has in recent years been sold at a substantial discount off the list price of \$ 93 per short ton fob. Wyoming, ex-works prices at the end of 1989 being around \$ 73 per short ton. List prices were raised by most producers to \$ 98 per short ton with effect from 1 July 1990 and the effective price went up to around \$ 85.

- (9) The pressure to export has led the United States producers to attempt to penetrate the European and

other markets: European manufacturers view them as the major competitive threat in their home markets. At current exchange rates it is possible for United States producers to sell in the EEC at prices substantially below local list prices without dumping. Natural soda-ash began to appear in the EEC in the late 1970s, principally in the United Kingdom. In 1982 United States imports into the EEC amounted to some 100 000 tonnes, almost 80 000 tonnes in the United Kingdom. The European industry successfully applied for anti-dumping protection against these imports in 1982.

- (10) The most recent measures granting anti-dumping protection against United States dense-ash involved:

- (a) for the two producers then in the market — Allied (now General Chemical) and Texas Gulf — minimum-price undertakings of £ 112,26 per tonne ex-store ⁽¹⁾;
- (b) for those producers not in the market — Tenneco, KMG, FMC and Stauffer — a definitive anti-dumping duty of ECU 67,49 per tonne ⁽²⁾.

The price undertakings accepted by the Commission provided for conversion into other currencies at the exchange rates then prevailing: the changes in parities since 1984 meant that the undertaking price for Germany, France and other markets was substantially above the market price so that sales outside the United Kingdom were no longer commercially feasible under the undertakings.

- (11) Texas Gulf suffered a loss in volume and withdrew from the United Kingdom in 1985, leaving General Chemical in the market (with sales of only some 30 000 tonnes per year).

[. . .] ⁽³⁾ Texas Gulf has also sold some tonnage in Belgium. In both cases the imports have been made free of anti-dumping duties under the inward processing regime ⁽⁴⁾.

- (12) A number of large EEC customers in the glass sector have already indicated their intention to place a

substantial percentage of their business with United States producers. So far however a total of only about 40 000 tonnes of United States soda-ash has been supplied in continental western Europe (CWE), almost all of it under inward processing rules.

The anti-dumping measures provided for by Council Regulation No 3337/84 expired in November 1989. A review of the measures had been requested by certain United States producers and by representatives of the EEC glassmaking industry in 1988. On 7 September 1990 the review was terminated without the imposition of protective measures by Commission Decision 90/507/EEC ⁽⁵⁾.

The Commission has in parallel with this Decision adopted Decisions finding that European soda-ash producers have infringed Articles 85 and 86 of the EEC Treaty ⁽⁶⁾.

E. The Ansac agreement

- (13) Under the membership agreement of 8 December 1983, the members agree that all export sales by them or by any subsidiary will be made through Ansac, with the exception of sales or deliveries to companies in which a member owns 20 % or more of the shares. Ansac's Board of Directors is empowered to ensure that each member receives a fair share of total tonnage shipped, to determine price policies and to exclude particular sales or territories from Ansac procedures; each member is responsible for providing a minimum share of estimated export needs. Ansac has an autonomous management and absolute authority to decide what to ship, to whom and at what price. However, a board resolution provides that if Ansac should begin operations in the EEC, General Chemical would be allocated its present (United Kingdom) tonnage in addition to its entitlement under the Ansac rules. The intention of Ansac as outlined in the notification is to enter the EEC market as a second supplier to glass manufacturers, as they would be unwilling to jeopardize relations with their main suppliers.

F. Ansac's submissions

- (14) Ansac maintained that, because of the rigidity of the EEC soda-ash market, only a new entrant could

⁽¹⁾ Commission Regulation (EEC) No 2253/84 of 31 July 1984 (OJ No L 206, 2. 8. 1984, p. 15).

⁽²⁾ Council Regulation (EEC) No 3337 of 27 November 1984 (OJ No L 311, 29. 11. 1984, p. 26).

⁽³⁾ In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

⁽⁴⁾ Council Regulation (EEC) No 1999/85 of 16 July 1985 (OJ No L 188, 20. 7. 1985, p. 1).

⁽⁵⁾ OJ No L 283, 16. 10. 1990, p. 38.

⁽⁶⁾ See pages 1, 16, 21 and 40 of this Official Journal.

create genuine competition; and that only Ansac, representing the whole of the United States natural soda-ash industry, had the necessary economic power to achieve a significant share of the market. Two of Ansac's members (General Chemical and Texas Gulf) had set up their own distribution facilities in the United Kingdom: Texas Gulf had been obliged to withdraw, and General Chemical maintained a presence only at the request of its large customers, which were prepared to pay a higher price for an alternative source of supply.

Ansac claimed that Article 85 (1) did not apply: here, the aim of its proposed market entry was pro-competitive, and the judgments of the Court of Justice in *Metro* ⁽¹⁾ and *Remia* ⁽²⁾ were examples of a wider principle, that:

'if the end is good, the means (within limits) cannot be regarded as restrictive.'

Such restrictions as the arrangements contained were ancillary to Ansac's overall, pro-competitive, aim. Moreover, Ansac was not a 'cartel' but a dedicated sales organization with 26 staff members.

(15) If Article 85 (1) was found to apply, Ansac argued that exemption under Article 85 (3) was justified:

1. Natural soda-ash being lower in chloride was environmentally superior and thus contributed to an improvement in the production of goods and to the promotion of technical progress.
2. The economies of scale achievable only by Ansac were necessary in view of the high overhead costs involved in setting up distribution facilities in the EEC and would thus lead to an improvement in the distribution of goods.
3. Ansac would, by helping to change the oligopolistic structure of the EEC market, promote economic progress.
4. Consumers would benefit from:
 - (a) the avoidance of the duplication of costs which would have been incurred had Ansac's member companies decide to enter the market separately;
 - (b) the lower prices which Ansac would need to offer;
 - (c) the existence of a credible competitive source of supply;

(d) the environmental superiority of natural soda-ash;

(e) the improved security offered by Ansac rather than its member companies acting separately.

5. The restrictions were indispensable and did not enable the parties to eliminate competition in respect of a substantial part of the soda-ash market. According to Ansac competition in the EEC market could be achieved only by allowing United States producers to combine.

(16) During the oral hearing Ansac's President demonstrated how, calculating back from a price ex-warehouse of \$ 165 per tonne, Ansac could show a higher cif value than an individual United States producer (\$ 143 as against \$ 138) and a higher price ex-works (\$ 86 as against \$ 70), giving Ansac a 'safety margin' of \$ 16 per tonne for anti-dumping purposes.

An economic expert called by Ansac sought to show by reference to a theoretical model that Ansac's entry would lead to an overall decrease in soda-ash prices for the glass industry. He made it clear, however, that his model was based on the assumption that Ansac would enter the market with sales comparable to those of the leading Community producers.

Another expert who had undertaken market research for Ansac stated however that the initial market share available to a new entrant would be only of the order of 5 %, or 200 000 tonnes.

(17) Representatives of the glass industry stated that they wished to have a reliable second source of supply, because limited storage facilities at glassworks made regular deliveries essential, and that United States natural soda-ash, because of its purity, offered considerable advantages over other alternative sources. They made it clear, however, that the industry had no particular preference for Ansac over other possible suppliers, including its member companies, provided that price, quality and security of supply could be guaranteed.

(18) Following the hearing a number of further submissions were made to the Commission on Ansac's behalf. It was argued that an exemption for a limited period (two years) would allow Ansac to demonstrate that its behaviour in the market would have a beneficial effect on competition.

It was also claimed that the ending of the Commission's anti-dumping review without a finding

⁽¹⁾ Case 26/76: (1977) ECR 1875.

⁽²⁾ Case 42/84: (1985) ECR 2545.

of injury created a situation in which only Ansac, and not its members acting individually, could market United States soda-ash in the EEC without running the risk of a finding of dumping injury by the Commission: economies of scale would allow Ansac to show a higher nominal ex-works price than its members selling individually.

II. LEGAL ASSESSMENT

A. Article 85 (1)

- (19) The Ansac membership agreement is an agreement between undertakings of the kind envisaged in Article 85 (1). Any decisions or resolutions made by Ansac's Board of Directors under the agreement are decisions of an association of undertakings within the meaning of that Article.

The agreement has as its object and likely effect a restriction of competition within the common market with respect to prices and quantities. The agreement obliges the members to sell soda-ash for export exclusively through Ansac and prevents them from selling individually, with the exception of sales or deliveries to associated companies. The overall size of the United States producers, their low production costs (compensating largely for higher transport costs) and the fact that some of them have sold regularly on an individual basis show however that they could compete effectively among themselves and with the European producers. Their past sales activities show that they have, on their own initiative, been capable of overcoming storage and transport problems and assuring regular supplies to their customers. They are therefore capable of acting independently within the common market.

- (20) The object and effect of the Ansac arrangements is that customers are confronted with a single supplier of natural soda-ash applying uniform prices and conditions. Ansac's members are entitled to a fair share of the sales allocated to them. The fact that one member — General Chemical — has been allocated an additional tonnage equivalent to its current annual deliveries to the United Kingdom demonstrates that Ansac is bound to respect the contractual rights of its members and to assure coordination between them. The Commission therefore does not accept the argument that Ansac enjoys an autonomous structure

and organization such as to exclude any anti-competitive cooperation. The fact that Ansac is set up as a separate corporation in order to function as a single selling agent for all United States producers, rather than to coordinate the activities of its members, is not relevant to an assessment under Article 85 (1). Ansac as a joint sales organization must therefore be seen as the vehicle for eliminating competition between its members.

- (21) Moreover, the Commission does not accept the argument that the restrictions are needed to allow a strong and credible new entrant to open up the structure of the market in the EEC:

1. It does not follow from the limited success of attempts to enter the market by General Chemical and TG Soda Ash that Ansac's proposals fall outside the scope of Article 85 (1) as being the only way to achieve increased competition. The Commission found in *Floral* ⁽¹⁾ that the parties in that case had failed to demonstrate the need for their collaborative arrangements. In *Woodpulp* ⁽²⁾ the Commission found that the members of the Pulp, Paper and Paperboard Export Association (KEA) — like Ansac a Webb-Pomerene association — had refrained from pursuing independent pricing policies in the EEC, thereby restricting competition between themselves. Ansac's proposed role in the present case is more active than that of the KEA in *Woodpulp*.
2. Ansac has stated that it expects to gain only a very limited share of the market — 200 000 tonnes, an amount which, although important to the competitive structure of the market as a second source of supply, could easily be supplied by one or two of its members.

- (22) If Ansac enters the EEC soda-ash market on the terms set out in the notification there will be only one new operator on the market. Trade within the Community will necessarily be conducted on different terms from those which would prevail if all or any of Ansac's members were to enter the market individually. The notified arrangements are thus liable to affect trade between Member States.

B. Article 85 (3)

- (23) The notified arrangements will not contribute to improving production or promoting technical

⁽¹⁾ OJ No L 39, 15. 2. 1980, p. 51.

⁽²⁾ OJ No L 85, 26. 3. 1985, p. 1.

progress. The Commission does not dispute the environmental arguments in favour of the use of natural, rather than synthetic, soda-ash. Those arguments have no bearing, however, on the marketing of the product, with which alone Ansac's proposals are concerned. Ansac's environmental argument in any case presupposes that it is the only vehicle by which natural soda-ash could reach the Community, i.e. that if Ansac were not granted an exemption, no individual United States producers or producers would market the product in the EEC. As shown in recital (25), the Commission does not accept that this would be the case. Further, as Ansac's own documents show, its current marketing plans are limited to supplying only a very small percentage (around 5 %) of total demand.

(24) Ansac has also failed to demonstrate that its proposals will lead to an improvement in the distribution of soda-ash or promote economic progress in the common market. To be exempted under Article 85 (3) restrictions should bring about an objective improvement over the situation which would have existed in their absence.

(25) The Commission does not accept Ansac's contention that its entry would enhance competition and lead to the improvement of the present rigidly oligopolistic market structure. If Ansac were granted an exemption under Article 85 (3) there would be no possibility of competition between its member companies, which would be obliged to grant it exclusive sales rights in the EEC for all natural soda-ash produced by them. Ansac would thus control, and be able to restrict, the amount of United States natural soda-ash produced for, imported into and sold within the Community; and would also determine the price at which it was sold. United States producers acting independently, however, would compete amongst themselves and improve competition in the EEC soda-ash market generally. They are all large undertakings with sufficient trading experience and resources to provide their customers with a reliable source of supply. The ending of the anti-dumping review without the imposition of protective measures means that they are now free to enter the EEC market.

(26) Furthermore, the concentration of all supplies of natural soda-ash imported from the United States in the hands of a single sales agency would facilitate the opportunity for collusion with the existing suppliers. Even if there is no express collusion on pricing, Ansac's current intention is to limit its sales in the Community to a level of around 200 000 tonnes and effectively to accept the role of a permanent secondary supplier. Ansac would at this level of business be in the market as a price follower, as indeed was clear from the presentation during the oral hearing of the economics expert called by Ansac.

(27) The Ansac agreement also forecloses an important element of competition which would otherwise be available. A number of major EEC glass producers have expressed an interest in buying soda-ash directly from producers in the United States, a plan which would be impossible under Ansac's membership agreement which specifically prohibits such direct sales for export by its members.

(28) The notified arrangements cannot be said to be indispensable or to offer consumers advantages which could not have been achieved by less restrictive means. The Commission does not accept the argument that the only means by which the rigidity of the EEC market can be reduced is by permitting the United States producers to combine as Ansac. Collusive pricing or marketing arrangements between the EEC producers do not by themselves keep out competition: if they set prices above the market level, competitors outside the arrangements should in theory be able to enter more easily by underpricing the collusive price. The principal obstacles to the entry of American natural-ash into the EEC were the anti-dumping measures which have now been removed and the exclusionary rebate systems operated by Solvay and ICI which are the subject of a prohibition in decisions of 19 December 1990.

(29) The only advantages which Ansac's entry might offer consumers flow from the economies of scale achievable by shipping and storing soda-ash in much larger quantities than would be possible for any of Ansac's members acting individually.

However Ansac itself does not intend those economies of scale to be passed on to the consumer in the form of lower prices. Its own forecasts (produced during the oral hearing) show that it intends to charge slightly higher prices in the EEC than it believes would be achieved by the individual United States producers. For Ansac, the main benefit flowing from any cost savings in the form of joint shipping or storage facilities would be the possibility in any future anti-dumping proceedings of showing a higher notional ex-mine price than would be the case for individual producers. Such considerations are not however relevant under Article 85 (3).

(30) In any case, joint-selling arrangements go far beyond what might be necessary to achieve economies of scale that could be passed on to the consumer. The Commission has indicated to Ansac on numerous occasions, both before and during the present proceedings, that it would be prepared, in accordance with the provisions of its notice concerning agreements, decisions and concerted practices in the

field of cooperation between enterprises⁽¹⁾, to give favourable consideration to arrangements limited to joint storage and transport facilities. While claiming that cost savings are its main rationale, Ansac and its members have not been prepared to limit cooperation to such measures.

C. Remedies — Article 3 of Regulation No 17

- (31) Where the Commission finds that there is an infringement of Article 85, it may require the undertakings concerned to bring such infringement to an end in accordance with Article 3 of Regulation No 17.

As the Ansac membership agreement and related arrangements notified by Ansac would, if put into effect in the EEC, amount to such an infringement it is appropriate to require by Decision that they shall not be implemented,

HAS ADOPTED THIS DECISION:

Article 1

The Ansac membership agreement and related arrangements notified to the Commission by American Natural Soda Ash Corporation on 9 December 1988 constitute an infringement of Article 85 (1) of the EEC Treaty in so far as they relate to the market in the EEC.

Article 2

An exemption under Article 85 (3) of the Treaty is hereby refused.

Article 3

American Natural Soda Ash Corporation and its member companies are hereby required to refrain from implementing the notified arrangements in the EEC.

Article 4

This Decision is addressed to:

- American Natural Soda Ash Corporation,
8 Wright Street,
Westport, CT 06880,
United States of America,
- FMC Wyoming Corporation,
2000 Market Street,
Philadelphia, PA 19103,
United States of America,
- General Chemical (Soda Ash) Partners,
PO Box 393,
Parsippany, NJ 07054-0393,
United States of America,
- Kerr McGee Chemical Corporation,
PO Box 25861,
Oklahoma City, OK 73125,
United States of America,
- Stauffer Chemical Company,
One Corporate Drive,
Shelton, CT 06484,
United States of America,
- Tenneco Minerals Company,
PO Box 281300,
Lakewood, CO 80228,
United States of America,
- TG Soda Ash Inc.,
PO Box 20321,
Raleigh, NC 27622-0321,
United States of America.

Done at Brussels, 19 December 1990.

For the Commission

Leon BRITTAN
Vice-President

(1) OJ No C 75, 29. 7. 1968, p. 3 (at point II.4).