JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
5 April 2001 *

In Case T-16/98,

Wirstschaftsvereinigung Stahl, established in Düsseldorf (Germany),

AG der Dillinger Hüttenwerke, established in Dillingen (Germany),

EKO Stahl GmbH, established in Eisenhüttenstadt (Germany),

Krupp Thyssen Nirosta GmbH, established in Bochum (Germany),

Thyssen Krupp Stahl GmbH, established in Duisburg (Germany),

Salzgitter AG (formerly Preussag Stahl AG), established in Salzgitter (Germany),

Stahlwerke Bremen GmbH, established in Bremen (Germany),

Thyssen Stahl AG, established in Duisburg,

represented by J. Sedemund, lawyer, with an address for service in Luxembourg,

applicants,

* Language of the case: German.

Commission of the European Communities, represented by K. Wiedner, acting as Agent, and H.-J. Freund, lawyer, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision 98/4/ECSC of 26 November 1997 relating to a proceeding pursuant to Article 65 of the ECSC Treaty (Case IV/36.069 — Wirtschaftsvereinigung Stahl) (OJ 1998 L 1, p. 10),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: J. Azizi, President, K. Lenaerts and M. Jaeger, Judges,

Registrar: G. Herzig, Administrator,

having regard to the written procedure and further to the hearing on 5 October 2000,

gives the following

Judgment

Facts

1 On 28 May 1996, Wirtschaftsvereinigung Stahl, the German steel industry trade association, and 16 of its members notified the Commission of an agreement on an information exchange system.

2 On 8 July 1996 the Commission issued a warning to the association. In view of the extremely brief nature of the notification and following a meeting with the parties on 31 July 1996, the Commission sent them a request for information pursuant to Article 47 of the ECSC Treaty. The applicants responded to that request on 24 September 1996.

3 On 4 March 1997, the Commission addressed a statement of objections to the parties. On 29 April 1997, the applicants submitted their comments in that regard.

4 On 26 November 1997, the Commission adopted Decision 98/4/ECSC relating to a proceeding pursuant to Article 65 of the ECSC Treaty (Case IV/36.069 — Wirtschaftsvereinigung Stahl) (OJ 1998 L 1, p. 10, hereinafter 'the contested Decision') the provisions of which are as follows:

'*Article 1*

The information exchange agreement notified on 28 May 1996 infringes Article 65 of the ECSC Treaty in so far as it involved 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 authorisation pursuant to Article 65(2).

Article 3

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

5 The contested Decision was notified to each of the applicants between 10 and 15 December 1997.

6 Under the heading 'Nature of the information', paragraph 13 of the preamble to the contested Decision reads as follows:

'The exchange relates to questionnaires 2-71 to 2-74 ECSC 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 certain 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.'

Procedure and forms of order sought

7 By application lodged at the Court Registry on 16 January 1998, the applicants brought the present action for annulment.

8 By order of the Court of First Instance (Third Chamber) of 6 October 1999, the applicants' request for access to certain documents contained in the file lodged with the Court Registry by the Commission in accordance with Article 23 of the ECSC Statute of the Court of Justice was rejected.

9 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure.

10 The parties presented oral argument and answered questions from the Court of First Instance at the hearing on 5 October 2000.

11 The applicants claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

12 The defendant contends that the Court should:

— dismiss the application as unfounded;

— order the applicants to pay the costs.

Law

13 The applicants put forward seven pleas in law in support of their application. In the first plea they set out a number of objections to the subject-matter and enacting terms of the contested Decision. The second plea alleges that the details of the structure of the markets concerned are inaccurate and insufficient and that there was an error of assessment. The third plea claims that the various product markets are wrongly defined. The fourth plea relates to the importance of market transparency with regard to consumer goods. The fifth plea alleges that there has been a breach of Article 65(1) of the ECSC Treaty and the sixth a breach of Article 47(2) of the ECSC Treaty. The seventh plea alleges infringement of the obligation to state reasons.

First plea in law, concerning the subject-matter and enacting terms of the Decision

Arguments of the parties

14 In the first part of this plea in law, the applicants submit that the contested Decision states, incorrectly, that the information exchange agreement notified relates to the market shares of producers in Germany. The agreement relates only to the exchange of the two questionnaires 2-71 and 2-74 ECSC concerning quantities delivered by undertakings party to the agreement during the previous

month. The exchange procedure provided for only makes it possible to determine market shares.

15 The applicants note the Commission's admission that the notified agreement only indirectly concerned market shares in Germany and did not directly concern the exchange of that information. They add that in itself the information available from questionnaires 2-71 and 2-74 does not allow market shares to be calculated, due to the absence of information from undertakings that did not participate in the exchange and the absence of information concerning imports.

16 In the second part of this plea the applicants submit that in the contested Decision the Commission is '*ultra petita*', in that it evaluated the exchange of questionnaires 2-71 to 2-74 ECSC, although the undertakings had not notified the exchange of questionnaires 2-72 and 2-73.

17 As the applicants described the aim of the planned information exchange procedure precisely in the notification, the Commission cannot reproach them for not having pointed out, in the reply of 29 April 1997 to the statement of objections, that the exchange did not apply to questionnaires 2-72 and 2-73. It is inconceivable that the Commission did not notice the obvious difference between the notified agreement and the description of it contained in the statement of objections. Rather, the Commission's defence shows that it considered itself entitled, in the context of a notification procedure, to prohibit conduct which never formed the subject-matter of an agreement between the undertakings concerned or which was never envisaged by them. However, Article 65(1) of the ECSC Treaty allows the Commission only to prohibit existing agreements, not to bring proceedings of its own motion against fictitious agreements of which it has never been notified.

18 In a third part of the first plea the applicants complain that Article 1 of the contested Decision prohibits the exchange of information concerning the data on deliveries of 'wire rod of stainless steel' ('Walzdraht aus Edelstahl' (in the French version of the Decision this is rendered as 'acier inoxydable' (stainless steel)). However, 'Walzdraht aus Edelstahl' means refined (special) steel although that term does not correspond with the markets for products listed in recital 32 of the contested Decision, namely wire rod of non-alloy steel, wire rod of stainless steel, and wire rod of alloy (other than stainless) steel. They point out that, according to recital 48 of the contested Decision, the exchange of information provided for restricts competition in the market for 'wire rod of stainless steel' ('Walzdraht aus nichtrostendem Stahl'), but according to recital 49 of the contested Decision, it does not limit competition in the market for 'wire rod (with the exception of wire rod of stainless steel)' ['Walzdraht (nicht aus rostfreiem Stahl)']. As 'wire rod of stainless steel' is only part of the product group 'Walzdraht aus Edelstahl', Article 1 of the Decision lays down a prohibition which goes beyond the findings in recitals 48 and 49 of the contested Decision, and therefore that prohibition is not properly reasoned.

19 The applicants point out that in the steel sector there has long been a widely-used terminology covering and describing precisely the ranges of specific products; they submit that the Commission's argument that the enacting terms of the contested Decision should be interpreted in the light of its statement of reasons entails the undertakings concerned, because of conflicting terminology, not being able to determine clearly what precise conduct the Commission considers to be authorised or prohibited.

20 The defendant submits, first, that even if it does not directly relate to the exchange of market shares in Germany, the information exchange agreement

notified extends to market shares because questionnaire 2-71 allows the market share of each steel producer in Germany to be calculated by means of the simple calculation steps set out in recital 15 of the contested Decision, which states:

'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 Statistisches Bundesamt)
+	Imports from third countries (statistics of the Statistisches Bundesamt)
+/-	Statistical corrections
=	Deliveries on the German market.'

21 The defendant submits that the contested Decision does not assert that market shares may be calculated using only the information given in the two questionnaires but that the statistics from the Statistisches Bundesamt (SBA; the Federal Statistics Office) referred to in recital 15 of the contested Decision must also be available. The applicants themselves, moreover, in their reply of 24 September 1996 to the request for information from the Commission, state that the procedure provided for allows market shares to be determined by means of the information exchanged under the notified agreement and statistics from the SBA concerning imports from third countries and intra-Community deliveries.

22 Secondly, the defendant contends that the principle '*ne ultra petita*' applies to judicial procedure but not to the administrative procedure conducted by the Commission which is authorised to act on its own initiative.

23 The defendant adds that the argument developed in the reply, according to which the Commission may act on its own initiative only when the prohibited conduct has been stipulated or provided for by the undertaking, amounts to a new plea in law which, under Article 48(2) of the Rules of Procedure of the Court of First Instance, is inadmissible. In any event, the plea is invalid because the applicants would not be injured by the contested Decision if they had never agreed upon or envisaged the exchange of questionnaire 2-73.

24 In addition, the defendant submits that the point could have been quickly rectified if the applicants had mentioned in their reply of 29 April 1997 to the statement of objections that the information exchange agreement notified applied only to questionnaires 2-71 and 2-74 and not to questionnaires 2-72 and 2-73.

25 Thirdly, the defendant submits that Article 1 of the contested Decision should be interpreted in the light of its statement of reasons and that the use of a term not included in the ECSC nomenclature ('Walzdraht aus Edelstahl') explains why the product referred to must be identified on the basis of the assessment in the light of competition law of the different types of wire rod made in the contested Decision. A reading of recitals 48 and 49 of the contested Decision leaves no reasonable doubt as to the fact that 'Walzdraht aus Edelstahl' means 'stainless steel wire rod' ('Walzdraht aus nichtrostendem Stahl'). The principle that the enacting terms of a Decision must be interpreted in the light of its recitals cannot be invalidated by the existence of a standard terminology serving to delimit categories of products. In any event, there is no question of an 'error of assessment'.

Findings of the Court of First Instance

26 In the first two parts of the first plea in law the applicants essentially submit that the contested Decision is marred by errors of fact in that its content differs from

the subject-matter of the information exchange agreement as notified by the applicants on 28 May 1996. They point out, in this respect, that the contested Decision states, in recital 13, on the one hand that the information exchange agreement notified relates to the 'market shares of producers in Germany' whereas in reality it relates only to the exchange of information relating to quantities delivered and, on the other hand, that the agreement covers the exchange of questionnaires 2-71 to 2-74 ECSC, whereas in reality it applies only to the two questionnaires 2-71 and 2-74 ECSC.

27 Regarding the first part of the first plea alleging that the contested Decision wrongly states that the information exchange agreement notified relates to 'market shares', it should be noted that recital 13 of the contested Decision indeed states that: '[t]he exchange relates to questionnaires 2-71 to 2-74 ECSC and to the market shares of producers in Germany' and that '[t]he 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,

...'.

28 The Commission has accepted that the notified agreement does not directly relate to the exchange of market shares, but submits that it relates indirectly to market shares in that the information exchanged, together with the SBA statistics, allows market shares to be calculated using the steps mentioned in recital 15 of the contested Decision. The applicants have admitted, however, in their reply of 24 September 1996 to the request for information from the Commission, as well as in their application, that market shares in Germany could in fact be calculated using the formula laid down in recital 15 of the contested Decision. Nevertheless it must be observed that those market shares can be calculated only in a fairly imprecise manner. Indeed, apart from the need referred to in recital 15 of the

contested Decision to carry out statistical corrections, the parties to the agreement do not have available data on deliveries in Germany carried out by German producers who are not parties to the agreement. Recital 19 of the contested Decision states that the 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). Since it provides data on sales in Germany of only a section of German producers, the information exchange agreement notified therefore enables only an approximate calculation of the market shares of different producers in Germany to be made.

29 It follows that although the assertion contained in recital 13 of the contested Decision in particular, according to which the notified agreement relates to the market shares of producers in Germany, is not inherently marred by a substantial error affecting its legality, since, on the admission of the applicants themselves during the administrative procedure, the abovementioned agreement, even if its direct purpose is not the exchange of market shares, allows those market shares to be determined, nevertheless it must be noted that the Commission's assertion does not correspond exactly to the wording of the notified agreement in that the information on market shares is only relatively accurate. To counter the applicants' argument that the notified agreement is confined to the communication of data on quantities and does not concern prices or future conduct, the Commission states, correctly, in recital 52 of the contested Decision, that the observation of competitors' behaviour and past performance is at the root of all the agreement's restrictive effects, because 'the more accurate and recent the information on quantities sold and market shares, the greater its impact on undertakings' future market behaviour'.

30 However, although that error or, at the very least, that imprecision in the assertion that the notified agreement relates to market shares is not enough in itself to lead to the annulment of the contested Decision, it must be examined whether, together with other errors, it may be capable of having had such an effect. It will therefore be evaluated at the same time as the second part of the first argument is examined.

31 Regarding this second part of the plea concerning ECSC questionnaires, it is apparent from the applicants' notification that the information exchange agreement related only to two questionnaires, 2-71 'and' 2-74 ECSC and not to questionnaires 2-71 'to' 2-74. As the Commission expressly accepted at the hearing, the contested Decision therefore contains an error of fact in that it states that the exchange of questionnaires 2-72 and 2-73 formed part of the notified agreement. Furthermore, the Commission admitted at the hearing that it had no proof that questionnaire 2-73 was exchanged and had never even contended that such an exchange had taken place even though the notified agreement made no such provision.

32 Of course, as the Commission correctly submits, the absence of notification of an agreement cannot prevent examination of its legality, since the Commission is entitled to act on its own initiative in order to ensure that the rules of competition are complied with.

33 However, in such an examination of the legality of an agreement, the Commission is bound to take account of the legal and factual context and, in particular to base itself on the precise provisions of the agreement.

34 The effect of that error on the legality of the contested Decision must therefore be assessed.

35 First, it must be stated that the error of fact made in connection with questionnaire 2-72 is of no consequence in so far as recital 50 of the contested Decision indicates that the Commission has no objections to the exchange of that questionnaire.

36 It is apparent from recitals 13 and 16 of the contested Decision that questionnaire 2-71 provides data on deliveries by each producer of the various ECSC products in each of the Member States, all qualities combined, and that questionnaire 2-74 mentions deliveries of certain qualities of steel by product, while questionnaire 2-73 concerns deliveries of steel on the national market by product according to qualities and by consumer industry, with a distinction made between 28 different consumer sectors.

37 The data established by questionnaire 2-73 are therefore much more detailed and accurate than those derived from questionnaires 2-71 and 2-74, in particular inasmuch as questionnaire 2-73 contains a breakdown in sales by consumer sector.

38 In the section of the contested Decision concerning the legal assessment, the Commission first points out, in recitals 38 to 41, that it already decided in the UK Tractors case (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 1992 L 68, p. 19)) that 'an agreement to exchange information which is both sensitive, recent and individualised in a concentrated market where there are important barriers to entry, is liable to restrict competition'. According to the Commission that view was upheld by the Court of First Instance which held, in Case T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905 and Case T-35/92 *John Deere* v *Commission* [1994] ECR II-957), 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 [...] likely to impair... competition', since it has 'the effect of periodically revealing to all the competitors the market positions and strategies of the various individual competitors'. In recital 52 of the contested Decision, the Commission adds that

'[t]he more accurate and recent the information on quantities sold and market shares, the greater its impact on undertakings' future market behaviour'.

39 It is apparent from those extracts from the contested Decision that the Commission is of the opinion that the 'sensitive' nature of the data is a fundamental factor in the assessment of the restrictive nature of an information exchange agreement, as is the fact that it reveals not only market position, but also the 'strategies' of various individual competitors.

40 When it examined the restrictive effects of the notified agreement, the Commission considered in recitals 42 and 43 of the contested Decision that questionnaires 2-73 and 2-74 are 'inextricably linked' to questionnaire 2-71 and that the latter, 'combined with questionnaires 2-73 and 2-74, 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)'. The Commission concluded, in recital 48, recital 60 and Article 1 of the contested Decision that the information exchange agreement, as notified, infringes Article 65 of the ECSC Treaty in so far as it involves an exchange of questionnaires 2-71, 2-73 and 2-74.

41 The fact remains, therefore, that it was in so far as the notified agreement included the exchange of questionnaire 2-73, in relation to questionnaires 2-71 and 2-74, that the Commission considered it to be contrary to Article 65(1) of the ECSC Treaty.

42 Since it is established that the exchange of questionnaire 2-73 does not form part of the notified agreement, it follows that the assessment of the anticompetitive effects of that agreement in the contested Decision is based on an error of fact.

43 That error of fact, together with the error found in the context of the first part of the plea, might, furthermore, have had a substantial effect on the assessment of the notified agreement by the Commission.

44 As is apparent both from the case-law and the practice followed by the Commission in adopting decisions, information exchange agreements are not generally prohibited automatically but only if they have certain characteristics relating, in particular, to the sensitive and accurate nature of recent data exchanged at short intervals. In the contested Decision, the Commission referred expressly and almost exclusively to the UK Tractors case, cited above, to found its primary position regarding the treatment of information exchange agreements in an oligopolistic market. That case concerned an exchange of extremely accurate data on registered vehicles and the place of their registration, allowing every sale by competitors on the territory of a dealer to be identified as well as sales by a dealer outside his own territory, allowing the activities of dealers to be monitored and imports and exports to be identified and, therefore, allowing parallel imports to be supervised. The Commission states, in recital 40 of the contested Decision, that the exchange of information in the UK Tractors case, cited above, had the effect of revealing the market positions and strategies of the various individual competitors. According to recitals 42 and 43 of the contested Decision, not only are questionnaires 2-71, 2-73 and 2-74 inextricably linked, but their combined effect is to reveal the strategy of each active producer undertaking in the markets in question.

45 Thus it appears that the Commission based its assessment on the combined effect of the exchange of the three questionnaires 2-71, 2-73 and 2-74, so that the fact that the notified agreement does not provide for the exchange of questionnaire 2-73, which specifically furnishes the most accurate and detailed data and is accordingly likely to reveal the strategy of the various producers, has the effect of completely invalidating the analysis made by the Commission in the contested Decision. If the Commission had taken account of the real scope of the notified

agreement, which is limited to data on the sales of the participating undertakings alone, without distinguishing between the different consumer sectors, and which allows market shares to be calculated only approximately, it is not inconceivable that its evaluation would have been different and that it would have considered that the agreement was not contrary to Article 65(1) of the ECSC Treaty.

46 Since it is not for the Court to substitute its own assessment for that of the Commission in proceedings for annulment (see in particular Case T-79/95 *SNCF and British Railways* v *Commission* [1996] ECR II-1491, paragraph 64), Article 1 of the contested Decision must be annulled.

47 Since the other articles of the contested Decision are not separable from Article 1, the contested Decision must be annulled in its entirety.

48 That conclusion cannot be invalidated on the ground put forward by the Commission at the hearing that the plea thus upheld is out of time under Article 48(2) of the Rules of Procedure.

49 First it should be recalled that in the context of their first plea in law, headed 'Subject-matter of the information exchange agreement notified and content of the contested Decision', the applicants stated that they did not notify the exchange of questionnaires 2-72 and 2-73 and submitted that 'this constitutes an error of fact on the part of the Commission which affects the contested Decision'. They pointed out that, in Article 1 of the contested Decision, the Commission considers that the exchange of questionnaire 2-73 constitutes an infringement although it was not the subject of notification. The applicants did therefore put forward, in the application, the plea alleging an error of fact, consisting in

particular of an incorrect definition of the content of the notified agreement. It should be added that the prohibition laid down in Article 48(2) of the Rules of Procedure concerns only new pleas in law and does not prevent the applicants submitting new arguments based on pleas already contained in the application (Case 19/58 *Germany* v *High Authority* [1960] ECR 225, p. 239).

50 Secondly, it is clear that, because of the error of fact committed by the Commission, there are no longer any grounds for the conclusion that the notified agreement is contrary to Article 65(1) of the ECSC Treaty, since the statement of reasons in the contested Decision relates to an agreement that is different from that notified. Since a matter of public policy is involved, the defective statement of reasons can be raised at any time by the Court of its own motion.

51 It follows from the foregoing that the contested Decision must be annulled, without its being necessary to decide on the last part of that plea or the other pleas in law seeking its annulment.

Costs

52 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the defendant has been unsuccessful and the applicants have applied for costs, the defendant must be ordered to pay its own costs and pay those incurred by the applicants.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Annuls Commission Decision 98/4/ECSC of 26 November 1997 relating to a proceeding pursuant to Article 65 of the ECSC Treaty (Case IV/36.069 — Wirtschaftsvereinigung Stahl).**

2. **Orders the Commission to pay both its own costs and those of the applicants.**

Azizi Lenaerts Jaeger

Delivered in open court in Luxembourg on 5 April 2001.

H. Jung — Registrar

J. Azizi — President