II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 20 December 1976

authorizing specialization and cooperation agreements between the following steel-producing undertakings : Eisen- und Stahlwalzwerke Rötzel GmbH, Eisenwerk-Gesellschaft Maximilianshütte mbH, Fried. Krupp Hüttenwerke AG, Klöckner-Werke AG, Siegener AG, Stahlwerke Peine-Salzgitter AG, Stahlwerke Südwestfalen AG and Theodor Wuppermann GmbH

(Only the German text is authentic)

(77/153/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 65 thereof,

Having regard to the applications made by the companies concerned on 29 June and 3 December 1976,

Whereas :

I

1. On 29 June 1976 the following steel companies (hereinafter referred to as 'the companies concerned') :

— Eisen- und Stahlwalzwerke Rötzel GmbH, Breyell (Rötzel) ;
— Eisenwerk-Gesellschaft Maximilianshütte mbH, Sulzbach (MH) ;
— Fried. Krupp Hüttenwerke AG, Bochum (FKH) ;
— Klöckner-Werke AG, Duisburg (KW) ;
— Siegener AG, Siegen (SAG) ;
— Stahlwerke Peine-Salzgitter AG, Peine (P + S) ;
— Stahlwerke Südwestfalen AG, Siegen (SSW) ;
— Theodor Wuppermann GmbH, Leverkusen (TW) ;

applied to the Commission, pursuant to Article 65 (2) of the ECSC Treaty, for authorization of agreements made in a specialization and cooperation contract ; the contract was amended and amplified on 3 December 1976.

2. The contract was concluded for the following purposes :

— assessment of the scope for specialization and cooperation offered by the wider framework provided by the participants, the ultimate aim being to improve production and competitive capacity ;
— to improve and safeguard supplies of raw materials and preliminary products ;
— to consolidate the rationalization already achieved and to adjust it to changed circumstances ;
— to enable production to be adapted to cyclical variations in demand.

3. The agreements for which authorization is requested contain *inter alia* the following provisions :

— the agreements extend to the following products, which are listed in an annex to the contract :
  — crude steel,
  — semi-finished products (including ingots and slabs),
  — permanent way material,
  — sheet piling,
  — sections,

— broad-flanged beams,
— merchant bars,
— reinforcing bars,
— special sections,
— wire rod,
— wide flats,
— wide hot-rolled strip,
— narrow strip,
— heavy and medium plates,
— sheets,
— electrical sheets,
— galvanized sheets;

— FKH, KW and P + S propose that, in line with their current production programming, they will seek all possible means of rationalization and specialization;

— MH will operate a strip galvanization facility on land belonging to P + S; P + S will supply MH with the sheets required for input into the galvanization line; MH will galvanize under contract for P + S; MH and P + S have contracted for the joint use of the shearing line in the galvanization facility;

— FKH and Rötzel have agreed that FKH will cover all Rötzel's supply requirements for its strip-rolling plant;

— P + S will supply MH with the vacuum-cast semi-finished steel products required for the manufacture of electrical sheets;

— FKH and SAG have agreed that FKH will supply SAG with the sheets required for input into SAG's galvanization line; SAG will galvanize sheets under contract for FKH, which agrees not to set up its own galvanization facility;

— FKH will supply crude steel for TW's continuous casting plant; FKH will operate the continuous casting plant for TW's account and will also supply slabs and billets under contract to TW; TW has undertaken not to set up its own electric steel foundry;

— the following companies have undertaken not to produce the products specified:

  — Rötzel will not produce merchant bars or wire rods,

  — MH will not produce wide hot-rolled strip, narrow strip, or heavy and medium plates,

  — FKH will not produce heavy plates on four-high mills or coated sheets,

  — KW will not roll broad-flanged beams or sheet piling or produce coated or electrical sheets,

  — SAG will not roll sheets,

  — P + S will not produce permanent way material, electrical sheets or coated sheets.

4. In order to attain the objectives of specialization in the various products specified above, the companies concerned agree that provision may be made for quantitative or financial compensation where substantial changes in market or technical conditions entail noticeable changes in production conditions compared with those existing at the time of the contract.

5. During any period for which the Commission lay down delivery guidelines under Article 46, allocated by undertaking, group of undertakings or combination of undertakings, the companies concerned will allocate orders and coordinate sales on the basis of the tonnages indicated by the Commission.

6. The companies concerned plan to coordinate their interests relating to the supply, carriage, handling and operation of new sources of raw materials, particularly iron ore.

7. They will also seek other ways of cooperating in relation to the supply of preliminary products, and will seek to step up rationalization and specialization in the production of products rolled by several of them.

8. They undertake to inform each other of all plans for investment in the areas of production covered by the contract. If one or more of the companies concerned so requests, the plan will be discussed with a view to ascertaining whether the investment can be carried out jointly. Their freedom of decision is not, however, thereby restricted.

9. The companies concerned have undertaken to inform each other of all matters relating to the performance of the contract and to exchange such documents as may be necessary. They are obliged to attain the objectives of the contract and to refrain from any action which may jeopardize them. They may not enter into any agreement with a third party which is inconsistent with the contract; accordingly, they will not transfer their plant to an outsider, nor use their plant for the production of any of the relevant products on behalf of an outsider unless they can do so without affecting the performance of the contract. They enter into all these undertakings likewise on behalf of all those of their respective group companies in which they hold 50 % or more of the shares.

10. If any one of the companies concerned so requests, an independent auditor may be called in to verify whether the others are complying with their obligations. If any breach is thereby ascertained, the auditor will furnish all directly relevant facts to all the companies concerned.

11. The companies concerned may set up a joint secretariat.

12. The contract is to run until 30 June 1981 ; it will be renewed automatically year by year unless terminated one year before expiration.

II

13. The agreements restrict the normal play of competition between the companies concerned since the latter :

— abandon production of certain products in favour of each other ;

— pool the use of all or part of their production facilities ;

— agree on quantitative or financial compensation in the event of substantial changes in market conditions or production techniques ;

— share out orders and coordinate sales if at times of reduced economic activity the Commission, using its powers under Article 46, indicates to them an overall delivery objective ;

— inform and may confer with each other in respect of all planned investments relating to the products covered by the contract.

14. The agreements are therefore caught by the prohibition in Article 65 (1) of the Treaty.

III

15. Under Article 65 (2) the Commission may authorize specialization agreements or joint-buying or joint-selling agreements and agreements strictly analogous in nature and effect if it finds that they satisfy all the specified conditions.

16. The agreements between the companies concerned relating to a reciprocal undertaking not to manufacture certain products, to share all or part of their production facilities and otherwise to vary their production programmes are specialization agreements or strictly analogous thereto.

17. The agreements specified in paragraph 16 may therefore be authorized under Article 65 (2) of the Treaty in so far as they make for a substantial improvement in production or distribution and are essential in order to achieve this result, without being more restrictive than is necessary for that purpose ; nor must the agreement give the undertakings concerned the power to determine the prices, or to control or restrict the production or marketing, of a substantial part of the products in question within the common market, or to shield them against effective competition from other undertakings within the common market.

IV

18. On the question whether the contract makes for a substantial improvement in the production or distribution of the relevant goods, the following points can be made.

The production programmes worked by FKH, SSW, MH, KW and P + S overlap to a large extent. But there are major differences in the age, capacity, and productivity of their production facilities.

Production specialization between these companies, through the allocation of products under the agreement to the best-equipped plant which can produce at the lowest cost, will enable their rolling mills to work at a higher proportion of capacity, thereby improving productivity.

The object of the agreement by certain companies not to undertake certain forms of production, and of the pooling of all or part of their production facilities, is to consolidate existing specialization and to ensure that unprofitable duplication of investment will not take place.

Rötzel, SAG and TW each roll a single product, either narrow strip or coated sheets.

By agreeing not to produce the preliminary products they require but to have them supplied by integrated works, they obviate the need for heavy investment which, in view of the scale of their own requirements, would not be used to optimal capacity ; secondly, their suppliers can increase use of their own facilities and thereby reduce costs.

The allocation of orders and the coordination of sales between the companies concerned, when in a period of reduced economic activity the Commission indicates to them an overall delivery objective, is designed

to allow them to share out among themselves this overall figure in a way which will secure the specialization objectives of the present agreements and, in the case of the single-product companies, to safeguard their position in the market without having to forego the pursuit of their specialization. This allocation of orders and coordination of sales in such circumstances constitutes an essential element in the specialization agreement.

19. However, the Commission must be able to verify whether the agreements will actually have these effects. The companies concerned will therefore be required to report annually to the Commission on the savings made and on the reasons for them.

20. It may accordingly be concluded that the agreements for production specialization and for allocation of orders in relation to the products covered by the agreements may make for a substantial improvement in production and distribution.

21. The said agreements are the indispensable means of attaining these objects — the improvement of production and distribution — and are no more restrictive than is necessary for that purpose. Acting individually the companies concerned could not attain this improvement, or at least the same degree of improvement.

22. The undertaking entered into by the companies concerned to inform and confer with each other on investment plans for the products covered by the agreements is unobjectionable in the context of specialization agreements, since each company remains free to take its own business decisions regardless of what the others think.

23. Under the agreement, to safeguard the objectives of specialization, the companies may give quantitative or financial compensation where major changes in market conditions or production techniques result in circumstances differing substantially from those obtaining at the time of the contract.

This is justified in that the parties cannot tell exactly how the market for each product will develop during the currency of the agreements. Where circumstances change considerably, they must be in a position to adapt the specialization agreements in respect of each product, specification, dimension and quality ; they must therefore be in a position to offset the economic implications of any such change in circumstances through quantitative or financial compensation. Such compensation is in any event simply a possibility, there being no advance obligation imposed on the partners. Compensation is therefore an indispensable component of the specialization agreement, and is no more restrictive than is necessary for its purpose.

The agreements relating to quantitative and financial compensation do not allow the companies concerned to establish a quota system ; if they did, the restriction would go beyond what was required for the specialization and rationalization objectives.

The Commission would be obliged to revoke its authorization if it found that the companies were applying quotas or that this agreement was substantially impeding rationalization. The Commission must therefore require the companies to provide regular information on the scale of the quantitative or financial compensation given.

24. The agreements therefore satisfy the tests of Article 65 (2) (a) and (b).

V

25. To ascertain whether the agreements for which authorization is requested satisfy the tests of Article 65 (2) (c), the following points must be considered.

26. FKH and SSW on the one hand and KW and MH on the other each constitute a concentration for the purpose of Article 66 (1). In 1975 they, together with the other companies concerned here, produced the quantities of the relevant products for which statistics are available set out in the table on the following page.

27. The companies concerned sell mainly in the Federal Republic of Germany. They compete with other German undertakings, other Community undertakings and undertakings in non-member countries.

28. Furthermore, these companies sell a substantial proportion of their products in other Community countries, where they face competition from local producers, producers from other Member States and producers in non-member countries.

29. In view of the close interpenetration of the domestic markets of the European Community, the Community market as a whole is to be regarded as the relevant market.

Product	Production (in 1 000 t)	Percentage share of Community production						
		Aggregate	F. Krupp and Südwestfalen	Klöckner and Maxhütte	Peine-Salzgitter	Wuppermann	Rötzel	Siegener
Crude steel	11 792	9·4	3·4	2·9	3·1	—	—	—
Wide hot-rolled strip/coils (total production)	4 138	12·5	2·9	4·5	4·8	0·3	—	—
Finished rolled products, of which :	8 675	9·7	2·5	3·4	3·1	0·6	0·1	—
— permanent way material	441	24·9	15·0	9·9	—	—	—	—
— sheet piling	102	13·9	5·0	—	8·9	—	—	—
— broad-flanged beams	185	8·7	—	—	8·7	—	—	—
— other beams	371	8·7	2·5	3·0	3·2	—	—	—
— wire rods	513	5·5	2·2	2·1	1·2	—	—	—
— merchant bars	2 022	10·2	3·1	5·2	1·9	—	—	—
Narrow strip and tube strip	892	16·3	5·3	—	0·6	8·3	2·1	—
Heavy and medium hot-rolled plates	687	5·0	0·2	0·7	4·1	—	—	—
Cold-rolled sheets	1 935	9·0	1·9	4·1	3·0	—	—	—
Final products :								
— galvanized sheets	267	9·0	—	5·4	—	—	—	3·4
— other coated sheets	10	1·4	—	—	1·4	—	—	—
— electrical sheets	40	4·6	1·7	2·9	—	—	—	—

30. No particular comment is called for on the shares accounted for by the companies concerned in the production of crude steel, broad-flanged and other beams, wire rods, heavy and medium hot-rolled plates, cold-rolled sheets and final products.

31. In the field of wide hot-rolled strip/coils, which are mainly used as a preliminary product, the companies concerned take a 12·5 % share of Community production (FKH 2·9 %, KW 4·5 %, P + S 4·8 % and TW 0·3 %). They rank fifth, behind undertakings or groups with respective shares of 15·8, 14·7, 13·2 and 13·2 %. These five undertakings account for roughly 70 % of Community output, the remainder being shared between 10 others.

32. In permanent way material production, the companies concerned account for a 24·9 % share. Five others account for respective shares of 21·5, 18·4, 10, 10 and 9 %. These six undertakings or groups, together accounting for more than 90 % of Community output, sell virtually their entire production to the railway companies.

33. With a 13·9 % share, the companies are the fifth and smallest Community producers of sheet piling. The four larger producers have respective shares of 31·6, 21, 17·9 and 15·6 %.

34. As regards merchant bars, the companies concerned, taken together have 10·2 % of production and occupy the first place among the producers of the Community. The five producers ranking behind them have respective shares of 8·9, 7·8, 7·4, 6·7 and 5 %. The 10 largest Community producers together account for more than half the total production, the remainder being accounted for by a large number of firms of all sizes.

35. As regards narrow strip and tube strip, the companies account for 16·3 % of production. Four other undertakings or groups have respective shares of 16, 14·1, 11·4 and 10·3 %. The 10 largest producers roll nearly 90 % of total output. Here it should also be mentioned that a substantial proportion of Community narrow strip and tube strip consumption is covered by products obtained from stockholders through the slitting of wide coils ; no statistics are available on this market.

36. In the interpretation of the foregoing percentages, it should be borne in mind, however, that the figures represent aggregates for all the various companies concerned. While competition between these companies is admittedly restricted by the special-

ization agreements, and even more so, in times of crisis, by the sales coordination agreements, there are many products where rolling programmes continue to overlap so that at least some degree of competition will exist in the future.

37. The Commission will keep a check to ensure that while the contract is in being the companies do not coordinate their distribution activities, either as between themselves — except at times when the system of delivery objectives set by the Commission is in operation — or with third parties.

38. In these circumstances, the agreements are not liable to give the companies concerned the power to determine the prices, or to control or restrict the production or marketing of a substantial part of finished rolled products in the common market, or to shield them against effective competition from other undertakings within the common market.

39. The agreements therefore satisfy the tests of Article 65 (2) (c).

VI

40. It is necessary to ensure that the autonomy and business independence of the companies concerned are not compromised. The following conditions should therefore be attached to the authorization :

— no member of a management body of any steel production or distribution undertaking directly or indirectly concerned may exercise a similar function in an undertaking of the same type not so concerned ; however the Commission should be empowered, in response to a duly reasoned request, to authorize exceptions to this prohibition, if special circumstances warrant this ;

— the companies concerned must refrain from coordinating their production and sales except in the areas covered by the specialization agreements and when the system of delivery objectives set by the Commission is in operation ;

— the companies concerned must refrain from coordinating their production and sales with third parties ; this will apply in particular to cooperation within associations of undertakings.

41. The Commission must further ensure that all measures taken by the companies under the agreements notified to the Commission are in conformity with the authorization given by this Decision and with the provisions of the Treaty.

42. To this end the companies concerned must be required to inform the Commission forthwith of all changes and additions to their agreements. It should be provided that such changes and additions to the agreements may not be put into effect until the Commission has declared them to be admissible or has authorized them under Article 65 (2) of the Treaty.

43. The agreements notified are valid until 30 June 1981. In view of this restricted duration and of the rationalization measures taken by the companies concerned, the authorization may be given for the full duration of the agreements.

44. Subject to the conditions attached, the agreements for which authorization has been requested are in conformity with Article 65 (2) and the other provisions of the Treaty,

HAS ADOPTED THIS DECISION :

Article 1

The agreements concluded between the following steel undertakings :

— Eisen- und Stahlwalzwerke Rötzel GmbH, Breyell ;
— Eisenwerk-Gesellschaft Maximilianshütte mbH, Sulzbach ;
— Fried. Krupp Hüttenwerke AG, Bochum ;
— Klöckner-Werke AG, Duisburg ;
— Siegener AG, Siegen ;
— Stahlwerke Peine-Salzgitter AG, Peine ;
— Stahlwerke Südwestfalen AG, Siegen ;
— Theodor Wuppermann GmbH, Leverkusen ;

for specialization and cooperation in the field of rolled steel products, contained in the contract of 29 June 1976, as amended on 3 December 1976, are hereby authorized.

Article 2

The following conditions are attached to the authorization :

1. members of management bodies in the steel production and distribution companies directly and indirectly concerned may not at the same time exercise similar functions in companies or sales organizations of the same type which are not so concerned ;

2. where special circumstances so warrant, the Commission may on receipt of a reasoned request authorize derogations from paragraph 1 ;

3. the companies concerned shall refrain from coordinating their production and sales except in areas covered by the specialization agreements and when the system of delivery objectives set by the Commission is in operation ;

4. the companies concerned shall refrain from entering into any agreement relating to production and sales with third parties, particularly within associations of undertakings.

Article 3

Each year the companies concerned shall provide the Commission within information on and reasons for :

— improvements made during the year in the sale and production of the relevant products by virtue of the agreements ; and

— the amount of any quantitative or financial compensation.

Article 4

1. The companies concerned shall forthwith inform the Commission of any changes and additions made to the agreements.

2. Effect shall not be given to changes and additions as referred to in paragraph 1 until the Commission has declared that they are in conformity with the authorization given by this Decision or has authorized them under Article 65 (2).

Article 5

This Decision shall have effect from 1 January 1977 to 30 June 1981.

Article 6

This Decision is addressed to the companies listed in Article 1.

Done at Brussels, 20 December 1976.

For the Commission

The President

François-Xavier ORTOLI