COMMISSION

COMMISSION DECISION

of 26 November 1997

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

(Case IV/36.069 Wirtschaftsvereinigung Stahl)

(Only the German text is authentic)

(98/4/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 notification submitted on 28 May 1996 in the name of the Wirtschaftsvereinigung and 16 of its members,

Having regard to the information transmitted to the Commission pursuant to Article 47 of the ECSC Treaty on 24 September 1996,

Having regard to the written comments submitted pursuant to Article 36 of the ECSC Treaty in the name and on behalf of the parties on 29 April 1997 and taking note of the fact that, by letter dated 12 May 1997, the parties formally waived their right to submit oral comments,

Whereas:

I. FACTS

A. PROCEDURE

(1) On 28 May 1996 an information exchange system was notified to the Commission in the name and on behalf of the Wirtschaftsvereinigung Stahl, the German steel industry trade association, and 16 of its members.

A warning letter was sent to the association on 8 July 1996. In view of the extremely brief nature of the notification and following a meeting with the parties on 31 July, a request for information was sent to them pursuant to Article 47 of the ECSC Treaty. Following analysis of the reply comprising, among other things, all the questionnaires 2-71, 2-72, 2-73 and 2-74 for the 16 undertakings concerned and the past four years, the Commission sent a statement of objections to the parties on 4 March 1997.

The parties submitted their comments on 29 April 1997. While they did not in any way dispute the facts as set out in the statement of objections and recounted below, they stated that, in their view, those facts did not constitute an infringement of the competition rules.

B. THE PARTIES

(2) The notification was submitted in the name of 16 German steel producers and that of the trade association to which they belong, the Wirtschaftsvereinigung Stahl ([1]).

(3) The **Wirtschaftsvereinigung Stahl** (hereinafter called the WV) is an association bringing together almost every German steel undertaking and a number of Belgian and Luxembourg associate members.

Its object is to defend its members' collective interests. Its functions include keeping its members informed of new developments and representing them before national and Community authorities.

The WV is a member of Eurofer, an association of Community steel undertakings and of national associations of European steel undertakings.

(4) The 16 notifying undertakings belong to six separate groups, namely: Usinor, Cockerill-Sambre, Preussag, Arbed, Thyssen and Krupp.

([1]) The names of the 16 notifying undertakings appear in bold type.

(5) **AG der Dillinger Hüttenwerk** (hereinafter called Dillinger) produces ordinary steel and alloy steel (excluding stainless steel), which it processes into hot-rolled flat products. The French undertaking Usinor, which, through subsidaries, produces steel products of every shape and quality, holds 48,75 % of the share capital of Dillinger. Usinor is the second largest steel producer in the Community and the fourth largest in the world. It controls either alone or jointly the following producers of steel (including finished products):

— in France: Sollac SA, Creusot Loire Industrie, Unimétal, Ascométal, Imphy, Lorfonte, Ugine, Ugine Savoie, GTS, Allevard, Fortech and Tecphy,

— in Germany: Dillinger and its subisdiary Rogesa,

— in Spain: Sidmed (jointly with the Luxembourg based undertaking ARBED) and Galmed (jointly with the Luxembourg based undertaking ARBED and the German undertaking Thyssen Stahl AG),

— in Portugal: Siderurgia Nacional Produtos Planos (jointly with the Dutch undertaking Hoogovens, the eighth-ranking steel producer in the Community),

— in Italy: La Magona (jointly with the Italian undertaking Lucchini),

— in Luxembourg: SA Train à Fil Esch-Schifflange and Sogerail.

Dillinger is a member of both the WV and Eurofer. Usinor participates in Eurofer thropugh the Fédération Française de l'Acier.

(6) **EKO Stahl GmbH** (hereinafter called EKO) produces ordinary and alloy steel (excluding stainless steel), which it processes into hot-rolled, cold-rolled and coated flat products

EKO is a subsidiary of the Belgian undertaking Cockerill-Sambre, which, through subsidiaries, produces steel products of every shape and quality. Cockerill-Sambre is the seventh-ranking steel producer in Europe and occupies a very prominent position in the market for flat products. It controls either alone or jointly the following producers of steel (including finished products):

— in Belgium: Cockerill-Sambre, Carlam, Segal (jointly with the Dutch undertaking Hoogovens and the Luxembourg undertaking ARBED) and Delloye Mathieu,

— in Germany: EKO,

— in France: Beautor, PUM and Haironville,

— in Luxembourg: Galvalange (with the Luxembourg undertaking ARBED).

Cockerill-Sambre participates in Eurofer through the Groupement de la Sidérurgie Belge.

(7) **Krupp Hoesch Stahl AG** [2] (hereinafter called KHS) produces both directly and through subsidiaries steel products of every shape and quality. KHS is the sixth-ranking steel producer in Europe. Besided Krupp Thyssen Nirosta and Rasselstein, which are also notifying parties (see below) and which it controls jointly with Thyssen, KHS controls the following producers of steel (including finished products) in Germany: **Hoesch Hohenlimburg**, **Krupp VDM**, **Krupp Edelstahlprofile**, and **HSP Hoesch Spundwand und Profil.**

KHS is a member of the WV and Eurofer.

(8) **Krupp Thyssen Nirosta GmbH** (hereinafter called KTN) produces stainless steel flat products. With a share of approximately 40 % of the flat products market, it is the leading producer of stainless steel in Europe. KTN controls the only Italian producer of stainless steel flat products, Acciai Speciali Terni.

(9) **Preussag Stahl AG** (hereinafter called Preussag) produces in Germany ordinary steel and alloy steel (excluding stainless steel), most of which is processed into flat products and beams.

Preussag is a member of the WV and Eurofer.

(10) **Stahlwerke Bremen GmbH** (hereinafter called Stahlwerke Bremen) produces ordinary steel and alloy steel (excluding stainless steel), which it processes into flat products. Stahlwerke Bremen is a subsidiary of the Luxembourg undertaking Arbed, which through subsidiaries produces steel products of every shape and quality. Arbed is the fourth-ranking steel producer in Europe. It controls alone or jointly the following producers of steel (including finished products):

— in Luxembourg: Profilarbed, Laminoir de Dudelange, Galvalange (jointly with Cockerill-Sambre (see above)), Ares, and Giebel (jointly with Ewald Giebel),

— in Germany: Stahlwerke Bremen, Bregal (jointly with the Finnish undertaking Rautaruukki and the Japanese undertaking Itoh) and Stahlwerke Thüringen,

[2] By Decision of 28 July 1997, the Commission authorized pursuant to Article 66 of the ECSC Treaty the merging of the flat carbon-steel products activities of Thyssen Stahl AG and Krupp Hoesch Stahl AG.

— in Belgium: Sidmar, ALZ (stainless steel), Sikel, Segal (jointly with the Dutch undertaking Hoogovens and the Belgian undertaking Cockerill-Sambre (see above)), Decosteel and Galtec (jointly with the Dutch undertaking Hoogovens),

— in France: Stul,

— in Spain: Aceralia.

Stahlwerke Bremen is a member of the WV and Eurofer. Arbed participates in Eurofer through the Groupement des Industries Sidérurgiques Luxembourgeoises.

(11) **Thyssen Stahl AG** ([3]) (hereinafter called Thyssen) produces both directly and through subsidiaries steel products of every shape and quality. Thyssen is the fifth-ranking steel producer in Europe. Besides KTN (see above) and Rasselstein (see below), which are also notifying parties and which it controls jointly with KHS, Thyssen controls alone or jointly the following producers of steel (including finished products):

— in Germany: Röhrenwerke Bous (jointly with Mannesmann), **Rasselstein Hoesch GmbH**, **EBG Bochum**, **Stahlwerk Oberhausen GmbH**, **Walzdraht Hochfeld GmbH** ([4]), and **WK Edelstahl Witten Krefeld GmbH**.

— in the Netherlands: Nedstaal,

— in Spain: Galmed (jointly with the Luxembourg based undertaking ARBED and the French undertaking Usinor (see above)).

Thyssen is a member of the WV and Eurofer.

C. THE NOTIFIED AGREEMENT

(12) The notified agreement is an information exchange agreement. According to the parties, the agreement is informal *(formlose Vereinbarung)*. Participation is voluntary.

1. Nature of the information

(13) The exchange relates to questionnaires 2-71 to 2-74 ECSC ([5]) and to the market shares of producers in Germany. These questionnaires, which were drawn up by the Commission, are transmitted to it pursuant to Article 47 of the ECSC Treaty to enable it to 'carry out its duties laid down in Article 3 of the ECSC Treaty'. The notifying parties have decided to exchange:

— the market shares held for each of the products by the producers on the German market and in the Community,

— data on deliveries by each producer of the various ECSC products in each of the Member States (questionnaire 2-71), all qualities combined,

— data on deliveries by each producer of the various ECSC products in certan third countries and by geographic area (questionnaire 2-72),

— deliveries of steel on the national market by product according to qualities and by consumer industry (questionnaire 2-73),

— deliveries of certain qualities of steel by product in each of the Member States (questionnaire 2-74).

The exchange is therefore concerned solely with data on deliveries and on market shares.

2. Aggregation of the data

(14) All the data exchanged are individual. All those taking part in the system receive all the information concerning the other producers, including that relating to products which they do not themselves produce.

(15) Market shares are calculated by determining the ratio between the deliveries by each producer and total deliveries in Germany calculated as follows:

Deliveries in Germany (questionnaire 2-71)
+ Intra-Community deliveries (statistics of the SBA ([6]))
+ Imports from third countries (statistics of the SBA)
± Statistical corrections
= Deliveries on the German market

(16) The data are presented by product and by country of delivery. Cross-checking between questionnaires 2-71 and 2-74 makes it possible to break down deliveries by quality of steel.

A distinction can be made between 45 different products and eight qualities of steel.

With regard to deliveries on the German market (questionnaire 2-73), a distinction can be made between 28 different consumer sectors.

3. Age of the data

(17) The data are exchanged at the end of the month following the period to which they relate. What is involved, therefore, is a monthly exchange of recent data (one month old).

([3]) See footnote 2.
([4]) This undertaking has been acquired by the ISPAT group after the notification.
([5]) Commission Decision No 1566/86/ECSC (OJ L 141, 28. 5. 1986, p. 1), as last amended by Decision No 3641/92/ECSC (OJ L 376, 22. 12. 1992, p. 1). The data are processed by the Statistical Office. They are aggregated and serve as a basis for the production of detailed statistics.
([6]) Statistisches Bundesamt.

4. **Structure of the system**

(18) The WV collects the data from the various undertakings which send them to it in different forms (letter, electronic mail, etc). The exchanged data are not made available to third parties.

Its employees are independent of its members. Data are not discussed at members' meetings.

(19) Only 16 undertakings out of the 74 members of the WV have notified their participation in the system, but the stated objective of the WV is that all should join in the not-too-distant future. The 16 notifying undertakings account for 94 % of all deliveries by German undertakings of flat products and 27 % of all deliveries of long products (including 100 % for sheet piling and 80 % for permanent way material).

D. THE PRODUCT MARKETS

1. **The steel industry: general remarks**

(20) Between 1977 and 1988 the Community steel industry was governed by more or less binding production quota or delivery arrangements coupled with measures concerning prices and external trade. These arrangements came to an end on 30 June 1988. The Commission nevertheless introduced a system for monitoring production and deliveries by producers in the Community and in third countries. As part of this system, each undertaking was required to declare its deliveries to the Commission. The system expired in 1990. Faced with a worsening situation in the steel industry, in March 1993 the Commission adopted guidelines relating to production and deliveries of steel products within the Community market ([7]). These guidelines were communicated to all undertakings for products within their product range. Following a marked improvement in the situation in the steel market in 1994, the Commission decided to terminate the measure.

(21) In the course of the last seven years, the Commission has adopted two Decisions relating to infringements of Article 65 of the ECSC Treaty (Decision 90/471/ECSC ([8]) in the field of stainless steel, and Decision 94/215/ECSC ([9]) in the field of beams). The main Community steel groups were involved in these cases.

(22) The steel industry is highly capital-intensive, especially in the flat-products sector. There are therefore considerable barriers to entry, linked to the initial cost of the necessary investment. Fixed costs are very high. The steel industry suffers from chronic overcapacity due among other things to the size of the exit barriers. To help reduce these, in 1993 the Commission authorized a financial mechanism facilitating the closure of production capacity for heavy sections, hot-rolled wide coils and strip, and reversing-mill plate ([10]).

(23) Until the 1980s, steel undertakings had often been public undertakings with a very distinct national character. Major merger operations and the formation of new undertakings have led to the emergence of European groups with plants in a number of Member States. Nevertheless, trade flows between Member States are remarkably stable.

(24) Except in the case of stainless steel, consumption of which is increasing, the European steel markets are mature markets. The products made by the various producers are homogeneous. As a rule customers have no preference between one supplier and another: the quality of products is transparent and the various parameters (delivery periods, transport costs, etc.) easy to compare.

(25) Steel undertakings are required pursuant to Article 60 of the ECSC Treaty to publish their price lists. This obligation is discharged by sending the lists to the Commission at least two working days before they enter into force. Undertakings are also obliged to communicate their lists to any interested party who so requests.

Owing to its having been regulated for so long, there are numerous sources of detailed statistical data in the steel industry.

([7]) OJ C 83, 24. 3. 1993, p. 6.
([8]) OJ L 220, 15. 8. 1990, p. 28.
([9]) OJ L 116, 6. 5. 1994, p. 1.
([10]) Commission Decision 94/6/ECSC of 21 December 1993 authorizing common financial arrangements in respect of individual programmes involving the closure of production capacity in the Community steel industry for heavy sections, hot-rolled wide coils and strip, and reversing-mill plate (OJ L 6, 8. 1. 1994, p. 30).

2. **The various markets for steel products**

(26) Steel is made either from iron ore ('integrated steelworks' ([11])) or from scrap ('electric steelworks' ([12])). Integrated steelworks account for approximately 70 % of all steel production in the Community. The steel obtained from melting ore or scrap (semi-finished products in the form of ingots, slabs, blooms and billets) is not usable as such and has to be rolled to give it its final shape and properties.

(27) In terms of their shape, there are two major categories of product:

— flat products obtained in the form of sheets (plates) or of coils (band steel). Products which are simply hot-rolled may subsequently be cold-rolled and coated (tinplate, galvanized sheets). Most flat products (apart from those of stainless steel) are made in integrated steelworks. Flat products are used to make pipes and tubes, ships, boilers, buildings, cars, packaging, etc.,

— long products: concrete reinforcing bars, rods, beams, joists, wire rod. Long products are used in sectors such as construction, bolt, nut and screw manufacture, wire drawing, etc.

(28) According to their composition, a distinction is made between non-alloy steels, stainless and heat-resisting steels and other alloy steels.

(29) The products listed in the questionnaires forming the subject matter of the notification belong to different product markets depending on their characteristics, the use to which they are put, and the plant and know-how needed to produce them. There are 23 product markets in all: semi-finished products, 12 flat product markets and 10 long product markets.

(a) *Semi-finished products*

(30) After solidification, crude steel takes the form of large blocks (ingots, slabs, blooms, billets) which must be rolled, that is to say passed between rollers which reduce the thickness of the blocks and give them their final shape. Most producers of finished products produce steel for their own purposes, but they also sell part of the semi-finished products they produce. Of the 152 million tonnes of crude steel produced in 1995, approximately 24 million were sold in the form of semi-finished products.

There are more than 125 undertakings or groups producing crude steel in Europe. The market is therefore dispersed.

(b) *Flat products*

(31) There are 12 markets for flat products:

Hot-rolled wide strip of non-alloy steel: These products may be sold without further processing (as is the case with 40 % of production) or be processed into cold-rolled sheet, which in turn may be sold further processing or coated.

There are 12 undertakings or groups in the Community which are independent of one another at the level of the production of wide strip. However, when it comes to processing such hot-rolled wide strip into cold-rolled sheet or coated sheet (which accounts for 60 % of production), there are in the Community 10 joint ventures, including six production cooperatives (which means cooperatives performing no marketing function): only seven of the 12 groups referred to above are totally independent of one another.

Hot-rolled wide strip of stainless steel: There are only six producers in the Community, of which the three largest account for 70 % of production.

Hot-rolled wide strip of alloy (excluding stainless) steel: There are 10 or so producers in the Community. Deliveries by German undertakings in Europe account for more than half of all deliveries by European undertakings.

Cold-rolled sheet of non-alloy steel: Cold rolling helps to reduce further the thickness of products and to endow them with special properties. Hot-rolled wide sheet may be cold reduced. Two thirds of cold-reduced sheet is then coated. The price of cold-reduced sheet is 25 % higher than that of hot-rolled wide strip. Only seven of the 13 existing producers are totally independent of one another.

Cold-rolled sheet of stainless steel: There are only six producers in the Community, of which the three largest account for 70 % of production.

Cold-rolled sheet of alloy (excluding stainless) steel: There are 10 or so producers in the Community. Deliveries by German undertakings in Europe account for 37 % of all deliveries by European undertakings.

([11]) Very large plants (coking, sintering, blast furnaces, converters); very little operating flexibility; average minimum capacity of some 2 million tonnes a year; very high initial investment and maintenance costs.

([12]) Limited investment (electric furnace); considerable operating flexibility.

Coated sheet (with the exception of steel for packaging or tinplate): More than 90 % of coated, non-tinned sheet is galvanized sheet. Nearly half of all cold-rolled sheet is coated with a metal coating other than tin (by hot dipping or by electrolysis). This operation increases the sheet's value by approximately 40 %.

There are a dozen producers in the Community. There are in the Community 10 joint ventures, including six production cooperatives (cooperatives without any marketing function): only five of those 12 producers are totally independent of one another.

Steel for packaging (or tinplate): Cold-rolled sheet is sold tinned, that is, coated with a tin coating to protect it from oxidation. The value added by the tinning is of the order of 60 %.

There are eight producers in the Community, of which the two largest account for 45 % of Community production.

Reversing-mill plate and universal plate of non-alloy steel: These consist of thick, uncoiled sheet. There are 20 or so undertakings or groups in the Community, of which the three largest account for 44 % of production.

Reversing-mill plate and universal plate of stainless steel: There are only five undertakings or groups in the Community, of which the two largest account for more than 60 % of deliveries in the Community.

Reversing-mill plate of alloy (other than stainless) steel: There are fewer than 15 undertakings or groups in the Community. Deliveries in the Community by German undertakings account for more than half of all deliveries by European undertakings in the Community.

Electrical sheet: There are eight undertakings or groups in the Community, of which the two largest account for more than 60 % of production.

The markets for flat products are therefore all concentrated.

(c) *Long products*

(32) There are 10 markets for long products.

Beams and sections for mine shafts: 20 or so undertakings or groups produce beams in the Community, of which the four largest account for more than 65 % of production.

Wire rod of non-alloy steel: There are forty or so undertakings or groups in the Community, of which the four largest account for more than 40 % of production.

Wire rod of stainless steel: There are eight producers in the Community.

Wire rod of alloy (other than stainless) steel: There are 30 or so undertakings or groups in the Community. Deliveries in the Community by German undertakings account for 25 % of all deliveries by European undertakings in the Community.

Concrete reinforcing bars: There are more than 50 undertakings or groups in the Community, or which the four largest account for more than 40 % of production.

Merchant bars of non-alloy steel: There are more than 80 undertakings or groups in the Community. The five largest account for 40 % of production.

Merchant bars of stainless steel: There are 15 or so undertakings or groups in the Community.

Merchant bars of alloy (other than stainless) steel: In the absence of more detailed information, it may be assumed that a large number of merchant bar producers produce both non-alloy steels and alloy steels.

Permanent way material: There are 10 or so undertakings or groups in the Community, of which the three largest account for more than half of production.

Sheet piling: There are only four undertakings or groups in the Community.

The structures of the various markets for long products are therefore diversified. Some markets are highly concentrated (sheet piling, beams, permanent way material), while others are more dispersed (concrete reinforcing bars, merchant bars, wire rod).

E. THE GEOGRAPHIC MARKET

(33) Numerous decisions pursuant to Article 66 of the ECSC Treaty have established that the relevant market for the various steel products is the Community market owing *inter alia* to the lack of barriers to intra-Community trade and the volume of intra-Community trade, which represents 30 % of all deliveries by Community producers in the Community.

(34) Nevertheless, this finding must be qualified to some extent. The figure of approximately 30 % stems from the fact that, firstly, a large number of countries do not produce the full range of products and, secondly, there are countries whose 'domestic' market is very small compared with the output of the national producer. Moreover, where there is a national producer, its deliveries on its domestic market account for more than half of all deliveries by Community producers on that market [13] and the market shares of the other producers on each market are fairly stable over time.

[13] This is especially the case with flat products, special steels and certain long products (sheet piling, permanent way material and sections for mine shafts).

F. POSITION OF GERMAN UNDERTAKINGS COMPARED WITH THAT OF OTHER COMMUNITY UNDERTAKINGS

(35) Deliveries by German undertakings:

(%)

Share of German undertakings in deliveries by Community undertakings in the Community in 1995

	Non-alloy steels	Stainless steel	Other alloy steels
Hot-rolled wide strip	25	18	51
Cold-rolled sheet	26	24	37
Coated sheet	28	—	21
Steel for packaging	19	—	—
Reversing-mill plate	25	24	51
Electrical sheet	36	—	38
Beams	26	—	52
Wire rod	31	11	25
Merchant steels	10	17	25
Concrete reinforcing bars	11	—	—
Sheet piling	40	—	—
Permanent way material	25	—	—
Total	24	21	38

(%)

Share of German undertakings in deliveries by Community undertakings in Germany in 1995

	Non-alloy steels	Stainless steel	Other alloy steels
Hot-rolled wide strip	76	44	84
Cold-rolled sheet	67	55	57
Coated sheet	68	—	38
Steel for packaging	71	—	—
Reversing-mill plate	66	46	89
Electrical sheet	93	—	84
Beams	57	—	72
Wire rod	77	46	67
Merchant steel	38	52	66
Concrete reinforcing bars	60	—	—
Sheet piling	73	—	—
Permanent way material	76	—	—
Total	67	52	76

G. LINKS WITH UNDERTAKINGS LOCATED IN OTHER MEMBER STATES

(36) Account must also be taken of the fact that some German undertakings form part of larger European steel groups:

— the British undertaking British Steel controls Manstaedtwerke,

— the French undertaking Usinor holds 48,75 % of the share capital of Dillinger,

— the Belgian undertaking Cockerill-Sambre controls Eko Stahl,

— the Luxembourg undertaking Arbed controls Stahlwerke Bremen, Stahlwerke Thüringen and Bregal,

— the Italian undertaking Riva controls Henningsdorf and Brandenburger,

— the Italian undertaking Feralpi controls ESF Riesa,

— the Finnish undertaking Rautaruukki controls Bregal with Arbed.

(37) Similarly, German undertakings have interests in other Member States: Krupp and Thyssen in Italy (AST) and Thyssen in Spain (Galmed).

II. **ASSESSMENT**

A. ARTICLE 65 (1)

1. **General**

(38) 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 the markets, products, customers or sources of supply.

(39) As the Commission decided in the 'UK Tractors' case ([14]), an agreement to exchange information which is both sensitive, recent and individualized in a concentrated market where there are important barriers to entry, is liable to restrict competition between the undertakings parties thereto in so far as it increases market transparency to such a degree that any independent competitive action on the part of an undertaking can immediately be noticed by its competitors, which are able to take suitable retaliatory measures. By eliminating any hidden competition in the market, the information exchange reduces considerably the advantage to be gained by an undertaking from competitive action and tends to dissuade it from trying to increase its market share.

(40) This view was upheld on 27 October 1994 by the Court of First Instance, which held in the UK Tractors case ([15]) that general use, as between main suppliers, of exchanges of precise information at short intervals, identifying registered vehicles and the place of their registration is, on a highly concentrated oligopolistic market on which competition is already greatly reduced and exchange of information facilitated, likely to impair considerably the competition which exists between traders. In such circumstances, the sharing, on a regular and frequent basis, of information concerning the operation of the market has the effect of periodically revealing to all competitors the market positions and strategies of the various individual competitors.

(41) Although they concern Article 85 of the EC Treaty, these findings are transposable to Article 65 of the ECSC Treaty, both Treaties being motivated, as the Court of Justice held in its judgment of 18 May 1962 ([16]), by a 'common intention'. Moreover, the Commission normally interprets in a similar fashion the prohibition in Article 65 (1) of the ECSC Treaty and that in Article 85 (1) of the EC Treaty, notably as regards exchanges of information between undertakings. In the notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises ([17]), the Commission viewed such cooperation in the same way under both Treaties.

([14]) Commission Decision 92/157/EEC of 17 February 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty — UK Agricultural Tractor Registration Exchange (OJ L 68, 13. 3. 1992, p. 19).

([15]) Judgments in Cases T-34/92, Fiatagri UK Ltd and New Holland Ford Ltd v. Commission [1994] ECR II, p. 905, at paragraph 91 and T-35/92, John Deere Ltd v. Commission [1994] ECR II p. 957, at paragraph 51.

([16]) Case 13/60 'Geitling', Ruhrköhlen-Verkaufsgesellschaft mbH and others v. High Authority of the European Coal and Steel Community [1962] ECR p. 165.

([17]) OJ C 75, 29. 7. 1968, p. 3, corrigendum OJ C 84, 28. 8. 1968, p. 14.

2. **Restrictive effects of the notified agreement**

(42) The undertakings decided to exchange questionnaires ECSC 2-71, 2-72, 2-73 and 2-74 (see footnote 5). The latter two are inextricably linked to the first, which must therefore be analysed first.

(a) *Questionnaires 2-71, 2-73 and 2-74*

(43) Questionnaire 2-71 is concerned with data on deliveries by type of product and by Member State of destination. They are individual, monthly and recent data. They are sensitive and confidential inasmuch as they make it possible to establish the various undertakings' market position. Combined with questionnaires 2-73 and 2-74, this questionnaire reveals the strategy of each undertaking in each Member State for the various products (45 products, eight qualities), and more particularly on the German market (28 different consumer sectors).

(44) The assessment of the notified exchange is directly linked to the degree of concentration of the market for the products in question and to its characteristics. The case-law (see above) has clearly established that the restriction of competition stems from the fact that, on an oligopolistic market, the exchange increases transparency in such a way as to deter competition between participants.

(45) All the markets for flat products and those for beams, sheet piling, permanent way material and stainless steel wire rod are concentrated. The concentration must be assessed in the light of various criteria, including the number of producers present in the market, the existence of structural links between them, the combined market shares of the main undertakings, and the barriers to entry. In the present case, for flat products, beams, sheet piling, permanent way material and wire rod of stainless steel, the number of producers in Europe is no greater than 20 (see above). For all these products, the sum of the production of the four leading producers comes to more than half of total production. The barriers to entry are very high owing to the capital intensity of the industry. There are numerous structural links between the steel groups. Thus, for example, only seven of the 12 producers of hot-rolled wide strip and sheet and five of the 12 producers of coated sheet are totally independent of one another (see above). These markets may therefore be characterized as highly concentrated markets.

(46) On these concentrated markets, the notified decision to carry out the exchange of information in question is liable to restrict competition. The fact of informing one's competitors each month of deliveries of each product in the different Member States and of one's market shares in one's domestic market is likely to deter them from trying to increase market shares. Competitors will be able to identify those undertakings which try to increase their market share and to take retaliatory measures against them. The notified exchange is therefore liable to induce undertakings to abandon a fundamental competitive activity consisting in increasing their market shares. The period during which an undertaking can engage in competitive activity is greatly reduced by the frequency of the exchange and the recentness of the data exchanged. By removing any remaining hidden competition in markets characterized by a small degree of openess, by fairly stable trade flows between Member States, by considerable homogeneity of products and chronic overcapacity, the notified agreement makes highly probable the development of behaviour having the effect of freezing market shares.

(47) The undertakings party to the agreement account for approximately one quarter of all Community deliveries in the Community. The notified information exchange is liable to restrict competition appreciably. This effect is even more noticeable on the German market, where the undertakings account for between one half and three-quarters of Community deliveries.

(48) For some of these products (beams, grain-oriented electrical sheet, steel for packaging, most stainless steel products), there is only one notifying producer. The undertakings to which it would communicate the date relating to its deliveries are not active on the same product market and there is therefore no restriction of competition directly caused by that exchange. However, some of the undertakings which receive data but are not competitors of the data-provider are controlled by undertakings which themselves control competitors of the data provider. There is no guarantee that such particularly sensitive data would not end up in the hands of such competitors.

In view of the above, the Commission considers that the exchange of questionnaires 2-71, 2-73 and 2-74 restricts competition in respect of the following products:

Product	Lines of questionnaire 2-71	Lines of questionnaire 2-73	Lines of questionnaire 2-74
Hot-rolled wide strip	311 to 336	311 to 336	8320, 8330
Cold-rolled sheet	411, 416	411, 416	8410
Coated sheet	451 to 457	451 to 457	
Steel for packaging	430, 440	430, 440	
Reversing-mill plate	341 to 350	341 to 350	8340
Electrical sheet	421 to 427	420	
Beams	540 to 559	540, 550	1550, 8550
Wire rod of stainless steel			1510, 2510, 3510, 4510, 5510, 6510, 7510 and 8510
Permanent way material	570	570	
Sheet piling	560	560	

(49) A large number of undertakings are active on the other product markets. The restrictive effect of an exchange of sensitive information is less marked in such cases. There is therefore no objection to the notified exchange in respect of the following products: semi-finished products, merchant bars, concrete reinforcing bars and wire rod (with the exception of wire rod of stainless steel).

(b) *Questionnaire 2-72*

(50) The Commission has no objections to the exchange of this questionnaire.

3. **Arguments put forward by the parties**

(51) In support of their notification, the parties submitted a legal study and two economic studies. The main arguments put forward are outlined below.

Age of the data

(52) In their notification the parties state that: 'The exchange is confined to the communication of data on quantities; no data on prices or turnover will be exchanged. The exchanged data concern only past conduct on the market and not future conduct'.

In a market where demand is stable, as is the case with the relevant product markets, the future behaviour of competitors may largely be anticipated on the basis of their recent transactions. The observation of competitors' behaviour and past performance is at the root of all the agreement's restrictive effects as described above. The more accurate and recent the information on quantities sold and market shares, the greater its impact on undertakings' future market behaviour.

From a certain point in time, however, data concerning past transactions becomes truly historic and no longer has any real impact on future behaviour [18]. In the present case, although the exchanged data relate to a past period, they must be deemed to be recent if they are less than a year old (here, they are one month old).

Proof of the restrictive effect

(53) The notifying parties state that 'the notified exchange of information is not caught by Article 65 (1) of the ECSC Treaty because it has neither as its object nor as its effect a restriction of competition'.

[18] Thus, for example, in the UK Tractors case the Commission considered that an annual exchange of one-year-old information on sales by the various competitors did not significantly distort competition (abovementioned Decision, recital 50).

The Commission considers that account must be taken not only of the immediate, visible effects of an agreement but also of its potential effects and of the fact that an agreement can create a structure capable of being used for anti-competitive purposes. Article 65 (1) must be interpreted as covering potentially anti-competitive effects because the objective of that provision is the maintenance of an effective competitive structure. This objective is particularly material in a highly concentrated market where an information exchange creates a structure of transparency which prevents any hidden competition. The fact that the Commission has been unable to establish the existence of an actual effect on the market therefore has no bearing on the outcome of the proceeding inasmuch as Article 65 (1) of the ECSC Treaty prohibits both actual anti-competitive effects and potential effects, provided that these are sufficiently marked.

The UK Tractors judgment

(54) The parties consider that the judgment of the Court of First Instance in the UK Tractors case was to some extent unfavourable to the Commission.

According to the legal study submitted in support of the notification, the Court of First Instance only partly concurred with the Commission in the UK Tractors case, in that it required the exchanges, before they could constitute an infringement of Article 85 (1) of the EC Treaty, to take place on a concentrated market in which competition is *already reduced.*

The Commission considers that this interpretation is wrong. In the above case, the Court of First Instance held ([19]) that general use, as between main suppliers, of exchanges of precise information at short intervals, identifying registered vehicles and the place of their registration is, on a highly concentrated oligopolistic market such as the market in question on which competition is, as a result, already greatly reduced and exchange of information facilitated, likely to impair considerably the competition which exists between traders.

Impairment of competition was therefore considered in the case in point, not as an additional condition for the application of Article 85 (1), but as a logical consequence of the oligopolistic nature of the relevant market.

Competition in the relevant market

(55) Following the logic of the argument set out above, the parties submitted to the Commission an economic study which seeks to show that competition in the steel market is intense.

(56) The study does not distinguish between the various product markets despite the fact that they differ considerably from one another (degree of concentration of the market, rate of utilization of production capacity, price trends, barriers to entry due *inter alia* to differences in fixed costs, transport costs, etc.). In view of the importance of these various factors when it comes to assessing the restrictive effect of the notified agreement, the furnished study is not really relevant to this case.

Existence of information on quantities in other economic sectors

(57) The parties submitted in support of their notification a study seeking to show that the availability of recent, individualized information in the consumer goods sector promotes competition and that the notified exchange would accordingly have a beneficial effect on competition.

(58) This argument is invalid, for two main reasons. First of all, they are not agreements between competitors capable of being caught by Article 65 of the ECSC Treaty or Article 85 of the EC Treaty. Specialist organizations carry out studies on the basis of surveys at the point of sale. Secondly, the information is sold by those organizations and not exchanged between competitors. However accurate those surveys are, this is an instance of a provision of services by a third party and not of an agreement capable of being assessed in the light of Article 65 of the ECSC Treaty.

4. **Applicability of Article 65 (1)**

(59) In a communication dated 31 December 1994 ([20]) concerning the withdrawal of the quarterly guidelines relating to production and deliveries of steel products, the Commission reminded undertakings and their associations that pursuant to Article 65 (1) they are prohibited from replacing the flanking measures introduced so far by the Commission by a similar or equivalent private information exchange system.

(60) The exchange of questionnaires 2-71 and 2-73 is contrary to Article 65 (1) in that it institutes a system for the exchange of information on recent individual data on deliveries and market shares in the fields of flat products, beams, sheet piling and permanent way material.

([19]) See footnote 15.

([20]) OJ C 379, 31. 12. 1994, p. 36.

(61) The echange of questionnaire 2-74 is contrary to Article 65 (1) for the products mentioned above and for wire rod.

B. INAPPLICABILITY OF ARTICLE 65 (2)

(62) Since it is neither a specialization agreement nor a joint-buying or joint-selling agreement, the notified agreement cannot be authorized by the Commission on the basis of Article 65 (2).

C. APPLICABILITY OF ARTICLE 65 (5)

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

(64) In this case, the parties have stated that they have not implemented the notified agreement following the warning letter which the Commission sent to them on 8 July 1996. There are therefore no grounds for fining them,

HAS ADOPTED THIS DECISION:

Article 1

The information exchange agreement notified on 28 May 1996 infringes Article 65 of the ECSC Treaty in so far as it involves an exchange of questionnaires 2-71, 2-73 and 2-74 in respect of flat products, beams, sheet piling, permanent way material and wire rod of stainless steel.

Article 2

The information exchange agreement notified on 28 May 1996 does not fulfil the conditions for authorization pursuant Article 65 (2).

Article 3

The Wirtschaftsvereinigung Stahl and the 16 notifying undertakings shall refrain from implementing the notified exchange.

Article 4

This Decision is addressed to:

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Done at Brussels, 26 November 1997.

For the Commission

Karel VAN MIERT

Member of the Commission