II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 18 July 1990

relating to a proceeding under Article 65 of the ECSC Treaty concerning an agreement and concerted practices engaged in by European producers of cold-rolled stainless steel flat products

(Only the German, English, Spanish, French, Italian and Dutch texts are authentic)

(90/417/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 information received by the Commission and inspections carried out under Article 47 of the ECSC Treaty by officials of the Commission on 28 and 29 April 1988 in the offices of the seven ECSC producers of cold-rolled stainless steel flat products.

Having regard to the written and oral comments made under Article 36 of the Treaty in the name and on behalf of the parties,

Whereas :

The Commission has come to the view that the members of the so-called Sendzimir Club, which comprises ECSC and Finnish and Swedish makers of the products in question, have made and operated a quota and price agreement in 1986 which contravened Article 65 of the Treaty.

By its letter of 5 October 1988, the Commission, under Article 36 of the Treaty, gave the undertakings concerned the opportunity to submit their comments.

The undertakings submitted their written comments by 10 January 1989 and supplemented them by 20 March 1989. Authorized representatives of those concerned also submitted oral comments on their behalf at a hearing held from 29 to 31 May 1989.

A. THE FACTS

I. General summary

1. The European producers of cold-rolled stainless steel flat products grouped together in the so-called Sendzimir Club have been involved during the period 1986 to 1988 in :

— quota arrangements,
— concerted pricing practices,
— bilateral interpenetration agreements.

2. Details of these agreements and concerted practices as well as of the Sendzimir Club itself are set out hereinafter.

II. The Sendzimir Club (Z Club)

1. The Z Club is a professional association of European steel producers of cold-rolled stainless steel flat products. This association gets its name from the specialized Sendzimir mills invented by Dr Sendzimir and operated by its members. Their output is mostly in the form of stainless cold-rolled sheet under 3 mm in thickness and over 500 mm in width.

2. The Z Club was already in existence in the early 1980s and at that stage included only Community producers. Later it was expanded to non-Community producers.

3. Since 1982 there has been a concentration process related to the overall restructuring of the steel industry that has led to closures and mergers in the cold-rolled stainless steel flat products sector. More specifically:

— Ilssa-Viola, SpA closed in February 1986,

— Usinor SA (Châtillon) acquired Peugeot-Loire in 1984,

— Ugine-Gueugnon SA and Usinor SA (Châtillon) merged on 1 July 1987 to form Ugine Aciers de Châtillon et Gueugnon,

— Terni Acciai Speciali SpA became operational on 1 July 1987 when it took over the 'Società per l'industria e l'elettricità SpA'. On 22 December 1987 the resulting company took over the production of 'Terninoss SpA',

— and British Steel Corporation has changed its name after privatization to British Steel plc.

4. The current ECSC members of the Z Club are:

— Acerinox SA (Spain),
— ALZ NV (Belgium),
— British Steel plc (BS) (United Kingdom),
— Krupp Stahl AG (Germany),
— Terni Acciai Speciali, SpA (Italy),
— Thyssen Edelstahlwerke AG (Germany),
— Ugine Aciers de Châtillon et Gueugnon (France).

5. The non-ECSC members are:

— Outokumpu OY (Finland),
— Avesta AB (Sweden).

6. The Z Club has no fixed seat but a rotating secretariat. The meetings of the Z Club are, or were during the relevant years, generally of the following types:

(a) Meetings of presidents or heads of delegations (i. e. the most important representatives of the companies concerned);

(b) Meetings of commercial directors or similar ranking officers;

(c) 'Experts' meetings, often export managers or other officials at a level below that of commercial director.

7. All these meetings were arranged either by the Z Club itself or within the framework of larger steel associations such as Eurofer or the Fine Steels Club.

8. Eurofer, the European Confederation of Iron and Steel Industries, was constituted at the end of 1976 by professional association and companies in the Community steel industry, as a successor to the 'Club des Sidérurgistes', a loose cooperation forum with a similar membership.

9. Eurofer's objectives include:

(a) cooperation among the national associations, and also among Community steel undertakings, in order to represent their interests before the Commission of the European Communities and other international organizations;

(b) the undertaking of studies and action to contribute to the harmonious development of the European steel industry.

10. Article 48 of the ECSC Treaty recognizes the right of undertakings to form associations. Their membership must remain open and they may engage in any activity which is not contrary to the provisions of the Treaty or to the decisions or recommendations of the Commission. Other Articles also provide for the Commission to consult associations, specially regarding the introduction of measures affecting prices and production (Articles 46, 58 and 61). Eurofer played an active role during the period of 'manifest crisis' (see section III below).

11. Eurofer has numerous committees and product groups such as the so-called CDAS (Comité de Direction Aciers Spéciaux) which groups the producers of special steels. Frequently, there were meetings of the Z Club on the occasion of meetings of the CDAS.

12. The Fine Steels Club is another association of special steel producers which predates Eurofer and which includes not only ECSC producers but other European producers (Swedish, Finnish, Austrian, etc.) Meetings of the Z Club also took place on the occasion of meetings of the Fine Steels Club.

III. The crisis in the steel industry

1. The European steel industry was affected by a drop in demand which created problems of excess supply and spare capacity and consequent low prices from the mid-1970s to 1986, with the normal variations between different steel products.

2. The Commission, on the basis of Article 57 of the Treaty, adopted the so-called 'Simonet Plan' on 1 January 1977 by which each company made unilateral voluntary commitments *vis-à-vis* the Commission to adjust its deliveries to the levels suggested by the Commission each quarter in its forward programme.

The plan stated: 'In any such crisis situation, the Commission expects that undertakings will display solidarity, and tailor their production or deliveries to these indicative tonnages, and that they will enter into individual undertakings with the Commission to this effect. When planning and implementing the measures outlined above, the Commission will consult the trade associations, and workers', consumers' and stockholders' organizations. The

Commission will make certain that any role given to these trade associations and organizations while these measures are in force is compatible with the ECSC Treaty in general and the competition rules in particular.

3. This system proved insufficient to stabilize the market and thus in 1978 the 'First Davignon Plan' came into effect. This new regime complemented the unilateral voluntary commitments with indicative and minimum prices as well as with external protection, i. e. the introduction of voluntary export restraints agreed with third countries, import reference prices and a more rigorous application of the ECSC anti-dumping measures. These external measures were in accordance with the burden-sharing consensus reached by the OECD Member States in 1977.

4. Despite all these measures, the situation in the steel market continued to deteriorate and on 31 October 1980 the Commission adopted Decision No 2794/80/ECSC [1], by which a state of 'manifest crisis' was declared in accordance with Article 58 of the ECSC Treaty. By virtue of this Decision, mandatory production quotas were imposed by the Commission but not for the products which are the subject of this Decision. These measures were extended by Decisions No 1831/81/ECSC [2], No 1696/82/ECSC [3], No 2177/83/ECSC [4], No 234/84/ECSC [5] and No 3485/85/ECSC [6].

5. This anti-crisis regime imposed by the Commission can be summarized as follows : the Commission fixed a general objective of Community production for each quarter for different product categories and each undertaking was allotted a compulsory production quota for deliveries within the Community market, known as its share of 'Big I', i. e. the Community market.

6. The Commission also adopted Decision No 3483/82/ECSC [7] establishing a so-called 'surveillance system' by which each undertaking was obliged to declare its deliveries by country to the Commission. In addition, Decision No 3717/83/ECSC [8] was adopted, requiring production certificates and accompanying documents for each delivery.

7. The cold-rolled stainless steel flat product sector felt the effects of the general crisis of the steel industry. However, this product, together with some other specific products, was never included in the product categories of the Article 58 regime.

8. Nevertheless, officials of the Commission held several meetings with the Community producers of cold-rolled stainless steel falt products between 1980 and 1982 in order to evaluate the situation for this product for which only the widths above 500 mm fall under the ECSC Treaty, and to try to find a solution to improve the conditions of the market.

IV. Historical Background (I) — 1983

1. To complete this summary of the background to the 1986 Agreement which is the subject of this Decision, it is necessary to refer to an agreement made in 1983 and to certain bilateral agreements. The contacts with the Commission officials, summarized above did not lead to any concrete results, but the Community producers continued to meet on their own.

2. However, it was not until 13 January 1983 that a formal 'Agreement on a voluntary system of delivery and production limitation for cold-rolled stainless steel flat products' was signed. The undertakings which signed the Agreement (Annex I to the Agreement) were :

ALZ NV,
British Steel Corporation,
Ilssa-Viola SpA,
Industria Acciai Inossidabili SpA,
Krupp Stahl AG,
Peugeot-Loire SA,
Terninoss SpA,
Thyssen Edelstahlwerke AG,
Ugine-Gueugnon SA,
Usinor SA.

3. On 17 January 1983 the Commissioners responsible for industrial affairs, Mr Davignon, and for competition policy, Mr Andriessen, co-signed a letter to Eurofer reminding the undertakings and Eurofer itself of their obligations under the Treaty. Specifically, these two Commissioners pointed out that the undertakings, or their associations, should not use the anti-crisis measures imposed by the Commission as an excuse to create cartels or to take decisions contrary to the Treaty and particularly contrary to Article 65.

4. A copy of the 1983 Agreement was handed over at the end of January 1983 to the Cabinet of Commissioner Davignon as well as to certain officials of the Commission. However, the signatories to the Agreement did not make an application for authorization of the Agreement under Article 65 (2) of the ECSC Treaty.

[1] OJ No L 291, 31. 10. 1980, p. 1.
[2] OJ No L 180, 1. 7. 1981, p. 1.
[3] OJ No L 191, 1. 7. 1982, p. 1.
[4] OJ No L 208, 31. 7. 1983, p. 1.
[5] OJ No L 29, 1. 2. 1984, p. 1.
[6] OJ No L 340, 18. 12. 1985, p. 5.
[7] OJ No L 370, 29. 12. 1982, p. 1.
[8] OJ No L 373, 31. 12. 1983, p. 9.

5. Eurofer replied to the Commissioner's letter of 17 January 1983 on 8 February 1983, stating that the Commission would always be informed of their activities and it would be up to the Commission to evaluate if these activities were contrary to the Treaty.

6. The signatories to the Agreement contacted the two Swedish and Finnish undertakings. Avesta and Outokumpu, in an attempt to persuade them to join the Agreement. These two undertakings objected to the proposals made by the Community producers and Avesta was quoted by the Community companies as arguing that they could not agree to participate in such an agreement for 'legal reasons'.

7. The 1983 Agreement was formally terminated on 30 June 1983 after less than six months in operation.

V. Historical background (II) — 1984 to 1986

1. Despite the failure of the 1983 Agreement and the disagreements which occurred among producers, the Z Club continued its activities on a regular basis.

2. There was a meeting initiated by British Steel in Düsseldorf on 27 February 1984. British Steel proposed 'cooperation on prices' and, as a second step, a new tonnage agreement similar to the 1983 Agreement.

3. The market situation for steel in the Community continued to deteriorate during 1984 and 1985.

4. Despite the fact that most European producers were incurring losses on stainless flat product, for some time the Z Club experienced difficulty in reaching consensus. Meetings of the Z Club took place regularly and frequent attempts were made to raise prices during this period 1984 to 1985.

5. Given the deterioration of the market situation on the one hand and the difficulties in reaching a multilateral agreement on the other hand, the producers chose in 1985 to conclude 'interpenetration agreements' on a bilateral basis (country to country).

6. The Commission has evidence that eight bilateral agreements had been made by early 1986. Six of them were between Community producers and producers in Finland and Spain, and were known to the Commission officials dealing with those countries (see section V — point 12 below).

7. Under these bilateral interpenetration agreements the producers of each country in question agreed on a maximum yearly tonnage to be exported to the other country, and vice versa.

8. Spain became a member of the European Communities on 1 January 1986 but the Act of Accession of Spain and Portugal established a transitional arrangement lasting for three years (1986 to 1988) for the steel sector to allow restructuring which included a restriction of steel exports to the other Community countries. The total tonnage of steel products allowed into the rest of the Community from Spain was to be decided by the Council of Ministers for each of these years.

9. Finland and Sweden were at all relevant times subject to the Community's external steel policy. There has been an annual Exchange of Letters between each of these countries and the Community providing for export restrictions since 1978.

10. From 1978 and under the Act of Accession, the same principle applied to these three countries, Finland, Spain and Sweden : the maintenance of traditional trade flows, in practice meaning that their steel exports to the Community were to be maintained at previous levels and no variations were allowed in regional distribution, product-mix or timing (the so-called 'triple-clause').

11. During 1984 and 1985 Acerinox, Avesta and Outokumpu experienced abnormal delays in obtaining import licences in some of the Member States (especially in Germany, France and Italy) despite the fact that under GATT rules these licences must be given automatically. The Member States involved complained that the three companies in question were not respecting the 'triple clause' as established in the Exchanges of Letters between the Community and their respective governments.

12. The Commission officials responsible for relations with these countries brought up this issue in their conversations with the representatives of the governments involved (Finland, Spain and Sweden). Since those governments did not have the legal power to impose formal export quotas on their own undertakings, it was recommended that their respective undertakings should contact the companies in the Member States which had complained, in order to solve the problem within the framework of the Exchange of Letters.

13. Commission officials never suggested that either Acerinox, Avesta or Outokumpu should join any multilateral agreement.

VI. The 1986 Multilateral Agreement, the subject of this Decision

1. By the time the Z Club met in Paris on 15 April 1986, a new formal Agreement was in sight. There were only technical details to be worked out.

2. An 'Agreement on a voluntary system of delivery limitations for cold-rolled stainless steel flat products' was signed on 16 May 1986 in Düsseldorf.

3. The main provisions of this Agreement were :

(a) products subject to the Agreement :

— cold-rolled stainless steel flat products in coils and sheets cut from oil, plates and narrow strip without limitation of widths or thickness,

— prime and non-prime products,

— deliveries to rerollers,

— KBR was excluded (KBR = finished cold-rolled sheet or plate of width greater than 63" (1 600 mm), thickness from 3 to 7 mm);

(b) markets subject to delivery quotas :

— Austria,
— Belgium/Luxembourg,
— Denmark,
— Ireland,
— Finland,
— France,
— Germany,
— Greece,
— Italy,
— Malta,
— Netherlands,
— Norway,
— Portugal,
— Spain,
— Sweden,
— Switzerland,
— United Kingdom.

These 17 markets considered together were referred to as 'bid C'. The markets considered separately were referred to as 'small c';

(c) establishment of Z Club statistics and elaboration of quarterly estimates of the level of demand;

(d) voting power of each member of the Z Club : 75 % of its market share in the market concerned plus 25 % of its relative position in the total territory covered by the Agreement;

(e) establishment of delivery quotas :

'Big C' % quota according to the following table :

(%)

Participating companies	'Big C'	Delivery quota
Belgium	6,152	
— ALZ		6,152
Finland	6,072	
— Outokumpu		6,072
France	18,843	
— Ugine Gueugnon		11,430
— Usinor Châtillon		7,413
Germany	27,831	
— Krupp Stahl		17,887
— TEW		9,944
Italy	18,671	
— IAI		9,3355
— Terninoss		9,3355
Spain	7,329	
Acerinox		7,329
Sweden	6,820	
Avesta		6,820
United Kingdom	8,282	
BSC		8,282
Total	100,000	100,000

These 'Big C' percentage quotas were converted into 'Big C' quarterly tonnage quotas using the market demand estimates described above,

— 'small c' : the quarterly quotas were determined by the respective quarterly market estimates and by the following matrix :

'Small c' Master table (Table 11 of 15 May 1986)

(tonnes)

	Germany	Belgium/ Luxembourg	Spain	Finland	France	Italy	United Kingdom	Sweden	Total
Germany	18 009	1 424	1 102	906	2 881	1 506	1 065	1 577	28 500
Belgium/ Luxembourg	448	563	25	136	462	425	130	80	2 269
Spain	551	271	3 515	100	391	33	36	70	4 967
Finland	176	96	87	1 454	108	6	32	268	2 207
France	956	765	501	212	8 781	903	531	159	12 808
Italy	1 410	1 249	501	522	1 954	12 622	394	408	19 060
United-Kingdom	1 106	465	73	204	1 133	339	5 158	434	8 939
Sweden	601	190	75	358	347	7	15	1 610	3 203
Netherlands	908	484	206	452	610	523	153	409	3 744
Irland/ Denemark/ Greece	823	98	281	563	362	384	252	808	3 571
Austria	516	—	30	284	155	413	—	346	1 744
Portugal	90	215	287	46	150	131	169	—	1 088
Malta	40	—	31	—	33	—	—	—	104
Norway	219	27	70	183	78	—	—	189	766
Switzerland	1 019	100	322	449	769	756	44	234	3 693
	26 902	5 947	7 085	5 869	18 214	18 048	8 006	6 592	96 663

(f) the 'small c' shares were corrected in cases of previous tonnages bilaterally agreed;

(g) implementation of a sophisticated system for compensation, carry-overs, exchanges and purchases of quotas;

(h) establishment of a system of fines:

— for the first quarter of the Agreement a fine of 125 ECU per tonne was imposed on delivery to each 'small c' market in excess of 3 % or 40 tonnes per quarter whichever was greater (5 % or 65 tonnes per quarter for ALZ) over the agreed quotas. A fine of ECU 125 per tonne was imposed on excess deliveries to 'big C',

— from the second quarter onwards, the fines were increased to ECU 250 per tonne,

— a fine of ECU 250 per tonne on delivery tonnages not declared;

(i) obligation of a deposit of a collateral in the form of promissory notes or bank guarantees;

(j) the 'pricing aspect' was described in the Agreement as follows:

'The efficient application of this Agreement should permit the progressive price stabilization in the 'big C' market area. Decisions in this regard will be taken as appropriate by the Sendzimir Club members during their periodic meetings, and adherence to these decisions is regarded as essential to this agreement.'

In practice, the members set up a pricing committee for this purpose;

(k) the administration of the Agreement was to be carried out by the Z Club secretariat 'in close collaboration' with Eurofer. A market forecast committee and a market arbitration committee were set up as well;

(l) the Agreement was made for a period of 12 months, namely the fourth quarter of 1986 (transition period) and the first three quarters of 1987.

4. The undertakings which signed the Agreement were:

— ALZ NV,
— Outokumpu OY,
— Usinor Châtillon SA,
— British Steel Corporation,
— Industria Acciai Inox SpA,
— Krupp Stahl AG,
— Terninoss-Acciai Inossidabili SpA,
— Acerinox SA,
— Avesta AB,
— Thyssen Edelstahlwerke AG,
— Ugine-Gueugnon SA.

5. At the next meeting of the Z Club in Paris on 3 July 1986, the application of the Agreement began: checking the deposit of collaterals, discussion of 'small c's' and collusion on prices (agreement to discuss minimum prices to become effective on 1 January 1987).

6. On 21 October 1986 the committee of experts of the Z Club met in Brussels to determine the method of calculation to be used for the fourth quarter of 1986 and the first quarter of 1987, the definition of cold-rolled material, how to account for indirect deliveries, and other technical matters.

7. On 1 October 1986, the day the Agreement came into effect, a price increase was implemented by all members and a further increase was announced for 1 January 1987.

8. The undertakings concerned did not request authorization of the Agreement under Article 65 (2) of the ECSC Treaty.

9. The companies have claimed that Eurofer's representatives gave a copy of the 1986 Agreement to the Commissioner responsible for industrial affairs and several officials of the Steel Directorate (Directorate General III). This statement has not been confirmed (see points 10 and 14 below).

10. A representative of Eurofer tried in June 1986 to give a copy of the Agreement to a high-ranking official in the Steel Directorate who refused to accept it and warned that the Commission could not tolerate any agreement among producers which would be contrary to Article 65.

11. Sir Robert Scholey, Chairman of British Steel (and then also President of Eurofer), sent a letter dated 29 May 1986 to Vice-President Narjes, in which he stated, 'You will recollect at our recent meeting in Düsseldorf that I reported the completion of an agreement between stainless producers.'

12. Vice-President Narjes replied in a telex message dated 17 June 1986 in which he did not refer to the Agreement but stated: '... At the end of 1984, a proposal had already been made to producers that problems in the sector and possible solutions to them be examined *together with the Commission*' (emphasis added).

13. Sir Robert Scholey sent another letter to Vice-President Narjes dated 15 October 1986, stating: 'Earlier this year I handed to you a copy of the Agreement ...'

14. Vice-President Narjes replied on 5 January 1987, saying:

'... I have no recollection of receiving from you a copy of an agreement relating to stainless steel. Your letter does not describe in any detail the agreement to which you refer, but I must draw your attention to the fact that the *Commission cannot give its approval to any agreement* between undertakings which is *contrary to the principles of Article 65* of the Treaty of Paris ...' (emphasis added).

15. British Steel claims that they never circulated this letter to the other members of the club because it was addressed to Sir Robert as Chairman of British Steel and not as President of Eurofer. Furthermore, British Steel argues that since Vice-President Narjes had written 'confidential' on the letter, they wanted to keep it so.

16. British Steel further argues that as a consequence of this letter, they brought the issue of the legality of the Agreement before the Z Club. The Chairman of the Z Club received the mandate from the members of the Z Club to check with the Commission on the issue of legality.

17. The undertakings subject to these proceedings have not provided any evidence to prove that the Agreement was the subject of any application to the Commission.

VII. Renewal of the 1986 Agreement

1. On 16 May 1987 the signatories to the 1986 Agreement (see section VI, point 4) signed an extension of the Agreement by which it was extended until 30 September 1989, but ALZ signed only for the period until 31 December 1988.

2. The members of the Z Club claim that they gave a copy of the extension to some officials in the Steel Directorate, in Directorate-General III. It has not been possible to confirm this statement. They did not mention it to the official mentioned in section VI, point 10, who had refused to accept the 1986 Agreement and had warned the Eurofer representative.

3. The market situation for cold-rolled stainless steel flat products improved considerably duriang 1987. Eurofer, on a report on special steels dated 6 November 1987, stated:

'The proper working of the Z Club, administered by Eurofer, is still being helped by a vigorous demand for cold-reduced material. The quantity forecasts made for the first half-year of 1988 do not show any weakening of the expected demand, compared to the "boom" observed in 1987.'

4. This Eurofer report also confirms the concerted pricing practices of the Z Club:

'As far as prices are concerned, the increases set for the fourth quarter of 1987 have been largely obtained. All members of the Sendzimir Club now report a very satisfactory response from the market regarding the price rise of 7 % in austenitic grades and 5 % in ferritic qualities decided for the deliveries in the first quarter of 1988.

This good result has been secured mainly thanks to an improvement of the organized coordination and direct contacts between members of the pricing committee.

Additional price increases will, therefore, be necessary to offset the rise of alloying elements, the Z Club members are considering a further improvement of their prices by 4 to 5 % on 1 April 1988.'

5. A meeting of the Z Club took place in Milan on 16 September 1987 at which representatives of all signatories to the Agreement were present, as well as two of Eurofer's representatives. The main topics of discussion were :

— allocation of 'Big C' and 'small c' quotas for the fourth quarter of 1987 and the three first quarters of 1988,

— discussion on the future of the bilateral agreements : the Italian, Swedish, Finnish and Belgian groups expressed their intentions not to make bilateral agreements, the German group wished to set up bilateral agreements with British Steel and Acerinox. Acerinox wished to extend their bilateral agreements with British Steel and the German producers and the British group wanted to modify its agreements with Acerinox and the German producers and establish new ones with Avesta,

— a report of Eurofer on implementation of the Agreement and distribution of the following table of fines :

Qu. 4/86 + Qu. 1/87 Penalty payment — Distribution in national currencies

	French francs	Pesetas	Swedish kronor
Acerinox	60 007	—	101 352
ALZ	14 340	104 517	23 415
Avesta	8 155	115 853	—
BSC	12 862	140 694	57 696
IAI	10 482	158 593	20 788
Krupp Stahl	24 958	303 870	52 145
Outokumpu	8 537	103 148	16 694
TEW	13 213	168 921	27 923
Terninoss	12 721	158 594	21 906
Ugine	6 105 (*)	320 100	63 778
Total	171 380	1 574 290	385 697

Remarks
— As yet, these amounts do not include additional interest on deposit made.
— Amounts in Swedish currency are blocked until 31 December 1987.
— Actual distribution will be made on net amounts between the French, Spanish and Swedish companies.
— (*) FF 6,105 = penalty to be paid by Ugine Gueugnon to Usinor Châtillon for QU. 4/86 = to be cancelled.

6. Another meeting of the Z Club took place on 3 November 1987 in Düsseldorf in order to discuss the implementation of the Agreement in the second and third quarters of 1987 and calculate the tonnage quotas for the first and second quarters of 1988.

7. The two German producers (Thyssen and Krupp), Acerinox and British Steel had bilateral agreements during the third quarter of 1987 as confirmed by Eurofer's letter to the members of the Z Club dated 17 July 1987.

8. The Z Club continued its regular meetings in 1988. Thus, at the meeting in Brussels on 3 February 1988 the members of the Z Club discussed the excess deliveries during the third quarter of 1987. British Steel requested the procedure of arbitration for a fine imposed for excess deliveries to a customer 'who otherwise would have been short of material and who could have, as a result, complained to Brussels' (emphasis added).

9. At this meetiang, the quotas for the second quarter of 1988 were fixed and the exchanges of quotas counted by the secretariat for the fourth quarter of 1987 were confirmed. The chairman also informed the club of the fact that the total amount collected from fines was equivalent to ECU 300 000.

10. The Commission was made aware of customers' complaints during 1987 both from articles in the British press and from the Portuguese Government which transmitted to the Commission in August 1987 a complaint received by its own Directorate-General for Competition put forward by an association of consumers.

11. At the time of the inspections carried out under Article 47 of the ECSC Treaty by officials of the Commission on 28 and 29 April 1988 in the offices of the seven ECSC producers, the 1986 Agreement was still in force.

12. After all the undertakings listed in section II, points 4 and 5 had received the statement of objections in October 1988, the Chairman of the Sendzimir Club sent a letter dater 24 October 1988 to the Commissioner responsible for competition stating :

'At the request of all the companies who are signatories to the agreement of 16 May 1986, I write to inform you formally that, in light of the position of the Commission as now set forth in its Statement of Objections in the above case, the parties have terminated the agreement.'

B. LEGAL ASSESSMENT

VIII. Article 65 (1)

1. Article 65 (1) of the ECSC Treaty prohibits 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, particularly those tending:

(a) to fix or determine prices;

(b) to restrict or control production, technical development or investment;

(c) to share markets, products, customers or sources of supply.

2. The European producers of cold-rolled stainless steel flat products mentioned in part A, section II, points 4 and 5, namely: Acerinox SA, ALZ NV, British Steel plc, Krupp Stahl AG, Terni Acciai Speciali SpA, Thyssen Edelstahlwerke AG, Ugine Aciers de Châtillon et Gueugnon, Outokumpu OY, Avesta AB, have, on the basis of the evidence detailed in sections VI and VII, made and carried out agreements and decisions and engaged in concerted practices forbidden by Article 65 (1). In particular:

(a) all the undertakings named in part A, section II, points 4 and 5, signed an agreement in May 1986 which was valid for the fourth quarter of 1986 and the first three quarters of 1987. In March 1987 the same undertakings extended the Agreement until 30 September 1989 (ALZ only until 31 December 1988). This Agreement, which was in operation during the period October 1986 to April 1988, prevented, restricted and distorted normal competition in the common market by controlling production, by sharing markets and customers, and by providing the basis for concerted practices on prices.

(b) all the undertakings named in part A, section II, points 4 and 5 engaged, during the period October 1986 to April 1988, in concerted pricing practices which tended to distort normal competition.

3. The 1986 Agreement, which covered almost all producers of cold-rolled stainless steel flat products selling in the Community and which applied to both production quotas and prices, inevitably had a significant effect on conditions on the Community market. The 1986 Agreement was followed by, and certainly contributed to, the substantial price increases which occurred during the period 1986 to 1988.

4. It was argued in various ways by several companies that because of the steel crisis Article 65 had in some way become inoperative until revived by the Commission. This argument cannot be accepted in any form. At no time during the crisis did the Commission ever say anything to suggest that Article 65 was inoperative. This would be incompatible with the common market as expressed in Article 4. Article 65 is part of the ECSC Treaty and cannot be set aside or made inapplicable, except in so far as the Commission authorizes agreements in accordance with Article 65 (2).

5. Article 58, which envisages a system of production quotas if there is a period of manifest crisis, and Article 61, which allows the Commission to fix prices, say nothing to limit the application of Article 65 beyond the measures envisaged in the quota and price regimes. Only the Commission itself, temporarily and exceptionally, may formally authorize or encourage companies to enter into specific agreements in relation to steels within the framework of a production quota regime and for the purpose of helping to solve difficulties existing during a manifest crisis. Companies are entitled to enter into agreements which would otherwise infringe Article 65 only to the extent that such agreements have been specifically and clearly authorized by the Commission.

6. Exceptions to basic Treaty rules must always be interpreted narrowly (see Case 154/78 Valsabbia. [1980] ECR 907 at paragraph 84). There is no legal or factual basis for arguing that statements made by the Commission encouraging companies unilaterally to limit production or to raise prices and to enter into commitments to the Commission as to the levels to be decided, in relation to ordinary steels, justified the companies, in subsequent years, in relation was needed to put Article 65 into operation again.

7. This conclusion is not affected by the references in Article 5 to limited intervention or in Article 57 to indirect means. These Articles govern the powers of the Commission : they do not give companies carte blanche to disregard the clear provisions of Article 65, which apply specifically to agreements between companies, or allow companies to cooperate with one another rather than with the Commission. Nor is this conclusion affected by references to the case law of the Court which shows that the Commission may choose, if necessary, to give weight to objectives other than competition : this allows the Commission to alter the emphasis between its objectives, but it does not allow the companies to enter into restrictive agreements merely on the grounds that they are said to promote objectives to which the Commission had previously and in different circumstances given weight.

8. If there could have been any doubt about this, the letter dated 17 January 1983 in which Commissioners Andriessen and Davignon stated that the Commission would not tolerate any agreements not in accordance with Article 65, would have put it beyond doubt (see section IV, point 3).

9. The subsequent reply from then President of Eurofer dated 8 February 1983 inviting the Commission to draw attention to any breaches could not be regarded as a legitimate or effective means of transferring to the Commission the responsibility which remains at all times with companies to take the normal steps, i.e. to notify their agreements and if necessary to request that these agreements are authorized to ensure that their actions remain within the law, (see section IV, point 5).

10. Other arguments were made to the effect that Article 65 did not apply because, it was said, 'normal' competition did not exist. These arguments cannot be accepted. The word 'normal' in Article 65 appears to mean 'competition unaffected by restrictive agreements'. Even if it means something more, it is for the Commission to decide when restrictive agreements are justified by abnormal circumstances, not for companies to behave as if they did not need to comply with Article 65 at all. It is also for the Commission, and not for the companies, to decide what measures, if any, need to be adopted from time to time to restore satisfactory economic conditions in the industry. There is nothing in Article 65 to suggest that it is inapplicable in 'abnormal' conditions. Any such interpretation, if it were accepted, would make Article 65 inapplicable when it might be most essential. The fact that subsidies were being given to steel companies, or that there was a quota regime for ordinary steels, certainly does not mean that Article 65 was inapplicable. By 1986 the Commission was moving away from strict crisis measures and towards a more liberal regime. Therefore, it was particularly unjustifiable for the companies to make agreements having the opposite objective.

11. Various arguments were made about the principle of legitimate expectations. But the Community law principle protecting legitimate expectations cannot be relevant when

(i) the companies concerned have not followed the only normal and correct procedure for companies acting in good faith to protect themselves aginst fines, that is, proper notification of their agreement and an application for authorization,

(ii) no statement has been made by anyone in the Commission saying that the agreements in question were consistent with competition law, and

(iii) no measure has been adopted and no policy has been altered with retroactive effect : the relevant rules of competition law have remained unchanged, and were clearly stated in the Treaty by Article 65, a Treaty provision which has been in force since 1953.

12. Even if, as argued by the companies, certain Commission officials were aware of the Agreement, this could not make the Agreement lawful : only a Commission decision based on a correct formal application for authorization could have done that. The companies remained responsible for their own actions and for ensuring that the correct precautions were taken to protect themselves from fines if there was a risk of fines, as there plainly was. The purpose of this Decision is to prevent a recurrence of this anti competitive behaviour and to indicate clearly that the Commission will not tolerate such practices in the future. The companies, argument is therefore relevant only to the question of fines (See section X below).

13. It has been argued by the undertakings subject to this Decision that the 1986 Agreement should be regarded as a voluntary or indirect measure under Article 57. But measures under Article 57 are measures to be taken by the Commission and this Article does not mention agreements between companies. There is a fundamental difference between argreements between companies made after consultation with the Commission and designed essentially to make measures taken by the Commission more effective and easier to supervise, on the one hand, and agreements made on the companies' own initiative, without consultation with the Commission (which was merely informed informally about them) and which were designed not to support existing restrictions

but to create new restrictions with additional economic effects, on the other. The 1986 Agreement was not designed to make existing restrictions work better (which would have had minimal economic effects) but to bring about economic results which the other measures in operation had not brought about and which the companies desired.

14. There were no consultations with the Commission with regard to the 1986 Agreement and no Commission official participated in any of the meetings which led to the 1986 Agreement. Nothing was ever said by any Commission official to suggest that the 1986 Agreement could be regarded as part of the measures under Article 58.

IX. Article 65 (2)

Under Article 65 (2) of the Commission shall authorize specialization agreements or joint-buying or joint-selling agreements or agreements which are strictly analogous in nature and effect if they satisfy certain specified conditions. In the present case the Agreements and concerted practices described in this Decision could never have qualified for authorization. They do not come within the types of agreements which can be authorized. On the contrary, they were designed to protect home markets, to share markets and to allow prices to be fixed, all of which activities are incompatible with the basic principles of the common market. Article 46 could not cause the inapplicability of Article 65 (2) because the Commission made clear from the beginning of the 'Simonet Plan' that all these crisis measures must be compatible with the Treaty and specially the competition rules (see section III, point 2 above).

X. Article 65 (5)

1. Under Article 65 (5) the Commission may impose fines or periodic penalty payments on any undertaking which entered into an agreement which is automatically void, or has enforced or attempted to enforce, by arbitration, penalty, boycott or any other means, an agreement or decision which is automatically void, or has engaged in practices prohibited by Article 65 (1).

2. The Commission may impose fines or periodic penalty payments not exceeding twice the turnover on the products which were the subject of the agreement, decision or practice prohibited by Article 65 (1); if however, the purpose of the agreement, decision or practice is to restrict production, technical development or investment, this maximum may be raised to 10 % of the annual turnover of the undertakings in question in the case of fines, and 20 % of the daily turnover in the case of periodic penalty payments.

3. The companies were aware, and had been reminded by the Commission of the distinction between:

(i) unilateral voluntary decisions by each company to raise prices or to reduce production, communicated to the Commission, and

(ii) decisions communicated by one company to another on a reciprocal basis. The fact that the Commission had encouraged the first kind of decisions does not alter the fact that decisions of the latter kind are unlawful unless formally notified to and approved, if possible, by the Commission.

4. At no time did any company make any application for the Agreement be authorized. Only an explicit request could have given any right to immunity from fines. The fact that no such application was made makes it clear that the companies were not acting in good faith.

5. Even if the companies had made such an application this agreement could not have been approved according to Article 65 and therefore the Commission would still be entitled to adopt this Decision declaring it unlawful. The Community companies had years of experience of legal controls under Community law and were well informed about Community competition law.

6. Companies cannot avoid fines by informally informing officials about agreements which are inconsistent with Community competition rules.

7. The Agreement concerned cold-rolled stainless steel flat products, for which there was no Community quota regime. No Community regime had ever authorized an agreement of this kind for stainless steel. The companies must have been aware of this.

8. The fact that competition has been limited by Community action in certain respects does not authorize companies to restrict it further or in other respects: indeed, it is especially important in such circumstances that the balance between competition and other considerations, when it has been decided on by the Community institutions, should not be altered. Cold-rolled stainless steel products were not subject to the Community production quota regime and the companies were not entitled to install their own regime through restrictive agreements.

9. The Agreements had no connection with restructuring the steel industry. No reductions in capacity were contemplated by the Agreements.

10. In considering what fines should be imposed, it is necessary to distinguish between the companies within the Community, the two Nordic companies and the particular situation of Acerinox. All of the companies acted deliberately, or at least negligently, and knew that they were restricting competition.

11. In deciding whether to impose fines, and if so, the amount of those fines on the enterprises within the Community (subject, in the case of Acerinox, to the comments made below), the following points are the most important :

(a) the companies had been accustomed to a Community regime for other steel products, in the operation of which they had been requested by the Commission to enter into certain agreements to stabilize supply and prices ;

(b) the companies informed some Commission officials, without ever requesting an authorization of the Agreement under Article 65 (2) of the ECSC Treaty ;

(c) the evidence in the Commission's possession shows that the 1986 Agreement was made by the companies on their own initiative and without any encouragement or pressure of any kind from any Commission official, and was not related to any crisis measures adopted by the Commission ;

(d) in this decision, fines are solely being imposed in respect of the 1986 Agreement.

Because of the facts set out above, it is clear that it would not be correct to impose, in these circumstances, the large fines which would otherwise be appropriate. Indeed, having regard to the possibility of a misunderstanding about the effects of Article 65 and to the fact that there had been 'manifest crisis' measures applicable to serveral other categories of products of the steel industry at various times it is considered that, in this exceptional case, the fines imposed on the Community producers should be very much reduced from the levels that would normally be applicable.

12. Regarding the Nordic companies Avesta and Outokumpu it must be said, in the first place, that the Exchange of Letters did not invite or authorize them to join any cartels, and did not exempt (indeed could not validly have exempted) them from Community competition law. Although it is sometimes unnecessary to enforce competition law when there is a commercial policy agreement in force, only the clearest possible words of a formal agreement made by the Commission could ever prevent the Commission from doing so, and even then only to a limited extent : not even the Council can set aside the provisions of the Treaty. Competition law creates private rights and the Commission could not set them aside or dispense companies from their duty to obey it. The Free Trade Agreements with the EFTA countries make it clear that the Commission is entitled to apply Community competition law, and the Exchange of Letters could not be interpreted as taking away that right. In circumstnaces such as in this case, companies in non-Member States which are carrying out instructions from the Commission or their national authorities must go no further than they are instructed to go. Avesta and Outokumpu were never instructed to sign the 1986 Agreement. However, the following points must also be taken into consideration :

(a) the freedom of Avesta and Outokumpu to sell in the Community at the prices and in the quantities they wished was clearly restricted by the exchange of letters between the Community and Sweden and Finland respectively. The Commission, on the instructions of the Council, had put pressure on the Swedish and Finnish authorities, who in turn put pressure on the two companies, to limit their exports to the Community substantially to levels reached in previous years. for this purpose, the Directorate-General for External Relations, which was responsible for the management of the Exchange of Letters, indirectly encouraged the Noridc companies to enter into certain bilateral agreements with enterprises within the Community.

In certain respects, these companies therefore acted as suggested by the authorities in their own countries. The companies could have communicated these agreements to the Commission, and would have been wise to do so,

(b) Avesta and Outokumpu were efficient companies in 1986 and subsequently. The Agreement restricting the volume of their exports was contrary to their interests and they would not have entered into them except under pressure. By failing to inform the Directorate General for competition they undoubtedly acted contrary to their own interests ;

(c) There may have been a false impression in the minds of the Nordic companies as to the effects of Article 65 regarding the 1986 Agreement, particularly as they sought and were given assurances by their Community partners that there were no problems in this respect.

13. The provisions in Protocol 10 to the Act of Accession of Spain and Portugal did not invite or authorize Acerinox or any other Spanish company to join any cartels, and did not exempt (indeed it could not validly have exempted) them from Community competition law. However, the following points must also be taken into consideration :

(a) The freedom of Acerinox to sell in the Community in the quantities it wished, was clearly restricted by the quantitative export limits imposed during the transitional period (1986 to 1988). In order to implement the provisions of Article 52 and of Protocol 10 to the Act of Accession, the Spanish authorities allocated the yearly export tonnage between the various Spanish producers so as to reflect the historical pattern of trade between Spain and the other Member States. Therefore, in some respect at least, Acerinox was acting as suggested by its authorities to comply with the provisions of Protocol No 10 of the Act of Accession;

(b) Acerinox was an efficient company in 1986 and it was expanding its production capacity for the products subject to this Decision. Consequently, the arrangement restricting the volume of its exports was contrary to its interests and it would not have entered into them except under pressure. By failing to inform the Directorate-General for Competition, it undoubtedly acted contrary to its own interests;

(c) there may have been a false impression in the minds of Acerinox as to the effects of Article 65 regarding the 1986 Agreement, particularly as they too sought and were given assurances by their Community partners that there were no problems in this respect.

14. For the reasons given in section X, points 12 and 13, it is considered that no fines should be imposed on the two Nordic companies, Avesta and Outokumpu, and the Spanish company Acerinox,

HAS ADOPTED THIS DECISION:

Article 1

The undertakings Acerinox SA, ALZ NV, British Steel plc, Krupp Stahl AG, Terni Acciai Speciali SpA, Thyssen Edelstahlwerke Ag, Ugine Aciers de Châtillon et Gueugnon, Outokumpu OY and Avesta AB have, during the years 1986, 1987 and 1988 (January to April), infringed Article 65 (1) of the ECSC Treaty by entering into the Agreement dated 15 April 1986 concerning quotas and prices which prevented, restricted and distorted normal competition in the common market by controlling production and by sharing markets and customers.

Article 2

For the infringements described in Article 1, the following fines are hereby imposed:

ALZ NV	ECU 25 000,
British Steel Plc	ECU 50 000,
Krupp Stahl AG	ECU 100 000,
Terni Acciai Speciali	ECU 100 000,
Thyssen Edelstahlwerke AG	ECU 50 000,
Ugine Aciers de Chatillon et Gueugnon	ECU 100 000.

Article 3

The fines imposed under Article 2 shall be paid within three months of the date of notification of this Decision to the following bank accounts:

Address	Account number for	
	National currency	ECU
Germany Dresner Bank AG (BLZ 300 800 00) D-4000 Düsseldorf	2 114 628	2 114 628 00
Belgium Générale de Banque SA B-1000 Brussels	210-0000107-62	210-0000107-62
France Société générale Agence Centrale F-75794 Paris Cedex 16	30003-03010- 00067030000	30003-03010- 00077001001/73
Italy Banca Commerciale Italiana I-20121 Milano Banco di Napoli Filiale di Brescia	961794/02/89 55/10	961294/49/56
United Kingdom Lloyds Bank Uk-London SE1 2HA Barclays Bank Int. Ltd Uk-London SW1X 7LW	50350974	59010501

On the expiry of that period, interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ecu operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, i.e. 13,75 %.

Should payment be made in the national currency of the Member State in which the bank nominated for payment is situated, the exchange rate applicable shall be that prevailing on the day preceding payment.

Article 4

The undertakings mentioned in Article 1 shall forthwith bring to an end the infringements referred to in Article 1 to the extent that they have not already done so. To this end, these undertakings shall refrain from repeating or continuing any of the acts or behaviour specified in Article 1 and shall refrain from adopting any measures having an equivalent effect.

Article 5

This Decision is addressed to :

(a) Acerinox SA,
Dr Fleming 51,
E-28036 Madrid ;

(b) ALZ NV,
Klein Langerlo,
B-3600 GENK ;

(c) British Steel Plc,
9 Albert Embankment,
UK-London SEI 7 SN ;

(d) Krupp Stahl AG,
Alleestraße 165,
D-4630 Bochum ;

(e) Terni Acciai Speciali Spa,
Viale B. Brin 218,
I-05100 Terni ;

(f) Thyssen Edelstahlwerke AG,
Oberschlesienstraße 16,
D-4150 Krefeld ;

(g) Ugine Aciers de Chatillon et Gueugnon,
Immeuble Ile de France,
Cédex 33,
F-92070 Paris-la Défense ;

(h) Avesta Ab,
Box 1000,
S-77401 Avesta ;

(i) Outokumpu OY,
Head Office,
Box 280,
SF-00101 Helsinki.

In accordance with Article 92 of the Treaty, this Decision is enforceable.

Done at Brussels, 18 July 1990.

For the Commission

Leon BRITTAN

Vice-President