II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 8 February 1980

relating to a proceeding under Article 65 of the ECSC Treaty in respect of a price-fixing system for the sale of rolled steel products ex stock by stockholders on the German market

(Only the German text is authentic)

(80/257/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 result of inspections carried out pursuant to Article 47 of the Treaty,

Having heard the trade association concerned pursuant to Article 36 of the Treaty,

Whereas :

The Commission carried out checks pursuant to Article 47 of the ECSC Treaty at the Bundesverband Deutscher Stahlhandel (BDS) Düsseldorf, and 21 German steel stockholders between 4 December 1972 and 18 May 1973. The inquiries were undertaken in order to shed light on the activity of BDS, in particular its part in preparing certain 'net ex-stock price lists', and to scrutinize the way in which prices were arrived at by BDS and the stockholders in the light of Article 65 of the ECSC Treaty. It became clear that ex-stock price lists for the entire Federal Republic had been calculated on a uniform basis with the assistance of BDS and then distributed to dealers and consumers, thus helping to fix the ex-stock selling price of rolled steel products at a predetermined level.

By its letter of 31 October 1975 the Commission informed BDS that it regarded this behaviour as an infringement of Article 65 and, pursuant to Article 36 (1) of the Treaty, gave the association the opportunity to submit its comments. BDS submitted written comments in a letter of 9 February 1976 and oral comments at a hearing on 7 October 1976. Up to this point the Commission's proceeding was concerned primarily with measures which the BDS adopted and put into effect from 1970 to 1972 for the purpose of stabilizing prices by means of 'ex-stock price lists'.

Nevertheless, the Commission has been able in the course of the proceeding to establish that BDS currently takes an active part in the price formation of its members by working out model calculations and circulating price lists. By letter of 19 November 1976, as requested by the Commission, BDS submitted details of the policy which it pursues in that field.

Accordingly, the Commission has decided to bring these activities within the same proceeding. With its letter of 30 January 1979 it gave BDS a further opportunity to submit its comments ; these were submitted by letter of 25 May 1979.

I. THE FACTS

1. With over 1 100 members, BDS represents virtually the entire German steel stockholding trade. This

number includes approximately 450 companies not solely concerned with steel, whose ex-stock sales of rolled products amount to fewer than 1 000 tonnes a year. The 25 largest stockholders account for two-thirds of the total volume of ex-stock sales.

In 1977 20·1 million tonnes of rolled steel products were supplied on the German market; 12·8 million tonnes were produced in Germany and 7·3 million tonnes were imported, 4·6 million tonnes of this from the other (eight) Community countries.

Ex-stock sales accounted for 8·9 million tonnes. A total of 2·5 million tonnes of this was supplied to other dealers and 6·2 million tonnes to steel-using industries. Ex-stock sales thus covered approximately 31 % of German market requirements. The remainder was supplied by steelworks direct to steel-users, or via what are called direct transactions (Streckengeschäfte) where a dealer acts as intermediary but the producer in fact delivers the goods directly to the user. Sections, merchant bars, concrete reinforcing bars, broad flanged beams and heavy plates accounted for some 82 % of ex-stock sales.

BDS is a highly organized body. Its corporate structure consists of: regional and members' meetings, a management board, a board of directors and an executive board. The management board can call on the services of six advisory committees (one for each group of products) and six general committees (dealing with various questions such as market research, statistics and sales, tax problems and law and competition). BDS's day-to-day activity is handled by its head office and the eight regional offices. BDS also has its own distribution company which, amongst other things, is responsible for printing the individual price lists for the member undertakings.

A. The ex-stock price lists (NSP lists) at the time of the investigation

The Commission's investigations were concerned chiefly with the 'net ex-stock price lists for rolled steel products' (NSP lists) and their effect on pricing on the German steel market.

2. These NSP lists varied according to type of product (flat products and long products) and area (seven areas divided according to freight charges). The calculations for the ex-stock prices were based on producer prices, i.e. the German steel producers' published list prices (basic prices excluding any temporary discount). BDS worked on the assumption that producer prices were uniform, due allowance being made for the various basing points (Oberhausen, Essen, Siegen and Saarbrücken) specified in the works' price lists. Included in the May 1972 edition of the NSP lists were extra charges for small quantities, freight charges up to and beyond first destination, overheads (27·5 % inclusive of 5 % profit) and a discount margin of DM 60 per tonne. The executive board of BDS stated that BDS had helped in calculating these price lists, which were intended for dealers and users alike and were based on the varying ex-works prices charged by any one of a number of large distributors active over several regions. According to BDS, these were non-compulsory guide prices for ex-stock sales and were intended merely to improve market transparency.

3. The investigation revealed, however, that BDS had in fact been responsible for preparing and publishing the May 1972 edition of the price lists. The committee on market research, statistics and sales had met several times to discuss the subject, and had agreed on detailed guidelines for price increases and changes in pricing methods 'with a view to reflecting recent cost increases in the ex-stock price lists and progressively unifying the calculation system for the whole of the Federal Republic' (from a file note on the meeting of the BDS committee on market research, statistics and sales, held on 8 March 1972 in Düsseldorf, and a BDS circular dated (in manuscript) 10 March 1972 and appended to the minutes).

4. The management board also received regular reports on the preparation of the price lists, and was informed of 'the calculation scheme of an inter-regional dealer supplying industrial users'. The scheme included such items as 'differentiation according to rate of turnover of prices charged by works for small deliveries; overall costs increase of 27·5 %; new freight rates; three price categories for quantities of up to 100 kg, 101 to 500 kg and over 500 kg; cutting charges more closely related to costs for merchant bars, sections and broad flanged beams, each listed separately; weights per metre for merchant bars'. The board was also kept informed of 'events subsequent to publication of the ex-stock prices by member companies' (Minutes of the management board meeting held on 18 April 1972).

5. The 'inter-regional' dealer in question, Carl Spaeter GmbH, Duisburg, which at that time arranged for the printing of the new price lists, stated that it had taken no part in calculating the prices. However, it was in regular correspondence with BDS and its

distribution company concerning publication of the lists, and agreed with BDS to inform its competitors of the new prices and/or send them copies of the lists on request (letters of 21 March and 4 May 1972 to BDS, and letter of 28 March 1972 to BDS's distribution company, copied to BDS).

6. The printing and distribution of the NSP lists were undertaken by the BDS distribution company based in Bochum, and (for the northern region) by Druckerei Ebeling, Hamburg. BDS informed its members by circular of the publication of the new lists, generally notifying them of the changes they contained. The BDS members kept standing orders with the distribution company for new issues. According to the company, in the case of the May 1972 edition dealers and steel users were circularized with a total of 117 000 NSP lists for long products, and 70 000 for flat products.

7. According to the firms in question the NSP lists were not binding and merely served as a basis for freely negotiated ex-stock prices. Research has revealed that between April/May 1972 and February/March 1973 dealers rarely set their prices as high as the list prices. The list prices did, however, normally indicate the basic price, with discounts of different values being offered by dealers according to the business situation and sales structure. When the market improved in March 1973 and the following months, discounts tended towards a greater similarity.

8. Furthermore, BDS pressed hard for uniform pricing, based on the NSP lists. It attempted actively to 'stabilize' prices, especially when trade was depressed. To this end BDS encouraged dealers to negotiate regional price and discount agreements, as can be seen from numerous records and circulars produced by the association in 1971 and 1972.

The regional boards reported that following recommendations made by the board of directors on 1 and 11 June 'all the regions held discussions with a view to halting the drop in prices. The management board considers that our efforts should continue with talks at regional level and with correspondence through BDS'.

It was stressed that recommendations to stockholders to follow the published regional prices should be observed for all transactions (see the item 'Market situation of individual product groups' from the BDS management board meeting of 7 July 1970).

On 11 June 1970 the board of directors exhorted a number of important stockholders to 'lend their active support to these measures, which are designed to stabilize the market'. At the same time regional and interregional discussions between BDS members were being held in the various areas to 'obtain transparency in pricing behaviour and in anticipation of individual companies actually behaving in accordance with their own expressed intentions' (BDS circular 'Marktinformation', 16 July 1970).

At management board meetings on 2 December 1970 and 27 January 1971 members representing the areas reported that 'efforts to stabilize ex-stock prices, made on the initiative of producer-linked stockholding companies, have resulted in an improvement of the price situation at regional level' and should be continued, along with the exchange of market information.

Finally, it was agreed at a BDS meeting on 9 September 1971, in the course of a discussion on ways of improving stockholders' profits, that 'the only possible or practicable approach to this problem, particularly when cost factors are taken into account, is at regional level. Stockholders should resume talks at district or regional level with a view to publishing maximum discount rates (firms have already commenced these discussions).'

9. An investigation necessarily confined to a few areas also revealed that discussions or meetings were held from 1970 to 1972 in the Mannheim/Ludwigshafen, Frankfurt, Saarbrücken and Stuttgart areas, nearly always with the same stockholding firms or individuals present. The initiative for these meetings came partly from BDS itself and partly from its members, chiefly the regional spokesmen, and the meetings were as a rule arranged with the assistance of BDS. The main objective was to agree on minimum prices or maximum discounts on NSP list prices for ex-stock sales of rolled steel products. It was agreed that the absolute limit would correspond to the list prices of the producers' group sales organizations ('Kontore') or of the works.

The minimum prices were fixed above market levels. On some occasions participants at the meetings, particularly independent merchants, referred to these prices as unrealistic', and in a period of recession they were regularly undercut. Attempts were made to enforce the new minima, particularly by the producers' own stockholding companies, which are required by the works or parent companies not to undercut works prices. In the Mannheim/Ludwigshafen area, producer-owned stockholders protested at the independent stockholders' attempt to set minimum prices at a more realistic level.

10. It was also discovered that BDS had sent its members a number of circulars entitled 'Marktbeobachtungen/Marktinformationen', which amounted in practice to publication of the minimum prices worked out or adopted in the various areas. But the publication or market information revealing undercutting of producers' list prices was forbidden by BDS as 'clearly detrimental to the stabilization of market price levels'.

B. The extent of BDS's current involvement in the price formation of its members

BDS's current policy on price formation consists of informing its members of new producer prices, providing its own experts to produce model calculations for its member companies and circularizing its members with price lists drawn up by individual dealers. The following description is based on information provided by those concerned.

(i) *Information on producer price changes*

11. Steel producers prepare lists showing the current prices of their products. These works price lists form a basis for the conduct of business between the producer and the direct stockholders, as well as works-to-customer deliveries arranged between these stockholders and smaller stockholders that cannot purchase direct. The works' price lists also form a basis for the calculation of ex-stock price lists.

According to the German works' price lists only those stockholders that are able to buy a certain tonnage of each product annually in the common market are recognized as 'direct stockholders'. There are currently about 110 or 120 stockholders, including subsidiaries, that are in a position to buy all their rolled finished products direct from the producers; some 90 or 100 firms are direct stockholders for certain products only.

In the event of a change in works prices the producer normally sends the new price list only to the small number of stockholders with whom he deals direct. However, since the importance of these works price lists means that other stockholders too need to receive copies without delay, BDS has made a practice of supplying the necessary information.

When there is any change in the extras included in the producer price lists, the BDS distribution company has copies printed and sent out on request to interested steel merchants. BDS informs its members in its monthly information bulletin of any change in basic prices.

(ii) *The role of BDS in the compilation of model calculations*

12. Ex-stock price lists are calculated on the basis of the works price lists. BDS has maintained that, in view of the large number of rolled steel products, the variations in dimensions and qualities, the subclassification to take account of extras and discounts and the gradation of ex-stock prices according to freight zones, any change in producer prices requires a complex and expensive recalculation. The main difficulty, it says, is that stockholders' costs consist largely of overheads, which in each case have to be related to the contract weight before the ex-stock price can be worked out; this is the only way to be sure of avoiding error and losses. This complex costing process apparently means that only major merchants with their superior technical and staff resources can perform the calculations made necessary by each change in producer prices; firms with a smaller turnover are ill-equipped to handle changes in producer price lists and their implications for the calculations.

BDS maintains that it is for this reason that it has been involved in the preparation of model calculations for several years.

There are points of difference between the stock model calculations produced since 1972, but all those examined have certain elements in common. Model calculation No 7 of 5 November 1974 deals with 'free ex-stock prices', calculated on the basis of an 'effective component price' (i.e. the basic price inclusive of quality extra). The ex-stock price for long products and flat products (subdivided in some cases into product groups) here includes, *inter alia*:

— an extra for small quantities, based on average reference figures; this is expressed in DM/t units and graded into four 'turnover frequency groups',

— a similarly graded 'works dimensional extra', also varying according to turnover rate,

and similarly for all products :

— 'contract/overhead costs' calculated on lots of 1 000 kg for contract weights of : more than 500 kg, 101 to 500 kg (average 300 kg), 100 kg and below,

— a profit margin of 5 % of the total cost components.

The product surcharge rates included in the calculation of the ex-stock prices took account of an analysis by the BDS of turnover frequency.

According to BDS, familiarity with costing parameters has developed only in the last few years and is restricted to a small number of companies. Model calculations are therefore worked out nowadays by individual stockholders, with BDS experts available to give assistance if required. If works' prices alter and a company is obliged to modify its NSP list prices, it will use the model to calculate the new selling prices.

(iii) *Information about revised ex-stock price lists and their dissemination*

13. As a rule, stockholders have their new NSP lists printed by the BDS distribution company. Since small stockholders, for the reasons described above, have an interest in learning as soon as possible of the larger stockholding companies' new price calculations, the distribution company treats these new calculations in the same way as new works price lists.

Once it has printed a major dealers' newly calculated stock price list, the distribution company advises BDS's members and obtains the consent of the originating company to distribution of the lists to other major dealers.

Conditional on this consent the distribution company then sends copies of the new list to other dealers. They can decide to adopt the new calculations in whole, in part or not at all.

As regards the scope and importance of ex-stock price lists, BDS has stated that they are used directly for medium-sized orders (approximately 100 to 500 kg), which account for a large percentage by number but only a small proportion by volume of all ex-stock sales, and that the NSP basic prices are in any case normally modified by negotiated discounts. It adds that for other size categories the NSP lists are used simply as a guide — for sales involving large quantities (e.g. over 5 000 kg) prices are negotiated per thousand kilograms for sales under 100 kg, per kilogram.

14. In its written and oral comments BDS has agreed that the Commission's findings, as set out above, are substantially accurate. It does, however, take issue with the conclusion that it has infringed the ECSC competition rules. Its argument can be summarized as follows : its system of price formation takes account of actual circumstances on the steel market. It helps chiefly to stabilize the market in times of recession — an aim actively pursued by the Community institutions themselves. Its compatibility with the Treaty is further supported by the fact that it furthers market transparency. It offers steel distributing undertakings a chance of publicizing their prices similar to that available to steel producers under Article 60 (2).

II. APPLICABILITY OF ARTICLE 65 (1)

15. Article 65 (1) of the ECSC Treaty reads : 'All agreements between undertakings, decisions by associations of undertakings and concerted practices tending directly or indirectly to prevent, restrict or distort normal competition within the common market shall be prohibited . . .'.

The effect of this provision is not restricted to such formal decisions as are taken in accordance with the procedure laid down in the association's constitution, in conformity with its objects as defined in that constitution, and are legally binding on all its members. If a decision by an association aims at or even only tends towards determining or influencing its members' competitive behaviour it is caught by Article 65 (1), regardless of whether the decision is binding or simply a recommendation. The actual conduct of an association of undertakings, its bodies or its subsidiary organs is the same thing as a 'decision' for the purposes of Article 65 (1), since it must be assumed that the association does not act without the express or tacit approval of its members. If such actions tend in themselves to restrict or distort competition they are automatically caught by the prohibition.

This interpretation is fully in accordance with the letter, the spirit and the purpose of Article 65, which is generally to prohibit all agreements, decisions and practices tending to prevent, restrict or distort normal competition. By the same token it applies to associations to the extent that their own activity or that of their member undertakings tends to produce the effects which the Article seeks to prevent. This is confirmed by a reading of Article 48, which allows associations to engage in any activity not contrary to the provisions of the Treaty [1].

16. As an association of undertakings, BDS is subject to the provisions of Article 65 since its members are undertakings covered by Article 80.

A. Restrictions resulting from the ex-stock price lists (NSP lists) at the time of the investigation

17. Between 1970 and 1972 BDS continually acted in infringement of Article 65 (1) by arranging the compilation and distribution amongst its members of 'net ex-stock price lists' for sales of rolled steel products (see I. A).

It is clear from their contents alone that these NSP lists were apt to restrict competition since the dealers' price they contained were all based on a uniform system of calculations. Not only were these prices based on standardized producer prices, but the other price components, such as freight charges up to and beyond first destination, dealers' overheads, extra charges for small quantities and profits, were included in detail. The only differences were between groups of products and distribution zones, and the NSP lists themselves defined the relevant products and zones in their own terms, as well as the special rates applicable to each. In addition, the lists indicated a uniform discount margin. The distribution of this type of net price list to members of the association inevitably encouraged them to adopt a uniform pricing method and, by extension, a uniform pricing policy, which entirely ignored the situation of each individual steel stockholder, especially his own particular structure and competitive position.

18. BDS has declared, and has demonstrated by its behaviour, that it consciously intended to achieve this result. BDS itself has remarked that the prime purpose of the NSP lists was to help stabilize prices on the German steel market; it was therefore not designed to help small and medium-sized member undertakings to work out their own individual calculations and set their own individual selling prices. The fact that new NSP lists were drawn up and distributed whenever ex-works prices altered is a clear indication that BDS introduced the lists to weaken competition in prices.

The logic of this conclusion is further indicated by the practical steps taken by BDS to push up stockholders' profits generally. These include repeated attempts to introduce agreements on prices and discounts at regional level, to prevent undercutting of ex-works prices by laying down minimum prices or maximum discounts and to suppress market information revealing undercutting of minimum prices., These moves were designed to standardize members' behaviour on the market, even in those areas in which the NSP lists allowed the undertakings a certain degree of individual room for manœuvre in setting their own prices and discounts.

19. For the purpose of Article 65 (1) it is immaterial whether and to what extent BDS's ideas were accepted by its member undertakings. The line is crossed as soon as the steps taken by an association are objectively found to be apt to restrict competition between its members. This is evidently the case, for the reasons set out above. However, according to the Commission's findings, BDS did actually succeed in restricting competition, if only partially. The selling prices given in the NSP lists were regularly recognized by dealers as basic prices, on which they subsequently gave their own discounts. Thus, whilst the BDS system may not have totally suppressed price competition between German steel stockholders between 1970 and 1972, it nevertheless weakened it.

B. Restrictions resulting from BDS's current involvement in the price formation of its members

20. BDS's involvement in price formation since 1973 is likewise incompatible with Article 65 (1) of the Treaty, since it has been directed towards standardizing the prices charged by its members for ex-stock sales, and thus towards setting the balance of prices at a level differing from that which would have been obtained in normal competition conditions.

[1] Judgment of the Court of Justice, 19 March 1964 : Case 67/63 (SOREMA v. High Authority) [1964] ECR 151, 162.

(i) *Information on producer price changes*

21. No objection can, however, be taken to the fact that BDS informed its members of changes in producer prices (see I B (i)). Under Article 60 (2) of the Treaty, steel producers are obliged to publish their price scales and conditions of sale in the common market. Thus details of ex-works prices are available to everyone, including stockholders, be they supplied direct by the producer or by direct-dealing stockholders. In re-printing and distributing ex-works price lists BDS aims to make it easier for those of its members who do not deal direct to obtain information, and to even out any advantage the directly-supplied dealers may gain from obtaining their information at source. This policy is also in line with the objectives embodied in Article 60 (2) in that it encourages market transparency at production level. To this extent it is, for the purposes of the third sentence of the first paragraph of Article 48, a legitimate activity for an association to pursue. There is no risk of a distortion of the normal conditions of competition to the detriment of the direct-dealing stockholder as long as the expense involved in reprinting and distributing price lists is met in its entirety by those BDS member companies that benefit from it.

(ii) *The role of BDS in the compilation of model calculations*

22. On the other hand, BDS's involvement in producing model calculations for its members constitutes, at least in the form it has taken to date (see I. B (ii)), an infringement of Article 65 (1) of the Treaty.

23. The Commission considers that model calculations shared by a number of firms are unobjectionable for the purposes of anti-trust law only where they go no further than indicating, analysing, explaining and classifying the separate cost components recognized as essential to price formation, and working out methods for imputing expenditure to the various cost headings (products or services). Model calculations containing specific values are, on the contrary, to be viewed as recommendations capable of restricting competition ([1]).

24. This applies to the model used since 1973 for determining 'free ex-stock prices'. The form and the construction of this model are admittedly unobjectionable : the classification of individual rolled steel products according to product types and groups, the attention paid to size and quality, the variations in stocking costs according to turnover frequency for the products in question and the distribution of fixed costs according to contract weights appear to be appropriate and a useful way of helping the user of the calculating system to make a realistic calculation of his costs. The model calculations supplied by BDS do, however, overstep the permissible limits in that they set actual values on the individual components. The same applies to the graduated extras for small quantities calculated according to average reference figures and to the 'works dimensional extra', which varies according to turnover rate. Both types of extra vary according to product and type of product (long and flat products) and are graded into four groups ('very popular', 'popular', 'less popular', 'unpopular'); they are imposed in terms of DM per tonne. The 'contract/overhead costs' are also imputed to the various cost headings at a fixed rate in DM per tonne. Lastly, the lists include a profit margin of 5 % for all stockholders.

25. Model calculations of this type have the effect of recommendations. They encourage the user companies to work from the figures contained in the model, or at least to keep close to them, when calculating their costs and thus indirectly when setting their selling prices. To this extent it is immaterial whether the cost components are expressed in straight figures or in the form of percentage surcharges. Either way, what may once have been offered as a service to explain to companies the various ways of achieving cost-related price formation has become a means of exerting a real, powerful influence on their pricing policy.

26. Contrary to what BDS asserts, there is no justification for giving specific cost components in model costings for 'free ex-works prices', even if these components express the average costs borne by German stockholders, obtained by a comparison of business. In a trade where average values exist, these tend to be used as standard values and are followed by a large proportion of undertakings. The inclusion of such data in model calculations leads many users to rely on fictitious quantities when calculating their operating costs rather than working from their actual costs and thereby to arrive at misleading figures.

([1]) Notice concerning agreements, decisions and concerted practices relating to cooperation between undertakings Section II (1) (OJ No C 75, 29. 7. 1968, p. 3 — corrected by OJ No C 93, 18. 9. 1968, p. 3).

27. There is an alternative means of catering for firms' interest in having a realistic analysis of costing comparisons and interfirm comparisons. It would be sufficient simply to compare the highest and the lowest cost actually observed for each cost component, or to take a selection of the data submitted and offer them as examples; the latter method must not, however, amount in practice to disguised publication of a scatter diagram. There would be no objection to relating the figures thus published to classes of firms classified by size; this would be particularly appropriate in view of the varied structure of the German steel stockholding trade.

28. The use of the existing model calculation restricts price competition between German steel stockholders. It is freely admitted that the models are available to all BDS members, and actually used many of the undertakings for which they are designed. These undertakings are encouraged to base their own calculations on the exact figures used in the model with the result that, rather than assessing their operating costs independently on the basis of their own experience, they follow a common, standardized set of values. This parallelism of cost calculating methods results in the harmonization of the pricing policy followed by the undertakings concerned. The model calculations provided by BDS offer exact figures for most price components including a profit margin. The remaining components which are not specified in the model ('effective basic price' or 'effective component price, freight costs, constant cost headings') are by nature predetermined and largely beyond the stockholders control. Furthermore, the cost price to the dealer, which is by far the most important cost component, varies only slightly owing to the uniform pricing policy followed by the producers. Given the circumstances, competition in the stockholding trade is restricted almost entirely to the choice of discounts the dealer may offer his customers.

29. BDS bears a substantial amount of the responsibility for the restriction of pricing competition between German steel stockholders. BDS approved the model calculations in question and distributed them for use by its member firms. It should therefore be considered as the originating force behind its members' concerted pricing policy. It is not necessary to establish whether the model calculations were produced by the individual dealers themselves or with the active cooperation of BDS experts, or whether they were prepared by the association's specialized committees; either way the question is of no practical significance. Nor is it necessary to determine whether the model calculations were the result of a formal decision, and whether they were expressly described as 'recommendations'. As explained above (paragraph 15), the prohibition in Article 65 (1) of the Treaty extends to actions taken by an association of undertakings, its organs, its committees or its working groups where such activities are liable to prevent, restrict or distort normal competition in the common market.

(iii) *Information about revised ex-stock price lists and their dissemination*

30. Finally, BDS commits an infringement of Article 65 (1) in informing its members about the new ex-stock price lists, drawn up by individual dealers and printed by its distribution organization, and in circulating them to the other members (see I. B (iii)).

31. The information system chosen is designed to restrict price competition between German steel stockholders. The subject matter and the timing of the information on prices is of decisive importance to this proceeding. The members of the association are informed of the revised price lists put out by major dealers. They receive this information as soon as BDS's distribution company has printed the lists. Thus the originating company's competitors are immediately informed of any price changes it intends to make before the lists have even been published or distributed to its customers. Recipients can thus be sure of their main competitors' future conduct on the market, which enables them immediately to realign their own prices accordingly. Firms which take the lead in increasing prices also benefit from including themselves in the information system, i.e., by consenting to the circulation of their new price lists. They know from experience that the other dealers will fall in with their pricing policy all the more readily if they are informed sufficiently well in advance of the intended price changes. This substantially reduces the risk of losing customers.

32. The operation of this system results in the coordination of the market conduct of a number of undertakings contrary to Article 65 (1). In place of price competition and its attendant risks, the system introduces practical cooperation between German stockholders which leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the product, the importance and number of the undertakings and the size and nature of the stockholding trade.

33. By taking part in the information system, BDS's member firms are induced to determine their prices in concert, instead of at their own discretion. Dealers who receive the new price lists decided on by the price leaders regularly follow their example. The price leaders themselves actively encourage this process of alignment by consenting to the circulation of their price lists; furthermore, as soon as they

decide on price changes they can predict and allow for their competitors' reactions, particularly since they themselves largely determine these reactions, simply by giving advance notice of their market strategy.

This type of system is in conflict with the basic principle underlying the rules on competition in the Treaty, which is that each commercial operator must determine independently the policy he intends to adopt on the common market. This requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors. It does, however, strictly preclude any direct or indirect contact between undertakings, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (1).

34. The coordination of selling prices results in a considerable distortion of the competitive relations between steel stockholders on the German market. BDS supplies all its members with the major dealers' revised ex-stock price lists. These price lists are in considerable demand, which is a sufficient reason to justify their being reprinted by BDS's distribution company from purely commercial considerations. It follows that many, if not most, of BDS's members have advance warning of the pricing policy the major dealers are about to follow, and adjust their own price lists accordingly. Thus, as an inevitable result of the information system described above, the member firms determine their prices to a large extent by reference to uniform criteria which bear no relation to the differing cost structures experienced by each, nor to the prevailing regional or local market conditions, which in turn has the effect of setting prices for ex-stock deliveries at an artificial level. This applies to all ex-stock sales of steel products.

35. BDS fails in its counter-argument that dealers receiving the new price lists can choose whether to align themselves with the major dealers' policies or ignore them. It is sufficient for the purposes of Article 65 (1) of the Treaty if the firms concerned are influenced in favour of uniform pricing. This goes without saying in the present case, since it cannot seriously be denied that the knowledge of the pricing behaviour about to be adopted by the most important firms provides the other steel stockholders with valuable information with which they can determine their own pricing policy. Even a system of 'guide prices' affects normal competition since it enables all the participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be (2).

36. Furthermore, Article 65 (1) is applicable despite the fact that the stockholders generally do not keep to their list prices, but give discounts on these prices or else use them as a guide for setting prices to be charged on individual dealings. Collective practices which lead to indirect price-fixing are also covered by the prohibition. This applies as soon as essential price components are artificially approximated in such a way as to place effective selling prices on a level differing from that which would result from a competitive situation. This artificial price level need not necessarily be adhered to by all the firms involved. For the purposes of Article 65 (1) price competition need not be completely suppressed; the provision applies as soon as competition between a number of undertakings is restricted or distorted.

37. The prohibition in Article 65 (1) applies not only to the concerted activities in which BDS's members engaged when determining their selling prices, but also to the association's own activities which enabled the pricing agreement to be organized in the first place. BDS's role is crucial to the success of the information system. It is responsible for all the arrangements needed to circulate the revised ex-stock price lists of leading steel stockholders to the other members of the association as quickly as possible. These arrangements include: informing members of the existence of a new price list, obtaining consent for its circulation, reproducing the price lists and distributing the copies to the relevant dealers. Thus all the most important steps towards a uniform pricing policy for German steel stockholders were taken by BDS. To this extent BDS's activities in the field of price information go far beyond the bounds of the activities that association may engage in according to the third sentence of the first paragraph of Article 48 of the Treaty, for they amount to practices which have the object of restricting or distorting competition in the common market. When followed, if only *de facto,* by an association of undertakings, such practices are prohibited by anti-trust law (paragraph 15).

38. BDS fails in its submission that the printing and distribution of new ex-stock price lists are undertaken by its distribution company and are by their very nature commercial activities. The BDS distribution company is a separately accountable undertaking working on behalf of the association and controlled by it. BDS must therefore be considered fully responsible for any anticompetitive practices pursued by its marketing company. The fact that BDS's distribution company sold its copies of major dealers' price lists to

(1) Judgment of the Court of 16 December 1975: Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 (Suiker Unie *et al.* v. Commission): [1975] ECR 1663, 1942.

(2) Judgment of the Court of Justice, 17 October 1972: Case 8/72 (Vereniging van Cementhandelaren v. Commission): [1972] ECR 977, 990.

the other members of the association for profit is likewise immaterial to the competition law assessment in this case. The third sentence of the first paragraph of Article 48 certainly permits associations of undertakings to engage in commercial activities, but such activities must, like their other activities, be kept within the limits laid down in the Treaty. In view of Article 65 this means that they must not affect competition. This rule is broken by the activities of the BDS distribution company.

39. A price information system is unobjectionable for the purposes of anti-trust law and does not amount to a concerted pricing practice only where at the very least it does not enable an individual party to the system to identify the competitive behaviour of the other parties. If a trade association intends to play a role in that field, it has in principle to restrict itself in reporting on general price trends on the relevant product markets in a period of time without disclosing the course of price conduct which individual firms have decided to adopt or contemplate adopting. In its current form, however, which is based on the dissemination among the members of individual price lists, the BDS information system does not meet this requirement and tends to produce the effects which Article 65 seeks to prevent.

40. BDS cannot claim in its defence that the information system set up by it and used since 1970 increases market transparency in the stockholding trade and thus helps to realize one of the general objectives of the Treaty. The reference made in this connection to the principle of price publicity, as being a guiding principle of the legal order introduced by the Treaty and thus an integral part of normal conditions of competition on the steel market, is out of place since in no circumstances may dealers or associations of dealers be authorized to make concerted arrangements to ensure greater market transparency in the stockholding trade and thereby restrict or distort competition.

The fact that the Commission has taken no step pursuant to Article 63 (2) of the ECSC Treaty in order to establish for sales from stock the prior notification of price lists laid down by Article 60 (2) for producers does not affect the right of steel stockholders to draw up and publish their individual price lists in an independent way. Nevertheless, the exercise of this right may in no way become, without being caught by the prohibition of Article 65 (1), the object, the means or the result of concerted behaviour by dealers when publishing uniform price lists for sales ex stock or when fixing the level of effective prices for sales from stock. In the same way, to be kept within the bounds of Article 48, BDS's activities relating to price information may not tend to encourage or even make possible such concerted behaviour of its members in the field of pricing policy. Accordingly, a distinction has to be drawn, for the purposes of Article 65 (1), between the individual exercise of this right by steel dealers and the setting up of a collective price information system at the distribution stage, such as that organized by BDS with the participation of its members.

41. Finally, none of the measures taken by the Commission to help the Community steel market through its present difficulties can justify BDS's behaviour. The steel stockholders were requested, by letter of 28 October 1977, voluntarily to draw up their own price lists, based on the producer's price lists, and submit them to the Commission. The purpose of these arrangements was to encourage merchants to keep to the minimum or recommended guidance prices prescribed at regular intervals for producers. The abovementioned letter from the Commission in no way implied an invitation to the merchants to indulge in concerted practices when drawing up their ex-stock price lists or fixing their effective selling prices. Commission Decision No 3002/77/ECSC of 28 December 1977 [1] requires Community iron and steel merchants making sales of concrete reinforcing bars, merchant bars and hot-rolled wide strip to charge for such products prices which are not lower than the Community producers' list prices. Even this Decision in other respects leaves unaffected the freedom of the merchants concerned to decide independently on their selling prices for ex-stock deliveries.

42. It follows from the facts and considerations set out above that from 1970 onwards BDS has continually infringed Article 65 (1) of the Treaty. From 1970 to 1972 the infringement consisted in preparing uniform net ex-stock price lists and distributing them amongst its member firms. From then on it consisted in sending detailed model calculations, complete with specific values for each cost component, to all its members and, furthermore, in distributing the price lists of leading steel stockholders amongst its remaining members before the lists had taken effect. The transition from the system of producing uniform net ex-stock price lists to the system of uniform model calculations and specific pricing information was merely a cosmetic change which failed to alter the content, let alone the objectives of BDS's policy. BDS's behaviour ever since the beginning of 1970 has been directed towards restricting and distorting competition in prices between German steel stockholders.

[1] OJ No L 352, 31. 12. 1977, p. 8, as last amended by Decision No 3071/78/ECSC (OJ No L 366, 28. 12. 1978, p. 20).

43. In order to clarify for the parties concerned and for interested third parties the appreciation in law of the practices dealt with in this proceeding, it is opportune to state in a formal Decision what infringements the BDS has committed. Furthermore, it is appropriate to require the association of undertakings concerned to terminate the infringements forthwith, in so far as they are still being practised. Finally, to ensure that this Decision is carried into effect, it is necessary to impose on BDS the obligation to bring the text of the Decision to the notice of all its members,

HAS ADOPTED THIS DECISION :

Article 1

It is hereby declared that the association of undertakings Bundesverband Deutscher Stahlhandel e.V. has continually contravened Article 65 (1) of the ECSC Treaty :

(a) from 1970 to 1972, in that it prepared uniform ex-stock price lists of rolled steel products and distributed them among its member firms ;

(b) from 1973 up to the present time, in that it drew up and sent to interested members model calculations, complete with specific values for each cost component, and, furthermore, in that it informed its members of revised ex-stock price lists drawn up by individual dealers and circulated them to the other members.

Article 2

The association of undertakings concerned is required to terminate the infringements declared in Article 1 (b) forthwith.

Article 3

The association of undertakings concerned is required to bring the complete text of this Decision to the attention of all its members.

Article 4

This Decision is addressed to the association of undertakings Bundesverband Deutscher Stahlhandel e.V., Graf-Adolf-Platz 12, D-4000 Düsseldorf.

Done at Brussels, 8 February 1980.

For the Commission

Raymond VOUEL

Member of the Commission