II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 21 January 1998

relating to a proceeding pursuant to Article 65 of the ECSC Treaty

(Case IV/35.814 — Alloy surcharge)

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

(Text with EEA relevance)

(98/247/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 information obtained by the Commission and the checks made pursuant to Article 47 of the Treaty,

Having regard to the written comments submitted pursuant to Article 36 of the Treaty and noting that the parties formally waived their right to present oral comments,

Whereas:

I. THE FACTS

A. Procedure

(1) Following reports in the specialised press and unofficial complaints from several consumers, the Commission initiated an investigation into the application by European stainless steel producers of a general price increase known as an 'alloy surcharge'.

On 16 March 1995, under Article 47 of the ECSC Treaty, the Commission asked a number of producers for data concerning the price changes, the formula or method used to calculate the amounts applied, the circumstances and the date on which the formula was first used, as well as any subsequent amendments or applications.

On the basis of the information obtained and, in particular, copies of circulars sent by the producers to their customers which announced a modification of the bases used to calculate the alloy surcharge, the Commission sent a statement of objections on 19 December 1995 to 19 undertakings.

Having examined the file, the undertakings replied to the objections at the beginning of 1996.

(2) The replies prompted the Commission to undertake further investigations. Checks under Article 47 of the ECSC Treaty were carried out at Acerinox, ALZ, Avesta Sheffield, Krupp, Thyssen, Outokumpu and Usinor Sacilor. Requests for information were sent to Acerinox, Acciai Speciali Terni, ALZ, Böhler, Olarra, Outokumpu and Usinor Sacilor.

The undertakings to which this Decision is addressed submitted their comments on the new statement of objections which the Commission sent to them on 24 April 1977 and which cancels and replaces that of 19 December 1995. In their replies, they formally waived their right to put forward their views at a hearing.

B. **The products**

(3) Stainless steel is a type of special steel whose main property is resistance to corrosion. This resistance is achieved by the use of different alloying materials (chrome, nickel, molybdenum) in the production process. Under CEN standard EN 10020:5.2222.1, steel containing at least 10,5 % chrome and no more than 1,2 % carbon may be classed as stainless steel. There are three main types of stainless steel, depending on the composition of alloying material:

— austenitic steel, whose basic grade contains 18 % chrome and 8 % nickel,

— ferritic steel, which may contain up to 30 % chrome,

— martensitic steel, which contains up to 14 % chrome.

Each of these types has different uses.

(4) Stainless steel is used in the form of flat products (plates or coils; hot-rolled or cold-rolled) and long products (bars, wire rod, sections; hot-rolled or finished). Most of these products are ECSC products within the meaning of Article 81 of the Treaty.

(5) Flat products account for 82 % of sales of stainless steel flat products. Flat products continuously manufactured in the form of coil (hot-rolled wide or narrow strip) account for 93 % of flat products, the rest consisting in thick individually rolled sheet (reversing-mill plate). About 70 % of hot-rolled wide strip is then cold rolled to reduce thickness and give it special properties.

The market for stainless steel flat products is highly concentrated. There are only six undertakings or groups in the Community which produce hot wide strip and cold-rolled plate. Five of the undertakings also produce reversing-mill plate.

In the Krupp/Thyssen/Riva/Falck/Tadfin/AST case [1], the Commission noted that, according to the forecasts of stainless steel producers, there was a large amount of excess capacity which would persist over the next few years.

(6) This Decision is addressed to the undertakings manufacturing flat products, and is restricted to ECSC products, namely hot-rolled flat products and cold-rolled flat products at least 500 mm wide.

C. **The geographic market**

(7) Unlike carbon steel, for which the market is regarded as mature, the market for stainless steel products is still expanding. Since 1950 production of all quantities of steel has grown by 2,4 % annually, whereas production of stainless steel has grown by 5,8 % annually. During the same period the main producing and consuming regions have changed; North America gave way to Western Europe (EC plus EFTA) and then to Japan from the mid-1960s onwards. Today, the growth area is located in the newly industrialised countries, where the annual rate of growth is of the order of 16 %. A number of European producers have decided to follow this trend by investing in the areas that are net importers (America and south-east Asia).

Exports by European firms outside Western Europe account for some 25 % of their total sales. By contrast, imports of stainless steel into Western Europe account for less than 5 % of consumption there.

(8) The relevant geographic market is Western Europe. There are no customs duties or legal or technical barriers to imports between the EFTA countries and the Community and, although producers have a large share of their respective domestic markets, trade between Member States is considerable. On the other hand, imports from third countries are relatively low. In the abovementioned AST decision, imports of cold-rolled products were estimated at 3 % of total consumption [2].

D. **The parties**

(9) The companies Acerinox SA, ALZ NV, Acciai Speciali Terni SpA, Avesta Sheffield AB, Krupp Thyssen Nirosta GmbH and Usinor SA account for almost 90 % of European output of stainless steel flat products in the form of coils (hot wide strip and cold sheet) and a very large proportion of the output of stainless steel long products. All in all, they account for over 80 % of European production of finished stainless steel products.

1. *Acerinox SA*

(10) Acerinox SA ('Acerinox') is a listed company incorporated under Spanish law. Set up in 1970, the firm has modern plant and is known for its low costs and profitability. It controls the Spanish producer of stainless long products Roldán SA and a US producer of stainless flat products.

2. *ALZ NV*

(11) ALZ is a company incorporated under Belgian law that belongs to the Arbed group. Like Acerinox, ALZ was set up in the 1970s and manufactures stainless steel flat products.

3. *AST SpA*

(12) Acciai Speciali Terni SpA ('AST') was set up on 1 January 1994, when ILVA's steel-making activities were split up into three undertakings with a view to subsequent sale. AST's main activity is the production of stainless steel flat products, electrical sheet and welded tubes, the last-named being produced by a subsidiary. On 24 December 1994 the Commission authorised the joint acquisition of AST by Fried. Krupp AG Hoesch-Krupp, Thyssen Stahl AG, AFL Falck, Tadfin SpA and FI.RE. Finanziaria SpA (Riva group).

In December 1995 Krupp increased its share in AST from 50 % to 75 % by purchasing the shares held by Falck and Riva.

4. *Avesta Sheffield AB*

(13) Avesta Sheffield AB ('Avesta') is controlled by British Steel. Avesta came into being as a result of a merger in 1992 between the British and Swedish stainless steel divisions. British Steel also controls the stainless long products manufacturers Fagersta Stainless AB (in Sweden) and British Steel Engineering Steels Holdings Limited (formerly United Engineering Steel) and a US manufacturer of stainless steel flat products.

5. *Krupp Thyssen Nirosta GmbH*

(14) Krupp Thyssen Nirosta GmbH was created on 1 January 1995 folllowing the merger of the stainless steel divisions of Thyssen Stahl AG and Fried. Krupp AG Hoesch Krupp which make products resistant to acids and high temperatures [3]. It has agreed to assume full liability in the present case for events preceding its creation in regard to both Thyssen Stahl AG and Krupp Hoesch AG. This Decision is not, therefore, addressed to either of those undertakings.

6. *Usinor SA*

(15) Ugine SA ('Ugine') was, at the time of the events in question, a subsidiary of the Usinor Sacilor group responsible for the production and sale of stainless steel. On 11 December 1995 Ugine SA became a division of Usinor Sacilor and thus lost its legal personality. Usinor Sacilor altered its trading name in June 1997 and is now known as Usinor SA. Usinor SA is the largest steel producer in Europe and one of the leading producers in the world. It also controls J & L Special Steels, a leading American producer of stainless cold-rolled sheet and holds a stake in the leading Thai producer of stainless cold-rolled sheet.

E. **Background: the alloy surcharge and its calculation**

(16) The alloy surcharge is a price supplement which is calculated on the basis of the prices of alloys and is added to the basic price for stainless steel.

(17) The cost of the alloys used by stainless steel producers (nickel, chromium and molybdenum) forms a very large proportion of the total production costs. The prices for these alloys are extremely volatile, which explains the desire of producers to offset the price fluctuations without recourse to frequent alterations in the basic price. The application of the alloy surcharge has a purely financial basis.

(18) Producers calculate the amount of the alloy surcharge to be applied in a given month (M) in the different Communities currencies as follows:

They calculate the average price of nickel, ferro-chromium and molybdenum in the two months preceding the month before the month of calculation — in other words, M − 2 and M − 3.

They compare the values thus obtained with the reference values since February 1994, namely:

—ECU 3 750/tonne for nickel,

—ECU 5 532/tonne for molybdenum,

—ECU 777/tonne for ferro-chromium.

If the difference between the average prices and the reference values is positive, a price supplement is added to the basic price for the month M. If it is negative, no increase is applied: there is no negative alloy surcharge. Such a situation occurred between 1991 and 1993, when alloy prices fell below the trigger values and producers applied a zero alloy surcharge.

The amounts in excess of the trigger values are multiplied by the percentage of each alloy in the quality of steel concerned (for example, for quality AISI 304, there would be 9 % nickel and 18 % chromium and for quality AISI 316, 12 % nickel, 18 % chromium and 2,5 % molybdenum.

(19) Calculation methods have varied, depending on the period and the producer. In the course of the inspections carried out under Article 47 of the ECSC Treaty in 1996 and in certain letters to the Commission, the producers stated that they had all been using the method described in the statement of objections of 19 December 1995 (with the exception of the trigger values) since 1988 ([4]). In its Decision 90/417/ECSC ([5]), the Commission objected to an agreement and concerted practices between European producers of stainless cold-rolled flat products which related in particular to prices. The agreement was in force between at least May 1986 and October 1988. The decision was not contested. All the parties in question in the present proceedings were at the time members of the 'Sendzimir club' referred to in Decision 90/417/ECSC.

F. **The behaviour of the undertakings in December 1993 and January 1994**

(20) The prices for alloys and stainless steel fell sharply in 1993. When nickel prices started to rise in September 1993, producers' profits were considerably reduced. To remedy this, the producers of stainless flat products, with the exception of Outokumpu, agreed to hold a meeting in Madrid. Following that meeting, a number of contacts took place between the producers.

1. *Meeting held in Madrid on 16 December 1993*

(a) Participants

(21) The meeting (hotel reservations and suchlike) was organized by Acerinox ([6]), which denies, however, having been the instigator. The meeting was attended by:

— Acerinox:	Mr Riestra
— ALZ:	Mr R.
— AST:	Mr Ronchi and Mr Moio
— Avesta Sheffield:	Mr T. and Mr W.
— Krupp Hoesch Stahl AG:	Mr Plömacher and Mr Hufen
— Thyssen:	Mr Peek
— Ugine:	Mr Laquay and Mr Lepage.

(b) Purpose

(22) According to the statements of the undertakings, the purpose of the meeting was to allow producers to exchange views on the possible reintroduction of an alloy surcharge as the most appropriate means of increasing prices and compensating for higher nickel prices.

Acerinox stated:

'Se celebró una reunión en Madrid con fecha 15 de diciembre de 1993, que había sido acordada entre las partes para hablar (...) de la problemática situación del mercado de las materias primas del acero inoxidable y las fuertes oscilaciones de los precios de las mismas.' ([7]).

In its statement, Avesta specifies that:

'The meeting involved an exchange of views on the difficulties caused by the various price developments described above and on the possible reintroduction of an alloy surcharge to address these difficulties.' ([8]).

According to Krupp and Thyssen:

'Dort sind die allgemein schlechte wirtschaftliche Lage sowie mögliche Auswege erörtert worden.' ([9]).

Ugine stated ([10]):

'Une réunion a eu lieu à Madrid à l'hôtel (...) le 16 décembre 1993 qui a permis de procéder à un échange de vues entre les producteurs d'acier inoxydable.'

In its statement, AST even specifies ([11]) that it is in order to find a solution to the crisis that the undertakings met in Madrid:

'In questo contesto, e al fine di trovare una via d'uscita dalla situazione di crisi, ebbe luogo un incontro tra i principali produttori di acciaio europei.'

(c) Selecting the calculation method and reference values

(23) Mr Laquay, a representative of Ugine, explained with the aid of a flip chart how the alloy surcharge had been applied in the past ([12]). According to Krupp and Thyssen:

'Herr Laquay hat als Spezialist für LZ-Berechnungen unter Zuhilfenahme eines Flip-Charts spontan und exemplarisch am Beispiel der von seinem Unternehmen in Frankreich geforderten Preise errechnet, welche zusätzlichen Erlöse bei entsprechender Umstellung des Stoppreises im französischen Markt erzielbar wären' ([13]).

(24) All the participants at the meeting said it was necessary to use the method adopted in 1991, and alter the reference values.

Acerinox stated:

'En la misma se planteó, ante las circunstancias ya conocidas de la volatilidad del mercado de las materias primas en el que Acerinox SA no tiene intervención alguna, la necesidad de aplicar el extra de aleación a los clientes con arreglo a una fórmula tradicional ya conocida y aplicada con los valores más adecuados para paliar la cada vez más especulativa situación de la LME' ([14]).

AST stated:

'Nel corso di quell'incontro furono discusse le iniziative che ciascuno dei partecipanti intendeva prendere al riguardo, che aveva elaborato in precedenza in totale autonomia (almeno per quanto riguarda AST). Dall'incontro emerse una naturale convergenza sull'adozione, come livello minimo della formula, del prezzo del nichel del settembre 1993' ([15]).

Avesta states that:

'The participants exchanged similar views on the use of the alloy surcharge calculation mechanism previously applied. In the course of the exchange, the ASAB representatives put to the meeting their views on using the previously adopted calculation mechanism with new trigger values' ([16]).

In their statement, Krupp and Thyssen gave the following explanation:

'Unter den gegebenen Umständen lag daher die einzige Möglichkeit, der Entwicklung zu begegnen, in dem Versuch, den wegen des früheren Absinkens des Preises der Legierungsmetalle unter den bisherigen Stoppreis ausgesetzten LZ wieder zu aktivieren.(. . .) Im Rahmen des Treffens hat dann Herr Plömacher bekundet, daß Krupp künftig als Stoppreis die niedrige Septembernotierung für Ni zugrunde legen werde' ([17]).

Ugine stated:

'Au cours de la réunion, certains participants dont Ugine ont fait connaître leur intention, assortie ou non de réserves, de reprendre l'application de la formule d'extra assortie d'un nouveau seuil de déclenchement (le point bas du cours du nickel en septembre) à dater du 1er février 1994' ([18]).

(25) The customers were already familiar with the mechanism. The September 1993 alloy prices (the lowest historical prices for nickel) were chosen as the new trigger thresholds. In its statement, Avesta states that calculations were carried out during the meeting using the September/October alloy prices and an approximate rate of exchange for that period:

'Calculations were made at the meeting on the basis of new trigger values reflecting alloy prices in September/October 1993 (i.e. using the basis of calculation of the previously adopted surcharge) and an approximate rate of exchange for that period' ([19]).

(d) Date of application

(26) With regard to the date of application of the new alloy surcharge, most of the participants were in favour of applying it as soon as possible: 1 February 1994 was considered to be the most realistic date for first application. In its statement, Avesta specifies:

'At the meeting, the participants also discussed an implementation date. 1 February was considered to be the earliest feasible date for introduction of the surcharge' ([20]).

Acerinox also states that:

'La mayoría de los presentes eran partidarios de aplicar el extra de aleación lo más pronto posible'. ([21]).

(27) Acerinox stated that it did not intend to apply the surcharge in Spain, as demand on the Spanish market was depressed:

'Acerinox indicó su intención de no aplicar el extra en España por considerar que no iba a ser positivo para el aumento de la demanda y para la industria española que estaba sumida en una profunda crisis' ([22]).

(e) Fax of 20 December 1993

(28) The fax ([23]) sent by Ugine on 20 December 1993 to producers participating in the meeting and to Outokumpu reflects the conclusions of the meeting. Drafted in English, the fax details the calculation of the alloy surcharge including the trigger values, the ECU/USD exchange rate (USD 1,179/ECU for nickel, USD 1,182/ECU for chromium and USD 1,171/ECU for molybdenum), the reference months and standard alloy contents.

According to Avesta's statement:

'On 20 December 1993, ASAB received a fax from Mr Laquay of Ugine setting out details relating to the alloy surcharge calculation including trigger points, an ECU/USD exchange rate calculation, the monthly basis (i.e. M − 2 and M − 3) and standard alloy contents. This document reflected the exchange of views between producers' ([24]).

Ugine admits to sending the document in its statement:

'À la suite de cette réunion, Ugine a communiqué aux participants par télécopies les 20 décembre 1993 et 11 janvier 1994 les bases et les résultats des

calculs fondés sur la formule qu'elle entendait adopter sur le marché national français ou européen en cas de non alignement' ([25]).

In its reply to the statement of objections of 23 April 1997 Ugine refers to the fax as containing the conclusions of the Madrid meeting ([26]).

AST could not rule out having either received or taken account of it in its decision:

'La mancanza di conoscenza diretta dei dettagli non permette però di escludere in maniera categorica che vi sia stato qualche scambio di informazione. (...) Dato l'apparente tenore di tali messaggi non si può per il vero neppure escludere che AST ne sia stata influenzata nella determinazione dei valori utilizzati nella formula' ([27]).

2. *Sequels to the Madrid meeting*

(29) In accordance with Article 60(2)(a) of the Treaty and pursuant to Decision 37/54/ECSC ([28]), as last amended by Decision 2515/86/ECSC ([29]), stainless steel producers must make public their price lists and conditions of sale. They fulfil that obligation by addressing them to the Commission and any other interested party at least two working days before applying them. Each time the price lists are amended, they must be made public and notified to the Commission. This is the legal background to the facts set out below which the Commission has identified as having taken place between the Madrid meeting and the publication of the alloy surcharges by the undertakings concerned.

(30) On 20 December 1993 Avesta Sheffield warned its distribution subsidiaries of the probable introduction of an alloy surcharge ([30]).

On 22 December 1993 ALZ warned its sales subsidiaries of the reintroduction of the alloy surcharge ([31]).

(31) On 6 January 1994 Ugine recalculated the figure using the same reference values, but with another, single ECU/USD exchange rate for all three alloys: ECU 1,17506/USD. This centesimal difference is minimal and its effect on the amount of the alloy surcharge is negligible (cf. point 37).

On 10 January 1994 Avesta Sheffield carried out detailed calculations to establish the alloy surcharges. It used the ECU/USD exchange rate used at the Madrid meeting ([32]).

(32) On 11 January 1994 Ugine sent all its competitors a fax ([33]) containing the alloy surcharges it was going to apply on the French market from 1 February with details of the calculation in ECU/tonne, a conversion table of the main European currencies and the comment that it would apply it only to austenitic steel.

In their statements, all the undertakings mention the fax:

'On 11 January 1994, Mr Laquay of Ugine sent a fax to Mr W. setting out Ugine's internal calculation of the alloy surcharge to be applied by it from 1 February 1994' ([34]).

(33) Up to 13 January 1994, contacts had taken place at least between Avesta and most of its competitors concerning the latter's position on the alloy surcharge. Annexes 2 and 6 to Avesta's statement point to the existence of some of these contacts.

Annex 2 is a fax dated 14 January 1994 from S. to W. The following extracts are relevant:

'ALZ through their Swedish representative called me this morning saying that he had been instructed from his mill to start applying alloy extras as from the 1 of February and that he should get the exact alloy surcharge details from us. (...) Outokumpu through S. also called me today and asked what we intend to do. I said that most likely we are going to apply the surcharge in the same way as announced by Ugine for the French market.(...) He said they want to do the same in both Sweden and Finland and suggested that we contact him on Monday' ([35]).

Annex 6 is a fax dated 14 January 1994 and signed by W. It takes note of the positions of some of Avesta's competitors, as follows:

'Ugine have announced surcharges effective 1 February 94 of 430 GBP 4,36, 304 GBP 47,55, 316 GBP 74,03. Acerinox have announced that surcharges will be applied from 1.4.94 (yes April!!). Outokumpu are thought to be following this line but no confirmation yet. Thyssen expect to announce something next Monday. Krupp — we have no current information. Ilva have announced a base price change effective from February but applicable to stockists and not end-users. ALZ are still considering their position' ([36]).

(34) On 13 January ALZ informed its competitors by telex of the amounts of the surcharges it was going to publish ([37]). It informed the Commission of its price list only on 24 January 1994.

(35) On the same day, AST sent Outokumpu a fax repeating the contents of the fax which it had received from Ugine on 20 December 1993 and the calculations carried out by Ugine on 6 January ([38]).

(36) On 17 January 1994 Ugine, AST and Krupp informed the Commission of the alloy surcharge they would be applying from 1 February.

On the same day, Avesta decided it would formally reintroduce the alloy surcharge and informed its distributors, giving them precise instructions on the application procedures ([39]).

On 19 January 1994, Thyssen notified the Commission of the alloy surcharges it would be applying from 1 February 1994.

G. **Application of the allow surcharge**

(37) On the basis of Article 60 of the ECSC Treaty, all the undertakings (with the exception of Acerinox) informed the Commission of the surcharges they intended to apply and the date of application: 1 February 1994. Acerinox, which informed the Commission of the new surcharges only in May 1994, nevertheless applied the amounts in certain Member States as early as February. The method used being identical, any differences in the final amounts are minor and are due to rounding-up or the exchange rate used.

(38) The practical aspects of applying the surcharge are described in an Avesta memo of 17 January 1994. The following points are worth noting:

'We will follow the rules set by the home producer in any given producer market, including applying the surcharge they declare.

In each non-producer market a lead will be taken by one of the mills — W. will advise those markets concerned.

The surcharge will not be imposed outside of the 17 European markets. We will need to secure appropriate price increases as soon as possible.' ([40]).

(39) The practical aspects of applying the surcharge may be illustrated by three facts:

The amounts of the surcharge applied by the producers on a given market are identical, irrespective of the amount that would have been obtained by converting the amount published in the tariffs.

In the United Kingdom, all the producers endeavoured to apply the alloy surcharge retroactively, following Avesta's lead.

For flat products, in the countries without a domestic producer, the undertakings aligned their prices on the price list of a single producer.

(40) In its statement, Avesta specifies:

'In the national markets in which ASAB was neither the domestic producer nor, in markets with no domestic producer, the leading supplier, typically, but not uniformly, ASAB would align on the domestic producer or leading supplier as was traditional in the stainless steel industry generally. The German producer had, for example, traditionally been regarded as the leading supplier in Austria and ALZ the leading supplier in the Nederlands, whilst the Nordic producers had been regarded as leading suppliers in Denmark and Norway and the British producer in Ireland '([41]).

(41) The producers finally sent letters to their customers announcing the amendment of the thresholds. The Commission has copies of some of the letters. The following extracts are relevant to the present proceedings:

On 28 January 1994 Ugine Savoie UK Ltd informs its customers that the alloy surcharge is being reapplied, as follows:

'It has therefore been decided at a European level to reactivate the surcharge system to take into account the increase in alloy costs since September 1993, and this surcharge will be applied generally from 1st February 1994' ([42]).

On 31 January 1994 Thyssen Fine Steels Ltd writes to its customers:

'For this reason, we have no choice but to implement alloy surcharges on all stainless flat products in line with all other manufacturers. As in the previous surcharge situation, a clear basis for surcharge has been agreed to account for the changes in relationship between prices and costs ' ([43]).

II. **LEGAL ASSESSMENT**

A. **Article 65(1)**

1. *Background*

(42) 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, and in particular those tending to fix prices.

2. *The agreement*

(43) Article 65 of the ECSC Treaty is infringed if the parties reach a consensus on a plan which limits or is likely to limit their commercial freedom by determining the lines of their mutual action or abstention from action in the market. No contractual sanctions or enforcement procedures are required. Nor is it necessary for such a consensus to be made in writing.

(44) In the present case, the Madrid meeting had a single aim: to secure an across-the-board increase in stainless steel prices to offset the rise in the price of alloys. A discussion took place of the different methods used in the past to calculate the alloy surcharge and, following the meeting, all the undertakings took identical action. They applied to their sales in Europe, except in Spain and Portugal, from 1 February 1994, an alloy surcharge based on the method last used in 1991, taking the September 1993 prices as reference values. A consensus had therefore been reached. That consensus was confirmed in the fax from Ugine of 20 December 1993, with the result that the consensus must be defined as an agreement. The content of the circulars referred to above (point 41) confirms the definition.

(45) In any event, if the definition of the consensus as an agreement is disputed, the reintroduction by the stainless steel producers of the alloy surcharge by deliberately identical methods as to value and date is at the very least and without any doubt a concerted practice. In creating the concept of 'concerted practice', the authors of the Treaty intended to forestall the possibility of undertakings' evading the prohibiton on concerted practices by colluding in an anti-competitive manner falling short of an agreement by, for example, informing each other in advance of the attitude each intends to adopt, so that each could regulate its commercial conduct in the knowledge that its competitors would behave in the same way.

Thus, in its judgment in the ICI case of 13 July 1972 ([44]), the Court held that

'Article 85 [of the EEC Treaty] draws a distinction between the concept of "concerted practices" and that of "agreements between undertakings" or of "decisions by associations of undertakings"; the object is to bring within the prohibition of that Article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition'.

(46) In any event, the question whether the conduct of the undertakings in this case is to be described as an agreement or as a concerted practice has no bearing on the conclusion that such conduct is contrary to Article 65 of the ECSC Treaty.

As the Court stated in its opinion delivered on 13 December 1961 at the request of the High Authority and the Council of Ministers concerning the interpretation of Article 65 of the ECSC Treaty ([45]), that Article, which contains the provisions giving effect to the prohibition in Article 4b of the Treaty, 'states in paragraph 1 the scope of the prohibition by forbidding in general terms all agreements'. The prohibitation in Article 4, according to the Court, 'is clearly intended to prevent undertakings from acquiring by means of restrictive practices a position which enables them to have or exploit markets.' The prohibition is 'of strict application and distinguishes the system established by the Treaty.'

3. *Purpose, effect and duration of the agreement*

(a) Purpose and effect of the agreement

(47) The purpose of the agreement is the use by all undertakings, as from the same date, of lower and identical alloy reference values in the surcharge calculation method used previously, in order to raise prices. Since the 'surcharges' or supplements form part of the final price of the products in question, the purpose of the agreement is to fix part of the price. Article 65(1) specifically states that agreements and concerted practices tending directly or indirectly to fix prices restrict competition.

(48) The agreement appreciably restricts competition. The undertakings concerned by this Decision account for almost 90 % of stainless steel flat products. The impact on the market of a concerted increase in prices between them is thus necessarily considerable.

Furthermore, the alloy surcharge is a major component of the final price. The price increase resulting from the alloy surcharge depends partly on the amount of alloy used in the steel and partly on fluctuations in alloy prices. It may account for as much as 25 % of the total price.

(49) As the purpose of the agreement is to restrict competition, it is not necessary to demonstrate that the market has actually been affected. It must be pointed out, however, that the change in the reference values for the alloy surcharge was followed by a virtual doubling of stainless steel prices between January 1994 and March 1995. While such a sharp increase cannot be explained solely by the change in the trigger values for the alloy surcharge in February 1994, it did greatly contribute to it through the mechanical price increase that it caused. In addition, one of the components of the price for stainless steel has been fixed at exactly the same level by all the producers since February 1994.

(b) Duration of the information

(50) It is clear from the documents on file that, whilst the principle of an alloy surcharge is not new and has been generally applied, the use of an identical calculation method by all the Community producers for their sales in Western Europe dates back approximately to 1988. There is reason to believe, therefore, that the agreement dates back to the same period and that the concerted modification of the reference values in 1994 is only a development thereof.

Nevertheless, the factual elements on which this conclusion is based are not sufficiently well-founded. It must therefore be concluded that the concerted action began at the Madrid meeting in December 1993 and has been pursued to date by all the undertakings with the exception of Avesta Sheffield, which announced in November 1996 that it had decided to use another calculation method.

4. *Arguments of the parties*

(51) None of the addressees of the statement of objections has contested the facts as described by the Commission.

(52) Avesta and Usinor do not dispute the legal assessment contained in the statement of objections and simply state that the infringement has ended with the adoption of a new calculation method (Avesta) or that it was an insolated measure (Usinor).

(53) Krupp, AST and ALZ, on the other hand, whilst acknowledging the facts, challenge the Commission's perception of them. They claim that the Madrid meeting was simply an exchange of views and that the amended alloy surcharge reference values do not stem from an agreement or a concerted practice. This interpretation must be rejected for the reasons given above.

(54) Lastly, Acerinox states that it informed its competitors at the Madrid meeting that it would not apply the surcharge on the Spanish market; according to Acerinox, this proves that it did not take part in any agreement. The fact that Acerinox took that position is explained by the particular characteristics of the Spanish market, where stainless steel consumption is lower than in other Member States. Acerinox, however, applied the surcharge outside Spain from February 1994, thus conforming to the decision taken at the Madrid meeting which it organised in full knowledge of the facts.

In addition, all the undertakings argue that there are 'extenuating circumstances'.

(a) All the undertakings concerned argue that recourse to the calculation method is a long-established practice

(55) It is necessary to distinguish between long-standing use of a calculation method which allows fluctuations in alloy prices to be reflected in product prices and the adoption of a uniform calculation method.

The surcharge calculation includes values which may be compared to recommendations within the meaning of the 1968 Commisson notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises ([46]). The method clearly constitutes a restriction of competition

(56) It seems that the general application of the method in force in 1994 dates back to 1988 (with the exception of the trigger values). In its abovementioned Decision 90/417/ECSC of 18 July 1990, the Commission found against an agreement and concerted practices between parties which related in particular to prices. The agreement had been in force at least between May 1986 and October 1988. The decision was not contested. The Commission does not, however, have sufficient evidence that the adoption of an identical calculation method was the result of concerted action as such. That is why the original adoption of the method is not the subject of this Decision. However, the circumstances in which the surcharge trigger value was recently amended points to the existence, at least in the present case, of collusion in the setting of the value and the date of implementation.

(b) Some producers ([47]) claim that customers are in favour of the surcharge method

(57) The fact that customers accept a practice that is contrary to the competition rules does not make it lawful. What is more, it was precisely owing to complaints from certain customers that the Commission undertook its investigations.

Indeed, the documents obtained in the course of the proceedings are evidence of the difficulties the producers encountered when they endeavoured to have the surcharge accepted by their customers.

(c) Some undertakings ([48]) minimise the effect of the practice objected to

(58) The undertakings claim on the one hand that the alloy surcharge was applied only to a small proportion of transactions and, on the other, that many customers benefited from fixed prices. They state that the increase in stainless steel prices in 1994 was not due to the amendment of the surcharge trigger threshold but to the ratio of supply to demand.

(59) These arguments must be rejected. In view of the fact that the concerted action was aimed at revising reference values in order to increase prices, it constitutes an infringement of Article 65 irrespective of its effect on the market. In addition, the application of dissimilar conditions to comparable transactions constitutes an infringement of Article 60 of the ECSC Treaty, and undertakings are not entitled to rely on a possible infringement in order to attempt to conceal or deny the existence of an established infringement. Finally, the alloy surcharge can, depending on the qualities and products concerned, account for up to 25 % of the final price.

(d) Several undertakings ([49]) pleaded the principle of legitimate expectation

(60) According to those firms, the Commission could have deduced from the price lists sent to it under Article 60 that there was a single method of calculation. The fact that it did not initiate proceedings under Article 65 created a legitimate expectation on the part of the firms that the use of a common method was lawful.

(61) The undertakings simply notified the Commission of the amounts of the alloy surcharges they were applying, in the different currencies. The calculation method itself was never sent to the Commission, nor were the data on its implementation.

(e) Certain undertakings ([50]) alleged that the Commission encouraged them to adopt a common method

(62) Commission policy concerning calculation models was determined in the late 1960s.

The 1968 notice on cooperation between undertakings provides that agreements having as their sole object the joint preparation of calculation models do not restrict competition. However, calculation models containing specified rates of calculation must be regarded as recommendations that may lead to restraints of competition.

(63) In its Decision 80/257/ECSC ([51]), the Commission specified how calculation models could amount to 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.'

The undertakings must therefore have been aware of the Commission's position on the adoption of a single method of calculation for the alloy surcharge.

(f) Several undertakings invoke the principle of market transparency laid down in Article 60 of the ECSC Treaty

(64) Usinor states in its replies to the two statements of objections that the price control system known to industrial economists as the 'basing point system' provides specifically for an element of concerted action, and Thyssen Stahl AG claims that the transparency requirements of Article 60 of the Treaty require the suppliers to provide general information on their intended prices.

(65) It is true that Article 60 of the Treaty stipulates that 'the price lists and conditions of sale applied by undertakings within the common market must be made public', but the prices and conditions must be adopted independently by each firm. They may not in any event be communicated to the parties concerned before the Commission is informed. The obligation to make the prices public does not

justify holding a meeting having the object or effect of either influencing the conduct on the market of an actual or potential competitor or of disclosing to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.

(66) Usinor also states that the harmonisation of the alloy surcharge is a result of the ECSC system of price controls. None of the provisions of the Treaty or secondary legislation, however, call for the application of any surcharge and even less for its standardization. The decision to add a surcharge to a price list and the fixing of the amount is a matter for each individual firm. Article 60 does not allow undertakings to concert and fix prices between themselves.

(g) Some undertakings dispute the Commission's finding that the infringement was continuous

(67) Usinor states in its reply to the statement of objections of 23 April 1997 that the increase in one cost-component is a single, temporary occurrence, that contacts between the producers did not continue after January 1994 and that therefore the infringement cannot be described as being continuous.

(68) Avesta points out that it announced the introduction of a new method in November 1996.

(69) Thyssen Stahl AG claims that the infringement ended no later than July 1994, when nickel reached the earlier reference values. AST considers that the infringement was an isolated measure and that it ended in June 1994.

(70) Only Avesta's argument can be accepted, as the introduction of its new system had the effect of ending the application of the contested measure. The infringement consisted in a concerted revision of the reference values for the alloy surcharge, values which have not subsequently been reamended independently by the undertakings concerned. The fact that nickel reached its former reference values in July 1994 is irrelevant, as the surcharge applied by the undertakings was necessarily higher than if the reference values had not been altered.

5. *Conclusion with regard to Article 65(1)*

(71) In the 'beams' case, the Commission concluded [52] that since extras form part of the ultimate price to be paid for the products in the European Community the agreements to harmonise extras were agreements to fix prices contrary to Article 65(1).

(72) In the present case, therefore, the Commission considers that the stainless steel producers referred to in this Decision increased prices in a concerted manner from 1 February 1994. The facts described above constitute an infringement of Article 65 of the Treaty.

B. **Fines**

1. *Applicability of Article 65(5)*

(73) Pursuant to Article 65(5) the Commission may impose fines or periodic penalty payments on any undertaking which has entered into an agreement which is automatically void, or has enforced or attempted to enforce an agreement or decision which is automatically void, or has engaged in practices prohibited by paragraph 1 of that Article.

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.

2. *Gravity of the infringement*

(74) An agreement or concerted practice aimed at a uniform increase of a cost component constitutes a serious infringement of Community law. The undertakings justify the decision on the grounds of the critical economic situation into which the combined effect of the rise in the price of alloys and fall in the price of stainless steel had plunged them. The Commission does not dispute the right of each undertaking to adopt, independently, measures to deal with the situation; it cannot, however, accept concerted action by virtually all the producers of stainless flat products as to the content of such measures.

(75) In view of the blatant nature of the infringement, symbolic fines would not be appropriate. However, taking account of the economic and legal elements referred to above and the relative gravity of the infringement, the Commission does not consider that the infringement that is the subject of this Decision merits very substantial fines.

(76) For these reasons the amount of the fine imposed to reflect the gravity of the infringement is set at ECU 4 million.

(77) All the undertakings referred to in this Decision are large. It is not necessary, therefore, to vary the amounts of the fines on that score.

3. *Duration of the infringement*

(78) The Commission considers (in spite of the views it sets out in paragraph 50) that the concerted action began with the meeting in Madrid in December 1993 and has been pursued since then by all the undertakings concerned, with the exception of Avesta Sheffield, which announced in November 1996 that it intended to use another calculation method, and Thyssen Stahl AG, which withdrew from the stainless flat products sector on 1 January 1995.

(79) The amount imposed to take account of the gravity of the infringement should therefore be increased by ECU 1,6 million in the case of Acerinox, ALZ, AST, Krupp Hoesch Stahl and Usinor. Increases of ECU 0,4 million and ECU 1,2 million respectively are applied to Thyssen and Avesta.

(80) The basic amounts are therefore set at ECU 5,6 million for Acerinox, ALZ, AST, Krupp and Usinor, at ECU 5,2 million for Avesta and at ECU 4,4 million for Thyssen.

4. *Aggravating or extenuating circumstances*

(81) The Commission considers that Usinor played a major part in the concerted action: it was Usinor that did the calculations at the Madrid meeting and sent the conclusions of the meeting and the definitive calculation of the alloy surcharge to the producers after the meeting ([53]). This justifies an increase of 25 % in the basic amount for Usinor on the grounds of aggravating circumstances.

(82) The Commission also recognises that while Acerinox organised the Madrid meeting and applied the surcharge in Denmark from February onwards, it made the surcharge public only in May 1994 ([54]), with a view to applying it on its principal market (Spain) in June.

(83) On the other hand, the economic situation in the sector at the end of 1993 was particularly critical. The price of nickel was rising rapidly, while the price of stainless steel was very low. It should be noted that this particular situation applies only to the very beginning of the concerted action.

(84) These factors justify a reduction in the basic amount of 30 % for Acerinox and 10 % for all the other undertakings on the grounds of attenuating circumstances.

5. *Applicability of the Commission notice on the non-imposition or reduction of fines in cartel cases* ([55])

(85) In their replies to the statement of objections of 19 December 1995, the undertakings concerned by this Decision did not deny the existence of a single method for the calculation of the alloy surcharge by the various European producers.

(86) The investigations carried out between July 1995 and December 1996 were aimed at determining any contacts between the undertakings prior to the modification of the surcharge reference values in 1994.

(87) Some of the undertakings categorically denied that any communication had taken place at all. In a statement made during the inspection on 25 September 1996, Acerinox said:

'No recibieron información'. ([56]).

(88) Following the inspection on 8 October 1996, Krupp and Thyssen stated in a letter dated 23 October 1996 that they had notified their decision only after 17 January 1994 (the same date on which they notified the surcharge to the Commission) and had received information from their competitors only after the latter had notified their price lists to the Commission ([57]).

(89) Ugine refused, during the inspection on 17 July 1996, to inform the Commission whether it had notified its competitors of its plans with regard to a surcharge ([58]).

(90) Other undertakings partially confirmed information already in the possession of the Commission. In reply to a request for information, ALZ stated:

'ALZ herinnert zich niet in de periode van 1 augustus 1993 tot 1 februari 1994 inlichtingen ontvangen te hebben van andere producenten van roestvrij staal met betrekking tot de wijziging van de drempelwaarden van de legeringstoeslag. (...) ALZ heeft vervolgens, rond 15 januari, aan de andere marktdeelnemers, d.w.z. cliënten, producenten en agenten, meegedeeld dat het voornemens was een legeringstoeslag bekend te maken voor leveringen vanaf 1 februari 1994' ([59]).

(91) AST stated in a letter of 31 October 1996:

'L'AST precisa comunque di avere sentito dire che è stato rinvenuto dalla Commissione il testo di un documento che l'AST avrebbe a sua volta successivamente ritrasmesso alla Outokumpu' ([60]).

(92) In December 1996 and January 1997, following Commission inspections at the offices of six of the addressees of this Decision, as well as Outokumpu and Edelstahl Witten Krefeld, the legal representatives of ALZ, AST, Avesta, Krupp-Thyssen and Usinor Sacilor and the representatives of Acerinox informed the Commission of their desire to cooperate in the current proceedings. Statements acknowledging the facts were sent to the Commission by those undertakings on 17 December 1996 (Acerinox, ALZ, Avesta, Krupp and Thyssen, Usinor Sacilor) and on 10 January 1997 (AST).

(93) The cooperation must be assessed in the light of the criteria laid down in the abovementioned Commission notice on the non-imposition or reduction of fines in cartel cases.

(94) None of the undertakings qualifies for the conditions set out in the notice under Section B 'Non-imposition of a fine or a very substantial reduction in its amount' as none of them reported the agreement to the Commission before it started its investigations or, indeed, before it sent the statement of objections on 19 December 1995.

(95) Nor do any of the undertakings qualify for the conditions set out in Section C 'Substantial reduction in a fine'. Only Avesta ended the infringement on 1 November 1996, but it was not the first to supply decisive evidence of the existence of the agreement. Such evidence was supplied in particular by Outokumpu at the inspection on 17 October 1996.

(96) All the undertakings may benefit to varying degrees from the provisions of Section D 'Significant reduction in a fine'.

(97) Only Usinor and Avesta acknowledged the existence of the concerted action. In addition, Avesta undertook, at the inspection on 18 October 1996, to examine its files carefully in order to trace any possible contacts. Some documentary evidence of such contacts was sent to the Commission on 31 October 1996. Avesta is the only undertaking to have put an end to the infringement by radically changing its method of calculating the alloy surcharge, thereby taking a major commercial risk. Usinor was the first to inform the Commission of the Madrid meeting.

(98) The statements and the replies to the objections submitted by Krupp-Thyssen-Nirosta GmbH, Thyssen Stahl AG, AST SpA and ALZ NV do not contribute anything new and dispute the existence of concerted action.

(99) Acerinox for its part acknowledges in its reply of 24 April 1997 to the statement of objections that concerted action was taken, but denied its involvement.

(100) Thus, although certain undertakings (Usinor and Avesta) cooperated extensively, the Commission must also bear in mind that they did so extremely late. The cooperation shown by the other undertakings (Krupp, Thyssen, AST, ALZ and Acerinox) was more limited: the firms did not provide any documentary evidence or facts not already in the possession of the Commission and did not acknowledge the infringement.

(101) This justifies a reduction of 10 % in the amount of the fine for all the undertakings except Avesta and Usinor, to which a reduction of 40 % is applied.

6. *Particular case of Krupp Thyssen Nirosta GmbH*

(102) By letter dated 23 July 1997, Krupp Thyssen Nirosta GmbH stated that it was assuming liability for the acts of Thyssen Stahl AG and Krupp Hoesch Stahl AG since 1993. The enacting part of this Decision takes that into account.

C. **Non-applicability of Article 65(2)**

(103) Under Article 65(2), the Commission authorises specialisation agreements; or joint-buying or joint-selling agreements; or agreements strictly analogous in nature and effect provided that they meet certain conditions. On the supposition that there was a formal agreement, no request for authorisation

within the meaning of Article 65 of the ECSC Treaty was made. In any event, such an agreement is not such as to belong to the categories that might qualify for authorisation. On the contrary, the Commission takes the view that such an agreement constitutes an agreement to fix or determine prices within the meaning of Article 65(1) of the ECSC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

Acerinox SA, ALZ NV, Acciai Speciali Terni SpA, Avesta Sheffield AB, Krupp Hoesch Stahl AG (Krupp Thyssen Nirosta GmbH as from 1 January 1995), Thyssen Stahl AG (Krupp Thyssen Nirosta GmbH as from 1 January 1995) and Ugine SA infringed Article 65(1) of the ECSC Treaty, in the case of Avesta Sheffield from December 1993 to November 1996 and, in the case of the other undertakings, up to the date of this Decision, namely by modifying and by applying in a concerted fashion the reference values used to calculate the alloy surcharge, such practice having both the object and the effect of restricting and distorting competition within the common market.

Article 2

The following fines are hereby imposed in respect of the infringements described in Article 1:

— Acerinox SA: ECU 3 530 000
— ALZ NV: ECU 4 540 000
— Acciai Speciali Terni SpA: ECU 4 540 000
— Avesta Sheffield AB: ECU 2 810 000
— Krupp Thyssen Nirosta GmbH: ECU 8 100 000
— Usinor SA: ECU 3 860 000

Article 3

The fines referred to in Article 2 shall be paid to the Commission of the European Communities within three months of the date of notification of this Decision to the following account numbers.

Address	Account number for	
	National currency	ECU
Germany Dresdner Bank AG (BLZ 300 800 00) Düsseldorf	2 114 628	2 114 628 00
Belgium Société Générale de Banque SA 3, Montagne du Parc B-1000 Bruxelles	210-0000107-62	210-0000107-62
Spain Banco Español de Crédito Calle Mesena, 80 E-28033 Madrid	137.003-270	394.002-278
France Société Générale Agence Centrale F-75428 Paris Cedex 09	30003-03010-00067030000/22	30003-03010-00077001001/73
Italy Banca Commerciale Italiana I-20121 Milan	961794/02/09	961794/49/56
Sweden Nordbanken H68 S-105 71 Stockholm	3959 77 084 85	3968 77 4 76 76

Upon expiry of that period, interest shall automatically be payable on the fines at the rate charged by the European Monetary Institute for transactions in ecus on the first working day of the month in which this Decision is adopted, plus 3,5 percentage points, namely 7,75 %.

Article 4

Acerinox SA, ALZ NV, Acciai Speciali Terni SpA, Krupp Thyssen Nirosta GmbH and Usinor SA shall immediately put an end to the infringements referred to in Article 1 and shall inform the Commission within three months of being notified of this Decision of the measures they have taken to that end.

The undertakings referred to in Article 1 shall refrain from repeating the acts or conduct specified in the said Article and from adopting any measure having an equivalent effect.

Article 5

This Decision is addressed to:

1. Acerinox SA, Santiago de Compostela 100, E-28035 Madrid;
2. ALZ NV, Industrieterrein Genk-Zuid Rechteroever, B-3600 Genk;
3. Acciai Speciali Terni SpA, Viale B. Brin 218, I-05100 Terni;
4. Avesta Sheffield AB, Vasagatan 8-10 P.O. Box 16377, S-10327 Stockholm;
5. Krupp Thyssen Nirosta GmbH, Alleestraße 165, D-44793 Bochum;
6. Usinor SA, La Défense 7, 13 Cours Valmy, F-92800 Puteaux.

This Decision is enforceable pursuant to Article 92 of the Treaty.

Done at Brussels, 21 January 1998.

For the Commission

Karel VAN MIERT

Member of the Commission

NOTES

(1) Commission Decision 95/421/EC of 21 December 1994 declaring a concentration to be compatible with the common market (Case IV/M.484 — Krupp/Thyssen/Riva/Falck/Tadfin/AST) (OJ L 251, 19.10.1995, p. 18).

(2) See footnote 1.

(3) Commission Decision of 26 July 1994 authorising Fried. Krupp AG Hoesch-Krupp and Thyssen Stahl AG to set up a joint venture for the production of flat special stainless steel products that are resistant to acids and high temperatures.

(4) See for example the statement by Acerinox dated 17 December 1996: 'La fórmula en su estado actual viene aplicándose desde el año 1988.' ('The current formula has been applied since 1988.') or the statement by AST of 10 January 1997: '(. . .) la Ilva SpA (che comprendeva la allora Divisione Acciai Speciali che, dopo la scissione del 1994 è divenuta la AST) applicava l'extra di lega già nel 1988'. ('(...) Ilva SpA (which then included the "special steels" division which, after the split in 1994, became AST) was already applying the alloy surcharge in 1988').

(5) Commission Decision 90/417/ECSC 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 (OJ L 220, 15.8.1990, p. 28).

(6) Statement by Acerinox (see note 4): 'Acerinox SA conforme lo muestran los hechos que posteriormente acontecieron, no promovió dicha reunión, aunque si, una vez decidida por las partes su convocatoria en Madrid, a petición de los asistentes, reservó un establecimiento para que la misma pudiera tener lugar.' ('As subsequent events proved, Acerinox SA was not the initiator of this meeting even if, after the participants decided to meet in Madrid, and at their request, it booked a venue for that purpose').

(7) 'A meeting was held in Madrid on 15 December 1993. The decision to hold the meeting was taken by the parties in order to discuss (. . .) the critical situation in the market for the raw materials used in the production of stainless steel and the extreme volatility of the prices of these raw materials.'

(8) Original version.

(9) 'The discussion concerned the generally poor situation as well as possible solutions.'

(10) 'A meeting took place on 16 December 1993 at the Hotel [. . .] in Madrid which allowed stainless steel producers to hold an exchange of views.'

(11) 'In this context, and in order to find a solution to this crisis, a meeting was held between the leading European steel producers'.

(12) Acerinox statement: 'El Sr Laquay expuso cómo se había aplicado históricamente el extra de aleación'. ('Mr Laquay explained how the alloy surcharge had been applied in the past').

(13) 'Mr Laquay, as a specialist in calculating the alloy surcharge, calculated, with the aid of a flip chart and taking as example the prices applied by his undertaking in France, the additional turnover that could be achieved by appropriately altering the trigger threshold on the French market'.

([14]) 'At the meeting, the participants also examined whether it was necessary, in view of the instability of raw material prices, a market in which Acerinox has no influence, to apply the alloy surcharge to customers using the tried and tested method by means of the most appropriate reference values so as to counter the increasingly speculative nature of transactions on the London Metals Exchange.'

([15]) 'At the meeting, participants discussed the initiatives they intended to take in this area, and those they had taken quite independently before (at least as regards AST). There was a natural convergence of views on the adoption, as a minimum level in the context of this formula, of the September 1993 nickel price.'

([16]) Original version.

([17]) 'Under the circumstances, the only possible solution to halt the trend is to try to reintroduce the alloy surcharge, which had been suspended owing to the fall in prices for alloys below the trigger level applied till then (...) At the meeting, Mr Plömacher then stated that Krupp would in future take the low September posted price for nickel as the trigger threshold.'

([18]) 'During the meeting, certain participants, including Ugine, expressed their intention, with or without reservations, to reapply the alloy surcharge together with a new trigger threshold (the lowest nickel price in September) as from 1 February 1994.'

([19]) Original version.

([20]) Original version.

([21]) 'A majority of those present was in favour of applying the surcharge as soon as possible.'

([22]) 'Acerinox said it did not plan to apply the surcharge in Spain because it considered the measure would not help to increase demand and would not have a positive effect on Spanish industry which was in the depths of a severe crisis.'

([23]) Fax obtained at Outokumpu's offices during the inspection on 17 October 1996.

([24]) Original version.

([25]) 'Following the meeting, Ugine notified participants by fax on 20 December 1993 and 11 January 1994 of the calculation bases and results based on the method it intended to use on the French domestic or European markets in the event of non-alignment'.

([26]) 'Outokumpu a été informée par télécopie des conclusions de la réunion de Madrid de 20.12.1993' ('Outokumpu was informed by fax of the conclusions of the Madrid meeting on 20.12.1993').

([27]) 'The lack of direct knowledge of the details does not however make it possible to deny categorically that there were exchanges of information. (...) In view of the apparent content of these messages, it is likewise impossible to state that they did not influence AST in determining the values used in the method.'

([28]) OJ 18 of the ECSC, 1.8.1954, p. 470.

([29]) OJ L 221, 7.8.1986, p. 14.

([30]) Avesta statement — Attachment 1: 'Alloy surcharges are likely to be introduced on CR and CPP products from 1 February. The details may not be available until early January 1994 when I will let you know.'

([31]) Reply given by ALZ to the request for information.

([32]) Avesta statement: 'On 10 January 1994, ASAB produced a full internal surcharge calculation for application in February. This internal calculation used the same trigger values as contained in Mr Laquay's fax of 20 December 1993.'

([33]) Document obtained from the offices of Outokumpu.

([34]) Original text, from the Avesta statement.

([35]) Original text.

([36]) Original text.

([37]) Document taken from the offices of Outokumpu.

([38]) Document taken from the offices of Outokumpu.

([39]) Avesta statement.

([40]) Original text.

([41]) Original text.

([42]) Original text.

([43]) Original text.

([44]) Judgment of 13 July 1972, Case 48/69 ICI v. Commission of the European Communities [1972] ECR 619.

([45]) Opinion 1-61 of 13 December 1961 of the Court of Justice [1961] ECR 505.

([46]) OJ C 75, 29.7.1968, p. 3.

([47]) ALZ, Avesta, AST, Krupp, Thyssen.

([48]) ALZ, AST, Krupp, Thyssen.

([49]) ALZ, AST, Avesta, Krupp, Thyssen, Usinor Sacilor.

([50]) AST, Krupp, Thyssen.

([51]) Commission Decision 80/257/ECSC 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 (OJ L 62, 7.3.1980, p. 28, at paragraph 25).

([52]) Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams (OJ L 116, 6.5.1994, p. 1, at paragraph 249).

([53]) See paragraphs 23, 28 and 32.

([54]) See paragraphs 21, 27, 33 and 37.

([55]) OJ C 207, 18.7.1996, p. 4.

([56]) 'We did not receive any information'.

([57]) Inspection minutes — Krupp.

([58]) Inspection minutes — Ugine.

([59]) 'ALZ does not recall having received from other stainless steel producers, between 1 August 1993 and 1 February 1994, information concerning the amendment of the alloy surcharge trigger values. (...) ALZ subsequently, towards 15 January, informed the other market operators, i.e. its customers, producers and agents, that it intended to announce the application of a new alloy surcharge from 1 February 1994.'

([60]) 'AST would point out, however, that it had heard that the Commission had discovered a document which AST in turn allegedly sent to Outokumpu'.